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THE
FEDERAL REPORTER.

VOLUME 62.

CASES ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS OF APPEALS AND CIRCUIT
AND DISTRICT COURTS OF THE
UNITED STATES.

PERMANENT EDITION.

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FEDERAL REPORTER, VOLUME 62.

JUDGES

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¹Commissioned Circuit Judge, March 23, 1893.

²Commissioned Circuit Judge, August 9, 1894.

³Commissioned August 9, 1894.

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

PELZER MANUF'G CO. v. HAMBURG-BREMEN FIRE INS. CO.

(Circuit Court, D. South Carolina. June 22, 1894.)

1. JUDGMENT—MISTAKE—CORRECTION—EQUITY.

Plaintiff brought several actions against a number of insurance companies for losses occasioned by the same fire. The jury found in his favor in one action, and it was agreed that the same verdict should be entered in the other actions. In one of these, plaintiff had declared on two policies issued by the same defendant, each policy being made the subject of a separate count. By haste and inadvertence, a verdict was taken on only one count, the judgment entered thereon was affirmed, and, the amount thereof being paid, satisfaction was entered on the record. The omission to take judgment on the second count was not discovered until three years after, when it was too late to move for a new trial or to appeal. *Held*, that plaintiff's only remedy was in equity, on the ground of mistake in the verdict and judgment.

2. REMOVAL OF CAUSES—ANCILLARY PROCEEDINGS—CORRECTION OF JUDGMENT.

Plaintiff sued in a state court on two policies of insurance, declaring on each in a separate count. It was agreed that the jury should return a verdict for him. By mistake, a verdict was returned on one count only. Judgment was entered thereon, and, after being affirmed, it was paid, and satisfaction entered on the record. The omission of verdict and judgment on the second count was not discovered until several years after, and plaintiff then filed a bill in the state court to correct the mistake and enter judgment thereon. *Held*, that his bill was not ancillary or supplemental to the original action, but was a separate proceeding, and hence removable, on the ground of diverse citizenship, if that existed.

In Equity. On motion to remand. Bill by the Pelzer Manufacturing Company against the Hamburg-Bremen Fire Insurance Company. Motion denied.

Smythe & Lee, G. G. Wells, and Haynsworth & Parker, for the motion.

Julius H. Heyward, opposed.

SIMONTON, Circuit Judge. The plaintiff in this case, which was brought in the circuit court of South Carolina for Greenville county, is a citizen of the state of South Carolina. The defendant, at the

time suit was brought, was and has continued to be a corporation created under the laws of Germany. The cause has been removed into this court, upon the ground that it is between a citizen and an alien. This motion is to remand it to the state court, on the ground that, notwithstanding this fact, it is not a removable cause. We can always examine into the character of the case to determine whether it be within the jurisdiction of this court. *Arrowsmith v. Gleason*, 129 U. S. 99, 9 Sup. Ct. 237; *Barrow v. Hunton*, 99 U. S. 80.

Suit had been brought in the circuit court of South Carolina for Greenville county by the plaintiff against this defendant on two policies of insurance against fire,—one for \$5,500, and the other for \$2,500. The complaint in the action counted on both policies, setting them forth in two separate causes of action,—one cause of action on one policy, the other on the other. The case came up for trial 24th March, 1891. There were ready for trial, at the same term of the same court, several separate actions by the same plaintiff against several separate insurance companies for the loss by the same fire. All of these cases, including the one now in question, depended upon the very same facts, and the same issues of law as well as fact. Two of these were tried, and a verdict had for plaintiff. Thereupon it was agreed that the jury should find a verdict in each case for plaintiff, subject to the right of appeal on the part of the defendant. In the hurry and confusion of taking all their verdicts, a verdict was taken on the case before us on only one cause of action,—that of the \$5,500 policy,—and the other policy was overlooked. Appeals were entered. All the cases, including this one, went into the supreme court of South Carolina, upon exceptions (15 S. E. 562), none of which were as to the amounts of the verdicts, and the judgments below were all affirmed. In this case the judgment had been entered on the verdict as found, one cause of action having been omitted. On 29th June, 1892, the defendant paid to the plaintiff the whole amount of the judgment as entered, with costs, and thereupon satisfaction was entered as of record on the judgment. The plaintiff remained in ignorance of this mistake or omission which had been committed until 15th February, 1894, and then endeavored to get the defendant to rectify it. This being refused, the suit was brought 4th May, 1894. The complaint sets out these facts. The prayer for relief is as follows:

"(1) That the mistake of the said jury be corrected, and their verdict reformed, and the judgment corrected so as to allow plaintiff judgment for said twenty-five hundred dollars, with interest thereon from May 15, 1889, being sixty days from the time of the fire at which said loss occurred; (2) that the judgment rendered in said action having been satisfied, that plaintiff have now judgment anew for said twenty-five hundred dollars, with interest thereon from May 15, 1889, and for the costs of this action; (3) and for such other and further relief as plaintiff may be entitled."

The motion to remand is based on the contention that this suit is in fact ancillary or auxiliary to the former suit, a graft upon it, and not an independent and separate litigation. It therefore is not removable. *Bank v. Turnbull*, 16 Wall. 195. The law is stated by that eminent jurist, Mr. Justice Bradley, thus:

"The question presented with regard to the jurisdiction of the circuit court is whether the proceeding is or is not in its nature a separate suit, or whether it is a supplementary proceeding, so connected with the original suit as to form an incident to it, and substantially a continuation of it. If the proceeding is merely tantamount to the common-law practice of moving to set aside a judgment for irregularity, or to a writ of error, or to a bill of review, or an appeal, it would belong to the latter category, and the United States court could not properly entertain jurisdiction of the case." *Barrow v. Hunton*, 99 U. S. 82.

The essential questions, therefore, are, what relief is sought by this plaintiff? Could he obtain such relief in the state court in which the first cause was tried by any motion or proceeding in said cause? Is this proceeding one wholly independent, based on some new ground for relief? The relief sought is to correct a mistake in a verdict on which judgment was entered 24th March, 1891. The purpose is to correct the mistake in the verdict, by adding to it the amount of the second cause of action, and then entering a judgment thereon. Could this relief be obtained in the state court in which the cause was tried by any motion or proceeding in that cause? The cause has ended by complete satisfaction of the judgment, and it no longer exists. But were this not the case, according to the practice in South Carolina, if there be error or mistake in a verdict, the party injured may move for a new trial. But he must do this during the term. No such motion was made in this case. If the judgment is complained of, there are certain modes of obtaining relief,—one is by writ of error or appeal. In order to secure a right of appeal, the party desiring to correct an error must give notice in writing to the other party within 10 days after the rising of the court. This is imperative, and the omission cannot be cured, even by the supreme court. Code § 345; *Renneker v. Warren*, 20 S. C. 581. In this case the defendant appealed, on grounds not affecting the amount of the verdict. Plaintiff gave no notice of appeal, and did not in fact appeal. So it lost this mode of relief. The Code of Procedure (section 195) also provides for relief from a judgment. But this is where the judgment is obtained against a person through his mistake, inadvertence, surprise, or excusable neglect; and if we broaden the terms of this section, and let them embrace cases of judgments obtained by a person, still he must apply for his relief within one year after notice of the judgment. It would seem as if plaintiff has lost this mode of relief also. His judgment was in March, 1891; his proceeding for relief May, 1894. Even, therefore, if we conclude that the peculiar facts of this case would have given the plaintiff the right, by ancillary, auxiliary, or supplemental proceedings in his cause, to obtain relief in the state court, it seems that he has lost this right; and he has lost the right by reason of the same mistake which existed when the verdict was rendered, and which continued to exist until a very recent period,—the period during which his remedy was lost. He can seek relief nowhere but in a court whose jurisdiction is grounded on mistake. He cannot get this relief except in an original proceeding. The error of which he complains is not patent on the face of the record. Non constat that, because he had a count on his cause of action, the

jury were bound to find it in his favor. To establish his case, he must go dehors the record, and establish an unintentional error by testimony; and, when that is done, his only remedy is on the conscience of the defendant. The judgment at law will always in a law court stand *res judicata*. The language of *Bondurant v. Watson*, 103 U. S. 286, is not inapplicable to this case.

"The case which was removed had all the elements of a suit in equity. The petition filed in the state court sought equitable relief, which no court strictly a court of law could grant."

In South Carolina, before the adoption of the New York Code of Civil Procedure, the courts of law and equity were distinct, the latter court conforming strictly to the practice of the high court of chancery in England. During this practice a case occurred, of *Cohen v. Dubose*, reported in *Harp. Eq.* 102. The case was heard below by Waties, Ch., a luminary of the South Carolina judiciary, and went into the court of appeals. This case establishes the doctrine that a mistake such as that which is set out in the case at bar is cognizable in equity, and, under the circumstances stated, cognizable only in a court of equity. A suit had been brought on a promissory note at law. The verdict was for the plaintiff on the general issue. The jury, however, gave the principal only of the note, neglecting to give the interest. It was alleged that this was through mistake or inadvertence. The mistake was not discovered until it was too late to correct the error in the law court by motion for a new trial or by appeal. The plaintiff in that case filed his bill to correct the mistake. The jurisdiction of the court was challenged, and was sustained, the plaintiff being without remedy at law to correct the mistake. Compare, also, *Phillips v. Negley*, 117 U. S. 674, 675, 6 Sup. Ct. 901.

The present proceeding, therefore, is in chancery. It is in effect a bill in equity, based wholly on equitable grounds, seeking relief because of an accident or mistake,—ancient sources of equity jurisdiction,—the plaintiff having no plain, adequate, and complete remedy at law. It is occasioned by something which occurred in the law case; but it is not ancillary to or dependent thereon or supplemental thereto. The fact upon which it is based is something outside of the record of that case, requiring testimony. The relief sought is protection against the consequences of a mistake made in that case. Being, therefore, an original proceeding, between a citizen and an alien, it is removable into this court, and over it this court plainly has jurisdiction. The motion to remand is refused. Let the pleadings be amended, so as to contain the prayer for subpoena and any other prayer for relief plaintiff may desire.

SHIPP et al. v. WILLIAMS et al.

(Circuit Court of Appeals, Sixth Circuit. May 8, 1894.)

No. 166.

MORTGAGE FORECLOSURE—JURISDICTION—DIVERSE CITIZENSHIP.

Federal courts have no jurisdiction of a bill by the beneficiary under a deed of trust against the debtor and the trustee to foreclose the deed,—

the trustee having refused to act,—where the trustee and debtor are citizens of the same state, since the trustee, although a defendant, is really on the same side of the case as the beneficiary.

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

Bill by Louisa L. Williams and others against J. F. Shipp and others to foreclose a trust deed. Complainants obtained a decree. Defendants appeal.

The original bill was filed in the United States circuit court for the southern division of the eastern district of Tennessee. The complainants are citizens and residents of the state of New York. The defendants are all citizens and residents of the state of Tennessee. The complainants are creditors of the defendants Shipp and wife and Temple and wife by notes exhibited with the bill, and secured by two deeds of trust on real estate in Chattanooga, Tenn. The other defendants are David Woodworth, Jr., and Xen. Wheeler, and are the trustees in the deeds of trust sought to be enforced by decree of sale. The bill alleges that both the trustees had qualified as trustees, and had twice undertaken to execute the trust by selling the property at public sale, after default, by virtue of a power contained in the deeds of trust; that each time the defendants had enjoined the sale under bills filed in a state chancery court upon an allegation of usury. The bill then alleges that the said defendants Woodworth and Wheeler, discouraged by the obstacles thrown in their way for purposes of delay, have "refused and declined to further exercise their duties as trustees under said deeds of trust, and announce their determination to decline the use of their names and services in the matter of foreclosing said deeds of trust." The defendants Shipp and wife and Temple and wife appeared, and demurred to the jurisdiction. The demurrer being overruled, they answered. Upon the final hearing there was a decree in favor of complainants. The defendants have appealed, and assigned errors.

Clark & Brown, for appellants.

Wheeler & McDermott (John Ruhm & Son, of counsel), for appellees.

Before TAFT and LURTON, Circuit Judges, and BARR, District Judge.

LURTON, Circuit Judge (after stating the facts as above). We are clearly of opinion that the circuit court had no jurisdiction, and that appellants' demurrer should have been sustained. It is clear that if Woodworth and Wheeler had filed this bill, as they well might, in their character as trustees, the federal court would have had no jurisdiction, inasmuch as the complainants and defendants would have been citizens of the same state. The result would have been the same if Williams and wife, creditors and beneficiaries under the deeds of trust, had been joined with them as complainants, or made parties defendant along with the debtor defendants. In courts of the United States, where the jurisdiction depends on citizenship, all the coplaintiffs must be competent to sue; and, if there is more than one defendant, each must be liable to be sued in those courts. If a trustee is, by his citizenship, qualified to sue in a federal court, the citizenship of the beneficiary under the trust is wholly unimportant. If the trustee is disqualified by reason of citizenship in the same state as that of the necessary defendants, the suit cannot be entertained, even though the beneficiary might be qualified. The jurisdiction is to be deter-

mined, in all such instances, by the citizenship of the trustee. *Coal Co. v. Blatchford*, 11 Wall. 172. Neither is the rule changed by the refusal of the trustee to act. His refusal may authorize the beneficiary to exhibit a bill against the debtor to obtain a decree of foreclosure. But, if the legal title to the property conveyed in the trust be in the trustee, then the court could not grant any relief until the trustee was made a party defendant. *Gardner v. Brown*, 21 Wall. 36; *McRea v. Bank*, 19 How. 376; *Knapp v. Railroad Co.*, 20 Wall. 117; *Thayer v. Association*, 112 U. S. 717, 5 Sup. Ct. 355; *Peper v. Fordyce*, 119 U. S. 469, 7 Sup. Ct. 287. In *Gardner v. Brown*, cited above, the facts were almost identical with those of the case before us. There the trustee, Walker, and the beneficiary, Brown, were citizens of Tennessee. Gardner, the debtor, was a citizen of New York. Brown filed his bill in the state court, seeking foreclosure, alleging that Walker, the trustee, had never qualified as trustee, and did not intend to qualify, or execute the same. Walker and Gardner were made codefendants. Gardner removed the case to the United States circuit court, alleging that there was a separable controversy, which could be finally determined, so far as he was concerned, without the presence of Walker, his codefendant. From a decree remanding the case to the state court, Gardner appealed. The opinion was by Waite, C. J., who said:

"The motion of Gardner, the mortgagor, to transfer the cause, as to himself, to the circuit court, under the provisions of the act of July 27, 1866, could not be granted unless there could be a final determination of the cause, so far as it concerned him, without the presence of the other defendant as a party. And we think that the circuit court was right in its opinion that Walker was a necessary party to the relief asked against Gardner, and in refusing to entertain jurisdiction, and in remanding the cause. The bill prayed a foreclosure of the mortgage by a sale of the land. This required the presence of the party holding the legal title. The complainant had only the equitable title. Walker held the legal title. The final determination of the controversy, therefore, required his presence, and as the cause was not removable as to him, under the authority of *Coal Co. v. Blatchford*, it could not be removed as to Gardner alone."

The contention of the appellee is that the trustees are merely formal parties, and that jurisdiction depends upon the citizenship of the real, and not the formal or nominal, parties; and, for this position, counsel cite *Brown v. Strode*, 5 Cranch, 303; *McNutt v. Bland*, 2 How. 15; and *Walden v. Skinner*, 101 U. S. 577. In each of those cases the court did decide that the citizenship of certain formal and nominal parties would not defeat jurisdiction over a controversy between the real litigants, having the requisite diverse citizenship. In *Coal Co. v. Blatchford*, heretofore cited, Mr. Justice Field distinguished the cases of *Brown v. Strode* and *McNutt v. Bland* from cases like the one under consideration by saying:

"There is no analogy between these cases and the case at bar. The nominal plaintiffs in those cases were not trustees, and held nothing for the use or benefit of the real parties in interest. They could not, as is said in *McNutt v. Bland*, prevent the institution or prosecution of the actions, or exercise any control over them. The justices of the peace in the one case, and the governor in the other, were the mere conduits through whom the law afforded a remedy to the parties aggrieved." 11 Wall. 177.

Walden v. Skinner may be distinguished in the same way, for the executors were held to be purely formal parties, because, by a statute of the state, they might perform the purely ministerial act of conveying the legal title vested in them by statute.

A trustee under a mortgage or a deed of trust is made so by act of the parties. His duties are active. The legal title vested in him by deed cannot be divested, so that a fee may be passed to the purchaser, unless he be a party to the cause. The cases we have cited above absolutely establish the proposition that such a trustee, instead of being a formal or nominal party, is a necessary party where the beneficiary seeks a decree of foreclosure. In the case of Pittsburgh, C. & St. L. Ry. Co. v. Baltimore & O. R. Co., decided at this term, and reported 61 Fed. 705, we said:

"In determining a question of jurisdiction, where it depends upon citizenship, it is unimportant that the pleader has put a particular party upon the one or the other side of the case. Jurisdiction in such cases depends, not upon an arbitrary arrangement of the parties by the pleader, but upon their arrangement according to interest. If, when arranged by interest in the litigated question, all on one side are citizens of a state other than that of those of the other side, then jurisdiction exists."

The duty of arranging parties according to their interests applies as well in cases of original jurisdiction under the first section of the act of March 3, 1875, as it does under the removal section of the same act. Railroad Co. v. Ketchum, 101 U. S. 289; Pittsburgh, C. & St. L. Ry. Co. v. Baltimore & O. R. Co., cited above. Arranging the parties to this suit according to their interests operates to place Woodworth and Wheeler on the same side of the case occupied by the complainants. We then have a case where some of the complainants are citizens of the same state as the defendants. Jurisdiction is thereby defeated. The judgment must be reversed and the bill dismissed for want of jurisdiction. The appellees, Williams and wife, will pay all the costs of both courts.

AMES et al. v. UNION PAC. RY. CO. et al.

(Circuit Court, D. Nebraska. April 5, 1894.)

RAILROAD COMPANIES—RECEIVERS—CHANGES IN REGULATIONS AND WAGES OF EMPLOYEES.

Previous to the appointment of receivers of a company operating an extensive railroad system, the relations between it and its employes, and their rates of wages, had been determined mainly by certain rules, regulations, and schedules, which had remained substantially unchanged for years, and which were the results of conferences between the managers of the railroad and representatives of organizations of the employes. One of such rules and regulations was that no change should be made in them, or in the rate of wages, without certain notice to the organization whose members would be affected. *Held*, that the schedules of wages must be presumed to be reasonable and just, and that new and reduced schedules, adopted by the receivers without notice to the employes or their representatives, would not be approved by the court, although recommended by a majority of the receivers; one only of them being a practical railroad manager, and he testifying that the new schedules should not be put in

force without some modifications, and it appearing that the allowances made by the existing schedules were in fact just and equitable, when all the conditions were considered.

This was a suit by Oliver Ames, 2d, and others, against the Union Pacific Railway Company and other companies, for the appointment of receivers of that company as insolvent. S. H. H. Clark and two others were appointed such receivers, and afterwards two additional receivers were appointed. On petition of the receivers, new rules, regulations, and schedules of wages for employes of the company, prepared by the receivers, were approved, and they were authorized to put the same in force, by order of the circuit court sitting in the district of Nebraska; but, the circuit courts sitting in other districts into which the road extended having declined to give effect to the order in those districts (60 Fed. 674), the receivers applied for a rehearing before the circuit judges.

John M. Thurston, for receivers.

George W. Vroman, chairman, for the Brotherhood of Locomotive Engineers.

C. A. M. Petrie, chairman, for the Brotherhood of Locomotive Firemen.

John L. Kissick, chairman, for the Order of Railway Conductors.

F. E. Gilliland, chairman, for the Order of Railway Telegraphers.

Henry Breitenstein, chairman, for the Union Pac. Employes' Ass'n.

Samuel D. Clark, chairman, for the Brotherhood of Railway Trainmen.

T. Fulton Gantt, Geo. L. Hodges, McClanahan & Halligan, and T. W. Harper, for several other labor organizations and the members thereof.

Before CALDWELL, Circuit Judge, and RINER, District Judge.

CALDWELL, Circuit Judge. On the 13th day of October, 1893, on a bill filed for that purpose, this court took into its possession, control, and management the Union Pacific Railway system, embracing the Union Pacific Railway proper, and some 14 other constituent and allied roads, which together constitute what is known as the "Union Pacific System." Whether the bill states a case of equitable cognizance, justifying the appointment of receivers, has not been mooted on this hearing, and we therefore express no opinion upon that question. The system of which the court assumed the management and control, comprised 7,700 miles of railroad, and about 3,000 miles of water communication, and had in its employ over 22,000 men. The great body of these men had been in the employ of the company for a considerable length of time, some of them for as much as a quarter of a century. The relation of these men to the company, and their rate of wages, were determined in the main by certain written rules, regulations, and schedules, some of which had been in force for more than a quarter of a century, and all of which had been in force, substantially as they stand today, for a period of eight years and more. These rules, regulations, and schedules were the result of free and voluntary confer-

ences, held from time to time, between the managers of the railroad and the officers and representatives of the several labor organizations representing the men in the different subdivisions or branches of the service, viz.: the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen, the Order of Railway Conductors, the order of Railway Telegraphers, the Union Pacific Employees' Association, and the Brotherhood of Railway Trainmen. These labor organizations, like the rules, regulations, and schedules, had become established institutions on this system many years before the appointment of the receivers. Two of the ablest railroad managers ever in the service of this system, and probably as able as any this country has ever produced,—Mr. S. H. H. Clark and Mr. Edward Dickinson, now general manager of the road,—testify that these labor organizations on this system had improved the morals and efficiency of the men, and had rendered valuable aid to the company in perfecting and putting into force the rules and regulations governing the operation of the Union Pacific Railway, which, confessedly, have made it one of the best managed and conducted roads in the country. The managers of this great trans-continental line testify that it has been their policy to bring it up to the highest standard of efficiency, and to afford to passengers and property transported over it all the security and protection attainable by the exercise of the highest degree of intelligence on the part of those engaged in the operation of its trains, and they cheerfully bear testimony to the fact that their efforts in this direction have been seconded and materially aided by the labor organizations which are represented in this hearing. The good opinion of the men entertained by the managers seems to be shared by the receivers, for, in their petition to the court in this matter, they declare "that the employes, generally, upon the Union Pacific system, are reasonable, intelligent, peaceable, and law-abiding men."

Among the rules and regulations referred to and in operation when the receivers were appointed was one to the effect that no change should be made in the rules and regulations and rate of wages without first giving to the labor organization whose members would be affected by such change 30 days' notice, or other reasonable notice. On the 27th day of January, 1894, the receivers, without giving the men, or the officers of the labor organizations representing them, any notice, filed in this court a lengthy petition, stating, among other things, "that, as receivers herein, they have, from the time they entered upon their duties as such, as far as consistent with the proper discharge of their duties to the public, and with justice to their employes, inaugurated economies in every department, with a view to reduce the operating expenses as far as possible, and produce results fair to all those parties having liens upon and interests in the properties confided to the care of your receivers." "Your petitioners further represent that they conceive it to be their duty to make and carry into effect such reductions and such reforms of the rules, regulations, and schedules without application being first made to the court in that behalf,"—and stating, further, that they had "revised the schedules aforesaid, upon

principles which have seemed to them just, right, and proper." With this petition, the receivers filed what they termed "rules, regulations, and schedules," which they asked the court to approve, and order that they be put into effect on the 1st day of March, 1894, and the "employees directed to conform thereto." The petition also prayed for a very extended injunction against the employees. On the day the petition was filed, the court entered an order declaring that the rules, regulations, and schedules prepared by the receivers, and filed with their petition, were "prima facie reasonable and just," and directed that they become operative on the 1st day of March, 1894, and ordered an injunction to issue as prayed for in the petition. Upon the presentation of this petition, and the order made thereon, to the United States circuit courts for the districts of Wyoming and Colorado, those courts declined to give effect to the order in those districts, for the reason that the employees had had no notice of the proposed change. Thereupon the receivers applied to the circuit judges at their chambers in St. Louis to put the order made by the United States circuit court in Nebraska in force in the districts of Colorado and Wyoming. This the circuit judges declined to do, but directed the receivers to annul their orders adopting the new rules, regulations, and schedules; and, this having been done, they made the following order:

"In the matter of the petition for rehearing before the circuit judges of the application of the receivers for authority to place in effect new and reduced wage schedules.

"Since the action of the courts in the different districts in this circuit on the petition filed by the receivers for leave to revoke the schedules of wages of the employees in force when they were appointed, and to adopt new and reduced schedules, has not been uniform and harmonious; and since it is desirable and necessary that any order made on said petition should have a uniform operation upon the lines of railway operated by said receivers throughout the circuit; and since the receivers have revoked and annulled their action heretofore taken, ordering new wage schedules into effect on the 1st day of March, 1894, and have resolved that the entire matter of new wage schedules be held in abeyance to await further action of the court,—it is now here ordered as follows: First. That the petition of the receivers for leave to set aside and annul the schedules of wages of the employees on the Union Pacific system in force when they were appointed, and to adopt new schedules in equalizing and in some cases reducing the wages of the employees, be set down for hearing before the circuit judges at Omaha, Nebraska, on the 27th day of March, A. D. 1894. Second. That the receivers forthwith, or as soon as may be practicable, invite the proper representatives of the employees on said system to attend a conference at Omaha, Nebraska, commencing on the 15th day of March, 1894, for the purpose of conferring with S. H. Clark, receiver (who is hereby specially designated and selected to conduct said conference on behalf of the receivers), and such other person or persons as he may select to act with him, at which conference the entire matter of proposed changes in wage schedules shall be taken up and, as far as possible, agreed upon between the said Clark and said representatives of the employees; such conference to continue from day to day until such agreement is reached. Third. That, in case there are any matters in difference remaining unadjusted, such matters of difference shall be clearly and specifically stated and presented to the court in writing on or before said 27th day of March, 1894, and the hearing herein shall proceed as to such matters in difference before the circuit judges holding the court; and, after hearing the parties and their witnesses and counsel, the circuit judges will make such order in the premises as may be right and just. Fourth.

That the receivers grant to such representatives of the employes leave of absence to attend said conference and hearing, and furnish them transportation to Omaha and return.

Henry C. Caldwell,
"Walter H. Sanborn,
"Circuit Judges."

In compliance with the terms of this order, a conference between Mr. Clark and his assistants and the officers of the several labor organizations representing the employes of the court was held in Omaha. At this conference an agreement was reached as to the rules, regulations, and schedules relating to the train dispatchers and operators, which have been reported to the court and confirmed. This was one of the most difficult schedules in the whole list to adjust, and the satisfactory agreement reached in the conference shows the great value of a good-tempered, calm, and intelligent inquiry in which both sides are represented, and in which both sides learned, perhaps for the first time, the ground on which the demand is made by the one and resisted by the other. The receivers had declared to the court, in their petition filed on the 27th day of January, 1894:

"That after careful consideration of the matter, and consultation with the managing officials of the Union Pacific system, they are of the opinion that the so-called rules, regulations, and schedules of pay for train dispatchers and operators are entirely unnecessary, and they have therefore not only decided to disaffirm the same, but they have also decided that they will not prepare or establish any rules and regulations in lieu thereof; and, with respect thereto, your receivers further advise your honors that all of said train dispatchers and telegraph operators are employed on monthly salaries which are determined in consideration of all the circumstances of each particular case, and are intended to cover all the services and all the time necessary in which to perform the service required from each of said train dispatchers and operators at the several respective stations on the lines of the Union Pacific system."

And yet at the conference held, under the order of the circuit judges, the position assumed by the receivers in their petition to the court was found to be untenable, and was abandoned, and rules and regulations governing telegraphers' wages adopted.

It would serve no useful purpose here to state the causes which, in the opinion of the court, prevented an agreement between the conferees upon rules, regulations, and schedules for the other branches of the service. It is sufficient to say that they were of a character which do not in any degree militate against the usefulness or efficiency of conferences or the ability or fairness of the conferees. Freed from the state of things brought about by the erroneous proceedings of a majority of the receivers in the beginning of this business, it is highly probable that the conferees would have agreed upon all the schedules. Failing to agree, the matter was brought before the court, in accordance with the order made by the circuit judges. At the appointed time the receivers appeared in person and by attorney, and the employes by the officers of the several labor organizations to which they belong, and by their attorneys. Upon calling the case for hearing, the court directed an order to be entered setting aside and vacating the order of the court made on the 27th day of January, 1894, approving the rules, regulations, and schedules framed by the receivers without notice to or conference with the employes affected thereby, and

also setting aside and vacating the order of injunction entered at the same time. The court then announced to counsel that the rules, regulations, and schedules in force when the receivers were appointed were still in force, and would be held and treated as *prima facie* just and reasonable, and that the burden was cast upon the receivers to show that the wages received by the court's employes under the existing regulations were in excess of a fair, just, and reasonable compensation for the service performed, taking into consideration all the circumstances and in view of the existing conditions. The hearing proceeded on these lines, and the court listened for a week to the testimony of witnesses.

Before stating the conclusions we have reached upon the facts, it will be well to state the leading principles which courts of equity must keep in view in this class of cases. When a court of equity takes upon itself the conduct and operation of a great line of railroad, the men engaged in conducting the business and operating the road become the employes of the court, and are subject to its orders in all matters relating to the discharge of their duties, and entitled to its protection. The first and supreme duty of a court when it engages in the business of operating a railroad is to operate it efficiently and safely. No pains and no reasonable expense are to be spared in the accomplishment of these ends. Passengers and freight must be transported safely. If passengers are killed or freight lost through the slightest negligence to provide all the means of safety commonly found on first-class roads, the court is morally and legally responsible. An essential and indispensable requisite to the safe and successful operation of the road is the employment of sober, intelligent, experienced, and capable men for that purpose. When a road comes under the management of a court on which the employes are conceded to possess all these qualifications,—and that concession is made in the fullest manner here,—the court will not, upon light or trivial grounds, dispense with their services or reduce their wages; and when the schedule of wages in force at the time the court assumes the management of the road is the result of a mutual agreement between the company and the employes, which has been in force for years, the court will presume the schedule is reasonable and just, and any one disputing that presumption will be required to overthrow it by satisfactory proof.

It is suggested that upon this question the court ought to be governed by the recommendation of a majority of the receivers. The suggestion is without merit in this case, for several reasons: Four of the five receivers are not practical railroad men, and are not familiar with the subject. Two of them are lawyers, residing in New York; one a merchant, residing in Chicago; and one a railroad accountant, having, doubtless, a thorough knowledge of the books of the company, but knowing nothing about the wage schedules. These four gentlemen are eminent in the line of their professions and pursuits, and entirely capable of managing the financial affairs of this great trust, for which purpose they were, doubtless, selected; but their opinions upon the subject of wage schedules are con-

fessedly of little value. The court shares in their anxiety to have an economical administration of this trust, to the end that those who own the property and have liens upon it may get out of it what is fairly their due; but, to accomplish this desirable result, the wages of the men must not be reduced below a reasonable and just compensation for their services. They must be paid fair wages, though no dividends are paid on the stock and no interest paid on the bonds. It is a part of the public history of the country, of which the court will take judicial notice, that for the first \$36,000,000 of stock issued this company received less than two cents on the dollar, and that the profit of construction represented by outstanding bonds was \$43,929,328.34. These facts are disclosed by the report of the "Commission of the United States Pacific Railway Company" (1887), of which Mr. Anderson, one of the receivers in this case, was a member. See Report, pp. 51, 137. There would seem to be no equity in reducing the wages of the employes below what is reasonable and just, in order to pay dividends on stock and interest on bonds of this character.

The recommendation of the receivers to adopt their schedules cannot be accepted by the court for another reason. That schedule was adopted without affording to the men or their representatives any opportunity to be heard. This was in violation of the agreement existing between the company and the men, by the terms of which no change of the schedules was to be made without notice to the men and granting them a hearing. This was a fundamental error. The receivers should have given notice and invited the men to a conference even if there was no contract requiring it. In answer to this objection to their mode of proceeding, it is said the order of the receivers and the order of the court extended an opportunity to the men to protest against the new schedules after their adoption. The men could have small hopes of a fair and impartial hearing after the receivers had prepared new schedules behind their backs, which were declared by the receivers and the court to be "prima facie just and reasonable." This was very much like first hanging a man, and trying him afterwards. It is small consolation to the victim of the mob to be told he shall have a trial after he is hanged.

It is further said that the receivers had the right to renounce the old schedules and adopt the new ones, because the old ones were mere executory contracts. There are some executory contracts which receivers may renounce, but they cannot claim the benefit of such contracts and at the same time renounce their burdens. This is precisely what was attempted to be done by the receivers in this matter. They renounced the old schedules, and adopted new ones, reducing wages, but seemingly with no idea of absolving the men from the duty of continuing to work and operate the road, for in their petition they ask that their schedules be confirmed by the court, "and all of the said employes directed to conform thereto."

The receivers were the first to break the contract between the court and its employes; but, if the converse had been the case,

the court could not have directed or enjoined the men to continue in its service. Specific performance of a contract to render personal service cannot be enforced by injunction, by pains and penalties, or by any other means. For a breach of such a contract, the only redress the law affords is a civil action for the damages. The court is asked to apply to the employes in its service the principles of the early English statutes, which, by the imposition of heavy pains and penalties, forced laborers to work at fixed wages, and made it an offense to seek to increase them, or to quit the service of their employer. The period of compulsory personal service, save as a punishment for crime, has passed in this country. In this country it is not unlawful for employes to associate, consult, and confer together with a view to maintain or increase their wages, by lawful and peaceful means, any more than it was unlawful for the receivers to counsel and confer together for the purpose of reducing their wages. A corporation is organized capital; it is capital consisting of money and property. Organized labor is organized capital; it is capital consisting of brains and muscle. What it is lawful for one to do it is lawful for the other to do. If it is lawful for the stockholders and officers of a corporation to associate and confer together for the purpose of reducing the wages of its employes, or of devising other means of making their investments profitable, it is equally lawful for organized labor to associate, consult, and confer with a view to maintain or increase wages. Both act from the prompting of enlightened selfishness, and the action of both is lawful when no illegal or criminal means are used or threatened. It is due to the receivers and to the managers of this property to say that they have not questioned the right of the labor organizations to appear and be heard in court in this matter, and that what they have said about these organizations has been in commendation of them and not in disparagement.

Men in all stations and pursuits in life have an undoubted right to join together for resisting oppression, or for mutual assistance, improvement, instruction, and pecuniary aid in time of sickness and distress. Such association commonly takes place between those pursuing the same occupation and possessing the same interests. This is particularly true of men engaged in the mechanical arts, and in all labor pursuits where skill and experience are required. The legality and utility of these organizations can no longer be questioned.

The action of the receivers is objectionable upon another ground. It would be difficult to devise any action better calculated to provoke a "strike." The method of adopting the new schedules was calculated to arouse resentment in the breast of every self-respecting, intelligent, and independent man in the service. While they might have been willing to acquiesce in the reduction of their wages, they were quite sure to revolt against the manner of doing it. Whatever may be the legal right of a railroad corporation to reduce the wages of its employes, or discharge them in a body, without giving them an opportunity to be heard, a court of equity will not act in that manner, or approve the action of its receivers.

who have acted in that manner. The receivers, no more than the court, should have undertaken to determine what wages were just and reasonable without giving the men an opportunity to be heard. It is fundamental in the jurisprudence of this country that no court can rightfully make an order or render a judgment affecting the rights of one who is absent and who has had no notice. The requirement that the court or any other tribunal shall hear before it decides is much older than Magna Charta or our constitution. It was written in the Book 3,000 years ago that "he that answereth a matter before he heareth it, it is folly and shame unto him."

A further and conclusive answer to the contention in favor of putting the receivers' schedules in force is found in the fact that Mr. Clark, the only one of the receivers who is a practical railroad man, testifies that they ought not to be put into force without "some modifications." As a result of the old code of rules and schedules, this company has been able to bring into every branch of its service, at reasonable cost, intelligent and capable men, who have carefully guarded and protected its property and business interests, until the train service upon the Union Pacific is to-day equal to that upon any of the great railway systems of the country. Upon the question of the reasonableness of the old schedules we have had no trouble in coming to a satisfactory conclusion. The record shows that all that portion of railroad mileage where excess mileage has been allowed runs through either a mountainous or desert country, where the men engaged in the operation of trains have to contend with heavy grades, and where the winters are long and often severe, and where the hazard of operating is necessarily greatly increased. There is practically no agriculture, and the cost of living is much greater than in an agricultural region. As stated by Mr. Dickinson, "It is a pretty tough place to live." The system of paying excess mileage, Mr. McConnell testifies, has been in vogue ever since the road was built, and was allowed because the company had difficulty in obtaining men who would stay in that region of country. If this system was a good thing for the company when operating the road, it is a good thing for the court when operating the road. As a result of this system, men of intelligence and character have been induced to enter the service, and to establish permanent homes in regions of country where there is practically no business except the business in which they are engaged, and where, for many reasons disclosed by the evidence, it is not desirable to live. A system of rules and regulations by which the company has been able to bring into its service, and retain for 25 years, in some instances, the class of men who have appeared before the court at this hearing, is certainly commendable, and meets the entire approval of the court.

In the opinion of the court, the allowances made by the schedules now in force are just and equitable, when all the conditions are considered. The employees, under the present system, share the burdens of diminished business. They make less mileage and get less pay per month. The rate now paid is not higher than the rate paid on other lines operated through similar country and under

like conditions, and, in the opinion of the court, is not higher than it should be for the service rendered. The employees, with families to support, are seldom more than a few days' wages in advance of want; and, if their present wages were materially reduced, they could not live. The highest and best service cannot be expected from men who are compelled to live in a state of pinch and want.

A court of equity will not pursue a niggardly and cheeseparating policy towards its employees. Intelligence, bodily vigor, and contentment are wanting among men who are compelled to work for inadequate wages. Sound public policy, no less than justice to the men, requires that they be paid a rate of wages that will enable them to live decently and comfortably, and school their children. Some corporations may pay their employees a less rate of wages than is here indicated, but a court of equity will not follow their bad example.

It is a gratifying fact that the officers and representatives of the labor organizations of which the men interested in this hearing are members have unanimously assured the court that whatever judgment is rendered in this case will be accepted by the men as a settlement of the dispute, and that in no event, after such a hearing as has been accorded to them in court, will they strike. We are confident these assurances will be kept.

When property is in the custody of receivers, the law declares it to be a contempt of the court appointing them for any person to interfere with the property or with the men in their employ. No order of injunction can make such unlawful interference any more of a contempt than the law makes it without such order. Such orders have an injurious tendency, because they tend to create the impression among men that it is not an offense to interfere with property in the possession of receivers, or with the men in their employ, unless they have been specially enjoined from so doing. This is a dangerous delusion. To the extent that a special injunction can go in this class of cases, the law itself imposes an injunction. For this reason no order of injunction will be entered in this case.

In conclusion, we may be indulged in giving expression to the hope that, in future differences about wages between courts and their employes, at least,—and we would fain hope between all employers and employes,—resort may be had to reason and not to passion, to the law and not to violence, to the courts and not to a strike. It is a reproach to our civilization that such differences should result, as they often have, in personal violence, loss of life, destruction of property, loss of wages to the men, and loss of income to the employer, and, when they occur on great lines of railroad, great damage and inconvenience to the public.

An order will be entered in the district of Nebraska continuing the present schedules (subject to the modification as to delayed or overtime) in full force and effect, and setting aside the order made by this court on the 27th day of January, 1894; also, an order directing the receivers to cause 500 copies of a complete record of this cause, including the pleadings, evidence, opinion,

and orders entered in the several districts, printed and distributed as provided in the order; also an order requiring the receivers to pay the expenses of employes attending the conference ordered by the circuit judges and while attending this hearing.

An order will be entered in the districts of Colorado and Wyoming modifying the orders entered in those districts on the 26th and 27th days of February, 1894, to conform to the order now entered in the district of Nebraska, relating to the rules, regulations, and schedules of pay.

RINER, District Judge, concurs.

THOMAS v. CINCINNATI, N. O. & T. P. RY. CO.

(Circuit Court, S. D. Ohio, W. D. May 31, 1894.)

No. 4,598.

1. RECEIVERS—REDUCTION OF WAGES—REASONABLENESS.

A railroad company, whose sole property was the equipment and leasehold of another road, passed into the hands of a receiver. The annual rent was a first lien on the equipment, and the leasehold was subject to forfeiture for nonpayment of the rent. Owing to general business depression, the earnings of the road fell off, until they were not sufficient to pay the rent, and the receiver ordered a reduction of 10 per cent. in the wages of all employes. It appeared that a like reduction had been theretofore made by competing roads, and that, in order to avoid discharging many employes, the receiver had been compelled to lessen the working time of each one. *Held*, that the reduction was not unreasonable.

2. SAME—WORKING TIME.

Where a 10 per cent. reduction of wages by a receiver of a railroad company is reasonable in itself under all the circumstances and the general condition of trade, it is not rendered unreasonable by the fact that his employes were already working on short time, with a proportionate reduction of wages; the shortening of time having been directed with their own consent, in order to avoid the discharge of many of their number.

Petition of Arland E. Brown and others in the suit of Samuel Thomas against the Cincinnati, New Orleans & Texas Pacific Railway Company.

Peck & Shaffer, for petitioners.

Harrison, Colston, Goldsmith & Hoadly, for receiver.

Before TAFT and LURTON, Circuit Judges.

TAFT, Circuit Judge. This is a petition by Arland E. Brown and others, claiming to represent a large majority of the men in the employ of Samuel Felton, heretofore appointed receiver herein, praying that the court direct him to modify an order issued by him on March 27th, and which went into effect May 1st, of this year. The order was as follows:

"Cincinnati, New Orleans and Texas Pacific Railway Company, S. M. Felton, Receiver.

"Cincinnati, March 27, 1894.

"The receiver regrets to announce to the officers and employes that, in spite of all the efforts made by the exercise of economies in every direction, a

reduction in wages cannot longer be prevented, owing to the enormous and continued decrease in earnings. It was hoped last fall that business throughout the country would show an early improvement, and that condition, together with the large economies inaugurated, would prevent the necessity for any general reduction in wages. This condition has not been realized. For the calendar year 1893, the gross earnings are over half a million dollars less than for the year 1890, and have shown a continued and steady decrease ever since that time. The last six months show the lowest earnings of any similar period since 1888. Therefore a general reduction of ten per cent. is ordered, effective on and after May 1st, to apply to all salaries over \$35 a month and all wages over \$1.10 per day, not including reductions of ten per cent. or more made since July 1st last.

"S. M. Felton, Receiver."

On the 30th of April, a petition was offered for filing in this court, which prayed that the foregoing order might be suspended and revoked. It was denied, because the petitioners, having had 30 days' notice, delayed presenting the petition until the day before the order went into effect. The court then stated that it would, however, hear an application to modify the order, and restore the rate of wages, on the service of five days' notice upon the receiver. The practice by which employees of railroad receivers are permitted to apply to the court for relief from any substantial grievance suffered by them in the operation of the road under the authority of the court is well established. It was approved by Mr. Justice Brewer in *Frank v. Railway Co.*, 23 Fed. 757; by Judge Treat in *Re Doolittle*, Id. 544, 548; by Judge Speer in *Waterhouse v. Comer*, 55 Fed. 149; by Judge Ricks in *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.*, 59 Fed. 514; by Judge Jenkins in *Farmers' Loan & Trust Co. v. Northern Pac. R. Co.*, 60 Fed. 803-818; and by Judge Caldwell in the matter of the *Union Pacific Railroad receivership*, 62 Fed. 7. In accordance with this practice, and agreeably to the leave of court, the petitioners, after due notice to the receiver, have presented their petition praying that the order of March 27th be modified, and the old rate of wages restored, on the ground that the order is unfair and unreasonable, and works great hardship to the men. The receiver has filed an answer to the petition, and affidavits have been submitted by both sides on the issues of fact raised in the petition and answer. Judge LURTON kindly consented to sit with me to hear the case. The questions arising have been fully argued by counsel, and we are now to decide them. We have examined with minuteness all the evidence adduced, and have given it the consideration which a step so important in the policy of the receivership and so full of interest to many persons deserves.

The employees who are represented in the petition may be divided, for the purposes of this discussion, into three classes: First, the shopmen and machinists; second, the terminal yard men, including the engineers and firemen of switch engines, foremen of switch crews, and helpers; and, third, the trainmen, including engineers, firemen, conductors, and brakemen, all of them engaged in the operation of trains upon the road, as distinguished from the second class, whose duties are performed in shifting trains at terminal points.

1. The shopmen and machinists are employed in the repair shops of the company at Ludlow, Ky. They are paid a fixed sum per day

of 10 hours, the sum being reduced proportionately when the number of hours of work per day is reduced, so that really they are paid by the hour. There is no definite evidence on behalf of petitioners that the rate per hour paid by the receiver since the order of reduction went into effect is less than that which is paid by railway companies having shops in this vicinity. On the contrary, it seems from the affidavits filed by counsel for the receiver that the present rates per hour are quite equal to any paid in this market. It does appear beyond question, however, that the amount of time which each individual in the shop is required and permitted to work is at least 20 per cent. less than the time which he worked a year ago, so that his income is proportionately reduced. There has not been enough work to occupy all the men full time. Two courses have been open to the receiver,—he might discharge more men, and employ those remaining at full time; or he could do what he has done, divide the work to be done among all the men, and reduce the number of hours of work and income for each individual. By the latter course he was able to help more men to earn something. This course he understood to be the choice of all the men, and he took it. We fully approve his action. The receiver cannot make work for the men, nor can he pay any more per hour because many individuals work few hours than he would if fewer individuals worked full time. The reasonableness of the rate paid for the work is to be determined by the same standards, whether the work is done by many, working a few hours a day, or by that number who, working full time, would be sufficient to do it. Judging in this way of the rate of wages now paid shopmen and machinists, it is 10 per cent. less than it was when times were good and the demand for labor was constant.

2. The switch engineers, firemen, foremen of the switch crews, and helpers are paid by the day. Some railroad companies whose lines run into Cincinnati pay more per day to this class of employees than the receiver now pays under the order of March 27, while others pay about the same or less. Whether the conditions of employment vary with these different companies we cannot judge. The hours seem to be about the same. We may reasonably presume that the rates of wages paid by the Cincinnati, New Orleans & Texas Pacific Railway Company in good times were the equivalent of market rates, because, if they were not, then the employees would have sought employment elsewhere. An attempt has been made to show that the switch crews, for the year last past, have done more work than in previous years, because 9 engines and crews now do the work which 12 did before. But it appears that the difference is offset by a change in the arrangement of tracks in the switching yards, and by a reduction in the loads handled. The switch engines are called into use to assist trains up the grade from Ludlow to Erlanger,—a distance of six miles. This is a saving to the company, because it dispenses with the necessity of the “pusher” engine, required when business on the road was heavy. It is said that the switch engineer and fireman should receive road mileage for this service, because, under the agreement in force between the

receiver and his employes until March last, it was provided that switch engineers and firemen, when engaged in road service, should receive road mileage. We do not think such pushing from Ludlow to Erlanger is to be regarded as "road service" within the meaning of the exception. The pusher engine crew were paid by the day, and not by mileage. While the switch engine is pushing a train up to Erlanger, it is not engaged in yard service, and we do not see how the change adds to the day's labor of the crew. It is merely an economy effected by the receiver, and rendered possible by the present condition of light traffic. On the whole, the only effect of the order of March 27th upon the wages of the men engaged in the yard service is to reduce their compensation by 10 per cent. from that which they received when business was good. Complaint is made that their hours are longer than men engaged in similar service upon other roads, but the evidence does not sustain the claim. One crew, called the "lot crew," is detained more than others; but this detention is made up to them by an allowance of half a day every two weeks, when they do no work, but receive full pay.

3. We come now to the trainmen. No evidence has been produced to us to show that the engineers, firemen, conductors, or brakemen on passenger trains operated by the receiver are paid any less wages under the order of March 27th than the same class of employes on roads similarly situated. The whole controversy has been in respect of the crews operating the freight trains. It is exceedingly difficult for us intelligently to compare the rates of wages for freight engineers, firemen, conductors, and brakemen prevailing on the different lines running out of Cincinnati to the south of the Ohio river. These employes are paid by the run or trip, and the pay per trip seems to be graduated by the mileage of the trip. Affidavits for the men show that in many instances the rate per trip of the same number of miles on other roads for engineers and other trainmen is higher than that now paid by the receiver, while the receiver shows many other runs on competing roads in which the pay is the same or less than that which he allows. The differences appear in runs of the same distance on different parts of the same road. It is obvious that conditions, not apparent, must vary the rates fixed for different runs, and that we cannot, with the lights we have, investigate them so as to make a useful or intelligent comparison for the purposes of this discussion. We must presume that the petitioners here received fair market rates for services they rendered before the financial depression began, about a year ago. It appears that the rates of wages of all these employes were increased between 1890 and 1893 by from 8 to 12 per cent., showing that they were subject to the influence of the labor market. It is objected to the 10 per cent. reduction that, even before the order went into effect, the trainmen on freight trains received less income by 25 per cent. than they did this time last year, because they were permitted to make less runs. This is undoubtedly true, but it is only because the receiver has, at the request of all the men, kept more men in his employ than are needed

to do all the work when working a full number of trips. The reduction in income to each individual comes, not from a reduction in the rate paid for the work done, but from a commendable and unselfish willingness of all the men to make a sacrifice in the interest of those who would otherwise be discharged. As we have already said in reference to the shopmen and machinists, the reasonableness of the rate paid by the receiver cannot be affected by the fact that, out of consideration for the men, and at their request, he employs many men working fewer trips, instead of fewer men working more trips. Neither the receiver nor the court, whose officer he is, in the operation and preservation of the trust property, is justified in making work for employes, or in employing more men than are necessary to do the work to be done, if the employment of more men involves a greater expenditure for the same work.

Complaint is made that a change took place in 1893 in the manner by which "overtime" is calculated, and which was a virtual reduction in wages. Overtime is the time which men are delayed on their runs beyond that fixed by the schedule. Previous to the receivership, if a trainman worked 35 minutes over time, he was entitled to compensation at so much per hour. The receiver found that this led to such delays in trains that he changed the rule, and did not allow overtime until the schedule was exceeded by two hours, when it was calculated from the end of the schedule. Overtime was intended merely to compensate for unexpected delays, over which trainmen had no control, and was no part of a man's regular compensation. The change was in the discipline of the road, and seemed necessary to avoid abuses which had crept in. We do not think the change unreasonable.

But it is claimed that the freight-train men do more work per trip, in that the number of cars in each train is now greater. No showing is made that on any road the rate of pay per run or trip is made to vary by reason of the number of cars in the train. It is true that, during the last year, business has so fallen off that the number of freight trains has been reduced, and the number of cars in each train has been increased from an average of 21.6 cars per train for the eight months preceding March, 1893, to an average of 24.2 cars for the eight months preceding March, 1894. But we are not informed that an increase of 2.6 cars per train makes any difference in the rate paid trainmen on any road, or that, in view of the air brake which is now in use on 25 per cent. of all freight cars, it ought to do so.

It is further objected that men engaged in the freight service work more hours per trip than formerly. The schedules show that the average run previous to May, 1893, was eight hours, and that now the average run is twenty-four minutes longer. In making up this average, all freight trains run upon the road are included,—local freight, fast freight, and through freight. The schedule runs of the through freight trains have been increased considerably more than this average,—by nearly two hours,—so that some of them exceed ten hours. Rates of pay per trip seem to be governed by the mileage and the character of the train service, rather than by

the time employed (provided it does not exceed twelve hours); that is, by the amount of work to be done, rather than by the time it takes to do it. All schedules on this and other roads for through freights brought to our attention show a variation in the speed of different trains on the same trip of from one to two hours, and yet the rate paid per trip for such services is the same. The schedules must vary in length with the exigencies of travel, and it would seem peculiarly a matter of expert railroad knowledge as to how such schedules should be arranged. In the absence of any knowledge of our own, we must rely on the person to whose professional skill and discretion we have intrusted the operation of the road, and conclude that the lengthening of the schedules was necessary, and does not produce an unjust discrimination in the matter of work and rates of pay against the through-freight trainmen, as compared with other employes.

It follows from what has been said that under the order of March 27th, here complained of, the rate of wages paid by the receiver is a reduction of not more than 10 per cent. below what it was before the financial depression, when business was good. In the way already explained, many employes have their incomes reduced much more than this, because more men are retained in the service than are needed, and they do not all work full time; but, for the work which is being done, the receiver is paying but 10 per cent. less than when times were good. Is such a reduction unreasonable? Certainly not, if we have regard either to the receipts and earnings of the railroad, or to the course of many other roads in making similar reductions. The great competitor of the Cincinnati Southern Railroad is the Louisville & Nashville road, and wages upon that road were reduced in September last,—more than six months before the order here complained of went into effect. The receivers of the East Tennessee, Virginia & Georgia Railroad—one of the most extensive systems in the south—also made a 10 per cent. reduction in wages in the fall of 1893. The Big Four system likewise made a reduction of 10 per cent. about the same time. Other companies have been compelled to resort to the same economy.

The condition of the trust and the receipts of the receiver not only justify, but require, the reduction. The assets of the Cincinnati, New Orleans & Texas Pacific Railway consist solely of the equipment and leasehold of the Cincinnati Southern Railway. If the annual rental of \$1,000,000 is not paid to the city of Cincinnati, the leasehold will be forfeited, and the property of the lessee company will be wholly sacrificed, because the city has a first lien for its rent upon the entire equipment. More than this, the city is almost entirely dependent on the rental to pay the interest which it owes on the bonds issued by it to construct the road, and a default in the rental will cause grave pecuniary danger to the city of Cincinnati, and may seriously impair its credit. To pay the rental, the road must earn over and above its operating expenses \$83,333.33 per month. In addition to the rental, the lessee is obliged, under the lease, to expend a certain amount in perma-

nent improvements of the road. Up to this time the receiver has paid the rental. In order to do this, and to keep up the betterments required by the lease between April 1, 1893, and April, 1894, the receiver has been compelled to increase the floating debt of the road from \$50,000 to \$200,000. During the 14 months of the receivership, there has been a decrease in gross earnings of \$525,000, and in operating expenses of \$515,000, as compared with the previous 14 months. This shows only a decrease in net earnings of \$9,000, all told. But, when we examine the decrease in the months of April and May of this year, the result is startling. In April of 1893 the net earnings of the road were \$74,143.02, while in April of this year they are but \$40,700. Considering that \$83,333.33 is needed each month to pay the rental, the significance of this falling off cannot be misunderstood. In May of 1893 the net earnings were \$71,206.56, while the net earnings for May of this year (with the last week estimated) are \$31,600,—a falling off of nearly 70 per cent. from the same month last year. It is hardly 40 per cent. of the amount required for rental. It should be noted, too, that the earnings for May were made after the order here complained of went into effect. Can it be said that it is possible for the receiver, under these circumstances, to increase expenses by restoring wages to the previous rate?

But it is argued by the learned counsel for the petitioners that the reduced earnings of the employer should have no bearing upon the proper rate of wages to be paid for labor; that the rate of wages is fixed by supply and demand. That, in the long run, the price of labor is determined by the law of supply and demand, need not be denied, but the operation of this law is set on foot by the act of the employer, whose earnings are reduced by loss of business, in discharging unnecessary labor, and offering less rates for the labor he can use. Moreover, the court must take judicial notice of the fact that there has been an enormous reduction in the demand for labor, with a corresponding increase in the supply. Could we have any stronger evidence of it than in the fact that men in the employ of the receiver wish to divide up the work to be done, so that no one of them works full time? It is not a pleasant duty for either a court or its receiver to cause any hardship to a large number of men and their families, and the court is personally cognizant of the earnest, zealous, and painstaking efforts made by the receiver to avoid the necessity for this reduction. At a time more than six months ago, when other roads were making a reduction, he declined to do so, and only now, when no other course is open to him, has he resorted to it. Every other economy possible has been practiced, with the hope that business would improve, until now, with a default in the rental and a forfeiture of the leasehold staring him in the face, he has been forced to it.

In closing, we should call attention to the attitude which a court must assume in the discussion of such a question as this. The court cannot and does not undertake to operate a railroad itself. It appoints, as its agent to do so, a man of well-known professional

skill and experience as a railroad manager. In his judgment, the court must necessarily repose a confidence, commensurate with the large interests intrusted to his care. Hearings of this kind may be had, and, if the receiver has made a manifest error or committed an abuse of the discretion intrusted to him, the court will correct it. But the burden of showing either must, in the nature of things, be upon the petitioner. We have gone more in detail into the complaints at the bar than was necessary in this view, but we have done it because the investigation was invited by both the men and the receiver. Mr. Felton, the present receiver, has no other interest than to serve the court faithfully and fairly in the administration of this property. He has no interest whatever in the Cincinnati, New Orleans & Texas Pacific Railway Company. His connection with it has been wholly professional. For that reason he was not deemed disqualified to act as receiver, though he had been the company's president. We desire to testify to the fidelity, energy, and singleness of purpose with which he has discharged his duties, and the sense of fairness he has always manifested in respect to his employees. If the time shall come when the interests of his trust and returning prosperity permit, we doubt not he will be glad to restore wages and work to all whom this order injuriously affects.

Our conclusion is that the order of the receiver here complained of was, under the circumstances, not unreasonable, but was necessary. The petition to modify the order, is denied.

MURRAY v. CHICAGO & N. W. RY. CO.

(Circuit Court, N. D. Iowa, Cedar Rapids Division. June 14, 1894.)

1. COMMON LAW—APPLICATION TO MATTERS WITHIN FEDERAL JURISDICTION.

The adoption of the constitution of the United States and the consequent creation of the national government did not abrogate the common law previously existing; nor did the division provided for by the constitution, of governmental powers and duties between the national and state governments, deprive the people of the benefits of the common law; as to such matters as thereby were committed to the control of the national government, there were applicable the law of nations, the maritime law, the principles of equity, and the common law, according to the nature of the particular matter, the common law applicable to such matters being based on the common law of England, as modified by the surroundings of the colonists, and as developed by the growth of our institutions since the adoption of the constitution, and the changes in the business habits and methods of our people; and the binding force of the principles of this common law, as applied to such matters, is not derived from the action of the states, and is no more subject to abrogation or modification by state legislation than are the principles of the law of nations or of the law maritime.

2. FEDERAL COURTS—APPLICATION OF PRINCIPLES OF GENERAL JURISPRUDENCE—COMMON LAW.

The constitution of the United States and congress, acting in furtherance of its provisions, have conferred on the supreme court and the other courts inferior thereto the right and power to enforce the principles of the law of nations, of the law maritime, of the system of equity, and of the common law, in all cases coming within the jurisdiction of those courts,

applying, in each instance, the system which the nature of the case demands; and, as to all matters of national importance over which paramount legislative control is conferred upon congress, the courts of the United States have the right to declare what are the rules of general jurisprudence which control the given case, and to define the duties and obligations of the parties thereto.

3. CARRIERS—INTERSTATE COMMERCE—APPLICATION OF COMMON LAW.

In determining the obligations assumed by a common carrier engaged in interstate commerce, the court has the right to apply the rules of the common law, unless the same have been changed by competent legislative action; and, in an action for damages for charging unreasonable rates for transportation from one state to another, shipments made before the adoption of the interstate commerce act are governed by the common law, and those made after the adoption of that act by the common law as modified by the act.

4. COURTS—CONFLICTING STATE AND FEDERAL JURISDICTION—INTERSTATE COMMERCE.

The fact that the subject of interstate commerce is beyond state legislative control does not ipso facto prevent the courts of the state from exercising jurisdiction over cases arising from such commerce.

5. SAME—FOLLOWING STATE DECISIONS—LIMITATION OF ACTIONS.

The conclusion of a state court as to the time when a cause of action accrues in case of fraud or concealment, based, not on a construction of the state statute, but on the view taken of the rule of the common law, is not binding on the United States courts, when called on to construe the common law and apply its principles to cases arising between citizens of different states.

6. LIMITATION OF ACTIONS—FRAUDULENT CONCEALMENT.

Query, whether, in an action at law against a common carrier to recover the amount of excessive charges for freight made by defendant or of the damages caused thereby, the bar of the statute can be avoided by showing that defendant fraudulently concealed the fact that lesser rates were charged upon like shipments made by others, there being no statutory exception applicable to such case.

This was an action by Murray against the Chicago & Northwestern Railway Company to recover damages for alleged unreasonable rates charged for transportation of freight. Submitted on motion and demurrer to amended petition.

Rickel & Crocker, for plaintiff.

Hubbard & Dawley, for defendant.

SHIRAS, District Judge. In the amended petition filed in this cause it is averred that during the years 1875 to 1887, inclusive, the plaintiff was engaged at Belle Plaine, Iowa, in the business of buying and shipping to Chicago grain, cattle, and hogs, the same being shipped in car-load lots over the line of railway owned and operated by the defendant company; that, at the several times when the shipments were made, the defendant company had posted at its stations, including that at Belle Plaine, printed lists containing the tariff rates charged by the company for the transportation of freight over its line; that, when plaintiff shipped his stock, he applied to the defendant and its station agent at Belle Plaine for the lowest freight rates charged, and was answered by the defendant and its station agent that the posted rates were the lowest and only rates charged by the company, no rebates or concessions in any form being made

therefrom to any one; that thereupon the plaintiff shipped his stock, and paid the posted rates therefor; that in fact such representations were false, and were made to mislead the plaintiff; that in fact, as the defendant and its agents well knew, rebates and concessions were then being made to other parties who were competitors in business of the plaintiff, to the great injury of plaintiff; that the fact that these rebates were allowed to the competitors of plaintiff was kept concealed by the defendant, and was not discovered by the plaintiff until within 18 months previous to the commencement of this action; that upon shipments of grain made from points west of Belle Plaine to Chicago the defendant charged the shippers thereof some \$15 per car less than it was then charging the plaintiff for shipping the same kind of grain from Belle Plaine to Chicago, thus discriminating against the plaintiff, and compelling him to pay an excessive and unreasonable rate. To recover the damages claimed to have been thus caused him, the plaintiff brought this action in the superior court of the city of Cedar Rapids, Iowa, whence it was removed to this court upon the application of the defendant company. On part of the defendant, a motion for a more specific statement has been filed, followed by a demurrer, and both have been submitted to the court.

The principal point made in the demurrer is that the petition on its face shows that the shipments made from Belle Plaine, Iowa, to Chicago, Ill., were in the nature of interstate commerce, the regulation of which is reserved to congress, exclusively, by section 8, art. 1, of the constitution of the United States, and that, at the dates of the several shipments in the petition described, there was no act of congress or other law regulating commerce between the several states. If I understand correctly the position of the defendant company, it is that, as this action was commenced in the state court, this court, upon removal, succeeds only to the jurisdiction which the state court might have exercised rightfully in case no removal had been had; that in the state court the action could not be maintained for two reasons: First, that as section 8, art. 1, of the constitution of the United States confers the right to regulate interstate commerce exclusively upon congress, thereby depriving the states of the power to legislate touching the same, it follows that state courts are deprived of all jurisdiction over cases growing out of interstate commerce; and, second, that there is no common law of the United States; that the common law of England has become the common law of the several states, in such sense that each state has its own common law; and that the common law of the state of Iowa cannot be applied to interstate commerce, in view of the provisions, already cited, of the constitution of the United States. Dealing with these propositions in the reverse order of their statement, is it true that the principles of the common law are not in force in the United States with respect to such subjects as are placed within the exclusive control of congress? It will not be questioned that, before the Revolution, the common law was in force, so far as applicable, in the several colonies then existing. Thus, in *U. S. v. Reid*, 12 How. 361-363, it is said:

"The colonists who established the English colonies in this country undoubtedly brought with them the common and statute laws of England, as they stood at the time of their emigration, so far as they were applicable to the situation and local circumstances of the colony."

When the constitution of the United States was adopted, it was based upon the general principles of the common law, and its correct interpretation requires that the several provisions thereof shall be read in the light of these general principles. The final disruption of all political ties between the colonies and the mother country did not terminate the existence of the common law in the colonies. It came originally into the several colonies, not by force of legislative enactments to that effect by the parliament of Great Britain, and the effect of which might be held to have terminated when the colonies became independent, but, as is said by Mr. Justice Story, speaking for the supreme court in *Van Ness v. Pacard*, 2 Pet. 137-144:

"Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation."

In *Cooley*, Const. Lim. 31, it is said:

"From the first the colonists in America claimed the benefit and protection of the common law. In some particulars, however, the common law, as then existing in England, was not suited to their condition and circumstances in the new country, and those particulars they omitted as it was put in practice by them. They also claimed the benefit of such statutes as, from time to time, had been enacted in modification of this body of rules; and, when the difficulties with the home government sprung up, it was a source of immense moral power to the colonists that they were able to show that the rights they claimed were conferred by the common law, and that the king and parliament were seeking to deprive them of the common birthright of Englishmen. * * * While colonization continued,—that is to say, until the war of the Revolution actually commenced,—these decisions were authority in the colonies, and the changes made in the common law up to the same period were operative in America also, if suited to the condition of things here. The opening of the war of the Revolution is the point of time at which the continuous stream of the common law became divided, and that portion which had been adopted in America flowed on by itself, no longer subject to changes from across the ocean, but liable still to be gradually modified through changes in the modes of thought and of business among the people, as well as through statutory enactments. The colonies also had legislatures of their own, by which laws had been passed which were in force at the time of the separation, and which remained unaffected thereby. When, therefore, they emerged from the colonial condition into that of independence, the laws which governed them consisted—First, of the common law of England, so far as they had tacitly adopted it, as suited to their condition; second, of the statutes of England or of Great Britain, amendatory of the common law, which they had in like manner adopted; and, third, of the colonial statutes. The first and second constituted the American common law, and by this, in great part, are rights adjudged and wrongs redressed in the American states to this day."

Thus it appears that, when the constitution of the United States was adopted, the general rules of the common law, in so far as they were applicable to the conditions then existing in the colonies, and subject to the modifications necessary to adapt them to the uses and needs of the people, were recognized and were in force in the colonies, and the people thereof were entitled to demand the enforcement thereof through the judicial tribunals then existing.

The adoption of the constitution did not deprive the people of the several colonies of the protection and advantages of the common law. The constitution itself recognizes the fact of the continued existence of the common law, and indeed it is based upon the principles thereof, and its correct interpretation requires that its provisions shall be read and construed in the light thereof. By section 2, art. 3, of the constitution it is declared that:

"The judicial power shall extend to all cases in law and equity, arising under this constitution; the laws of the United States, and treaties made or which shall be made, under their authority; * * * to all cases of admiralty and maritime jurisdiction. * * *"

In this section we have a clear recognition of the existence of the several systems of law, equity, and admiralty. The section does not create these systems, but, recognizing their existence, it declares the extent of federal jurisdiction in regard thereto. The rules and principles which form the laws maritime are not created by the constitution, for, as is said by Chief Justice Marshall, in *Insurance Co. v. Canter*, 1 Pet. 511-546:

"A case in admiralty does not, in fact, arise under the constitution or laws of the United States. These cases are as old as navigation itself, and the law admiralty and maritime, as it has existed for ages, is applied by our courts to the cases as they arise."

In *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344-390, it is declared that:

"By the constitution, the entire admiralty power of the country is lodged in the federal judiciary, and congress intended, by the ninth section, to invest the district courts with this power, as courts of original jurisdiction."

The constitution does not create a system of maritime law, nor does it enact that the system, as prevailing in England or in Europe, shall become the law of the United States; but, recognizing the fact that the law maritime was then in force in the colonies, it confers the jurisdiction upon the federal courts. The same is true of the equitable jurisdiction. It is certainly not necessary to cite authorities in support of the proposition that the constitution of the United States neither created nor enacted a system of equitable jurisprudence and procedure, but, recognizing the existence of the system, it conferred upon the courts of the United States jurisdiction in equity, maintaining the pre-existing distinction between equitable and legal remedies. Is it not clear that the same is true in regard to the common law? At the time of the adoption of the constitution there was in existence in the colonies the system of the common law, of equity, and of admiralty. It was not the purpose of the constitution to abrogate any one of these systems. One of the main objects sought to be accomplished was to establish the extent of the legislative and judicial powers of the national government then being created. Owing to the fact that it was not proposed to destroy the state governments then existing, but, continuing these, to create a national government, to be paramount and supreme within its limited sphere, it became a necessity that the extent of the powers of each government should be defined; and, in a general sense, it may be

said that the plan adopted was to confer upon the national government the power of control over subjects affecting the country or people at large, reserving to the states control over all that are local, or which do not require a uniform system or law for their proper regulation. Can it be denied that, at the time of the adoption of the constitution, the people of the several states possessed the rights, and were subject to the duties and obligations, recognized and enforced by the principles and modes of procedure forming the separate systems of law, equity, and admiralty? Is there any ground for holding that it was the purpose of the constitution to recognize the continuing existence of the systems of equity and admiralty, but to deny the existence of the common law, or to refuse its recognition? Such a construction of its provisions is clearly inadmissible. The principles and modes of procedure of the three systems of law, equity, and admiralty, in force previous to the adoption of the constitution, remained in force after its adoption, save as to such modification as were created by the provisions of the constitution. That this is the true view of the question appears, not only from the references found in the constitution, and the amendments thereto, to the common law, as a recognized and existing system, but in the judiciary act of 1789 the several branches of the law, such as the law of nations, the common law, the admiralty and maritime law, and equity are fully recognized as then existing, and the jurisdiction arising under the same is divided between the courts created by that act. That the principles of the common law have always been recognized and enforced in proper cases by the courts of the United States is a proposition so plain that a citation of the cases is not necessary for its support; yet, to show the course of judicial action in this particular, a few of the numerous cases to be found in the decisions of the supreme court will be quoted from.

In *Cox v. U. S.*, 6 Pet. 172-204, wherein suit was brought in the United States court in Louisiana upon the bond of a navy agent, it was held that the bond must be deemed to be a contract performable at the city of Washington, "and the liability of the parties must be governed by the rules of the common law." To the same effect is the ruling in *Duncan v. U. S.*, 7 Pet. 435. In *Swift v. Tyson*, 16 Pet. 1-18,—a case involving the law of negotiable paper,—the supreme court held that the provisions of the thirty-fourth section of the judiciary act of 1789 did not require the courts of the United States to follow the ruling of the state courts upon the principles established in the general commercial law, it being said by Mr. Justice Story, speaking for the court, that:

"We have not now the slightest difficulty in holding that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principle and doctrines of commercial jurisprudence."

To the same effect is the ruling in *Oates v. Bank*, 100 U. S. 239, and *Railroad Co. v. National Bank*, 102 U. S. 14. In the latter case it is said:

"The decisions of the New York court, which we are asked to follow in determining the right of parties under a contract there made, are not in exposition of any law local to that state, but as to their rights under the general commercial law existing throughout the Union, except where it may have been modified or changed by some local statute. It is a law not peculiar to one state, or dependent upon local authority, but one arising out of the usages of the commercial world."

In *Fenn v. Holmes*, 21 How. 481-484, it is said:

"In every instance in which this court has expounded the phrases 'proceedings at common law' and 'proceedings in equity,' with reference to the exercise of the judicial powers of the courts of the United States, they will be found to have interpreted the former as signifying the application of the definitions and principles and rules of the common law to the rights and obligations essentially legal, and the latter as meaning the administration with reference to equitable, as contradistinguished from legal, rights of the equity law, as defined and enforced by the court of chancery in England."

In *Railroad Co. v. Lockwood*, 17 Wall. 357, the question of the power of a common carrier to exempt himself by contract from the liability placed upon him by the common law is discussed at length, and it was held that the court was bound to decide the question upon the ground of public policy, and according to the principles of general commercial law.

The case of *Kohl v. U. S.*, 91 U. S. 367, 374-376, presented the question whether the United States could exercise the right of eminent domain for the purpose of condemning land in the city of Cincinnati, to be used as a site for a public post office. The right was maintained, it being said that:

"When the power to establish post offices and to create courts within the states was conferred upon the federal government, included in it was authority to obtain sites for such offices and for courthouses, and to obtain them by such means as were known and appropriate. The right of eminent domain was one of those means, well known when the constitution was adopted, and employed to obtain lands for public uses. Its existence, therefore, in the grantee of that power, ought not to be questioned. * * * The right of eminent domain always was a right at common law. It was not a right in equity, nor was it even the creature of a statute. The time of its exercise may have been prescribed by statute, but the right itself was superior to any statute. * * * It is difficult, then, to see why a proceeding to take land by virtue of the government's eminent domain, and determining the compensation to be made for it, is not, within the meaning of the statute, a suit at common law, when initiated in a court. It is an attempt to enforce a legal right."

In *Moore v. U. S.*, 91 U. S. 270, the question was, by what law is the court of claims to be governed in respect to the admission of evidence in the hearings had before it? and the supreme court held that:

"In our opinion it must be governed by law; and we know of no system of law by which it should be governed other than the common law. That is the system from which our judicial ideas and legal definitions are derived. The language of the constitution and of many acts of congress could not be understood without reference to the common law. The great majority of contracts and transactions which come before the court of claims for adjudication are permeated, and are to be adjudged, by the principles of the common law."

In *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, 110 U. S. 667-681, 4 Sup. Ct. 185, it is said:

"The Atchison, Topeka & Santa Fe Company, as the lessee of the Pueblo & Arkansas Valley Railroad, has the statutory right to establish its own stations, and to regulate the time and manner in which it will carry persons and property, and the price to be paid therefor. As to all these matters it is undoubtedly subject to the power of legislative regulation, but, in the absence of regulation, it owes only such duties to the public, or to individuals, associations, or corporations, as the common law, or some custom having the force of law, has established for the government of those in its condition."

In *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, was presented the question whether the engineer and fireman of a locomotive engine are fellow servants, so that the fireman could not recover from the railway company damages for injuries caused by the negligence of the engineer, there being no statutory enactment to that effect in the state of Ohio, wherein the accident happened. Under the decisions of the supreme court of Ohio, liability on part of the railway company existed; but the supreme court of the United States refused to follow these rulings, holding that:

"The question is essentially one of general law. It does not depend upon any statute. It does not spring from local usage or custom. There is in it no rule of property, but it rests upon those considerations of right and justice which have been gathered into the great body of the rules and principles known as the 'common law.' There is no question as to the power of the states to legislate and change the rules of the common law in this respect, as in others; but, in the absence of such legislation, the question is one determinable only by the general principles of that law."

Citations of this character from the decisions of the supreme court might be continued almost without limit. From them it appears, beyond question, that the constitution, the judiciary act of 1789, and all subsequent statutes upon the same subject are based upon the general principles of the common law, and that, to a large extent, the legislative and judicial action of the government would be without support and without meaning if they cannot be interpreted in the light of the common law. When the constitution was adopted, it was not the design of the framers thereof to create any new systems of general law, nor to supplant those already in existence. At that time there were in existence and in force in the colonies or states, and among the people thereof, the law of nations, the law admiralty and maritime, the common law, including commercial law, and the system of equity. Upon these foundations the constitution was erected. The problem sought to be solved was not whether the constitution should create or enact a law of nations, of admiralty, of equity, or the like, but rather how should the executive, legislative, and judicial powers and duties based upon these systems, and necessary for the proper development and enforcement thereof, be apportioned between the national and state governments. The principles, duties, and obligations inhering in these systems of law were already in force. The constitution neither created nor adopted them, but, recognizing the fact that they were in fact in existence, and were the possessions of the people, it proceeded to apportion the exercise thereof between the national and state governments. The general line of division, as already said, is based upon the principle of national control over subjects affecting the country and the people as a whole, and wherein

uniformity of rule and control is desirable, if not indispensable, and of state control over subjects of local interests. The result was that upon the national government was conferred, as to some subjects, paramount and exclusive control; as to others, paramount, but not exclusive, control, unless congress by legislation excluded state action; as to others, control concurrent with the states. The division thus made is as to the subjects of legislative and judicial jurisdiction, and not a division of systems of law. The constitution does not place under national control the law of nations and of admiralty, and under state control common law and equity, but it divides the subjects of governmental control, and each subject carries with it the law or system appropriate thereto. The subject-matter of dealing with other nations is conferred exclusively upon the national government, and of necessity all questions arising under the law of nations and the right to seek changes in this law by conventions with other governments are committed to the national government. The right to regulate foreign commerce is conferred exclusively upon congress, and of necessity that confers upon the national legislature and judiciary the duty of enforcing the law maritime. The right to regulate interstate commerce is conferred exclusively upon congress, and, when it legislates, the resulting statute will be interpreted with reference to the general principles of the common law. In the absence of congressional regulation of interstate commerce, the courts called upon to decide cases arising out of interstate commerce must apply the principles of the common law. So, also, when called upon to decide cases arising out of intrastate commerce, when there is no state statute or law applicable thereto, the courts must apply the common law. The apportionment of control over foreign, inter and intra state commerce, made by the constitution, did not affect the applicability of the common law thereto. It divided the control over the general subject of commerce, and apportioned to the national government exclusive legislative control over foreign and interstate commerce; and this apportionment carried with it the right to confer upon the national judiciary jurisdiction over cases involving foreign and interstate commerce, and, in the exercise of this jurisdiction, the courts are bound by the general principles of the common law, save where the same have been changed by legislative enactment.

To me it seems clear, beyond question, that neither in the constitution, nor in the statutes enacted by congress, nor in the judgments of the supreme court of the United States can there be found any substantial support for the proposition that, since the adoption of the constitution, the principles of the common law have been wholly abrogated touching such matters as are by that instrument placed within the exclusive control of the national government. But it is not to be denied that support to the proposition is to be found in part of the reasoning employed by Mr. Justice Matthews in announcing the opinion of the supreme court in *Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. 564. This case came before the supreme court upon a writ of error bringing into review a judg-

ment of the supreme court of Alabama affirming a judgment of the city court of Mobile in habeas corpus proceedings, and which presented the question whether a statute of the state of Alabama, providing for the examination and licensing engineers engaged in operating locomotive engines in that state, was void, as applied to engineers running interstate trains, on the ground that it was an attempt to regulate interstate commerce. The case did not in fact involve any question in regard to the common law. The judgment of the court was that the statute was passed to secure the safety of the public in person and property, and any effect it had upon interstate commerce was incidental and remote; and the validity of the statute was sustained. In the course of the opinion it is pointed out that the laws of the states provide for remedies in cases of nonfeasance or misfeasance on part of common carriers, and that it had never been held that such laws were void, as being unconstitutional regulations by the state of interstate commerce. Following these propositions, we find it said:

"But for the provisions on the subject found in the local law of each state, there would be no legal obligation on the part of the carrier, whether *ex contractu* or *ex delicto*, to those who employ him; or, if the local law is held not to apply where the carrier is engaged in foreign or interstate commerce, then, in the absence of laws passed by congress or presumed to be adopted by it, there can be no rule of decision based upon rights and duties supposed to grow out of the relation of such carriers to the public or to individuals. In other words, if the law of the particular state does not govern that relation, and prescribe the rights and duties, which it implies, then there is and can be no law that does until congress expressly supplies it, or is held by implication to have supplied it, in cases within its jurisdiction over foreign and interstate commerce. The failure of congress to legislate can be construed only as an intention not to disturb what already exists, and is the mode by which it adopts, for cases within the scope of its power, the rule of the state law, which, until displaced, covers the subject. There is no common law of the United States, in the sense of a national customary law, distinct from the common law of England, as adopted by the several states, each for itself, applied as its local law, and subject to such alterations as may be provided by its own statutes. * * * There is, however, one clear exception to the statement that there is no national common law. The interpretation of the constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history. The code of constitutional and statutory construction, which, therefore, is gradually formed by the judgments of this court, in the application of the constitution and the laws and treaties made in pursuance thereof, has for its basis so much of the common law as may be implied in the subject and constitutes a common law, resting on national authority."

The meaning to be given to this last sentence quoted from the opinion of Mr. Justice Matthews is not at all clear. If it be true that the supreme court, in construing the provisions of the constitution, and the laws and treaties made in pursuance thereof, has the right to adopt, as the basis of its construction, so much of the common law as may be implied in the subject, which proposition seems to be affirmed, then is it not true that the principles of the common law, so far as applicable to the subject-matter, are recognized as in force touching matters of national control? It is evident that it was present to the mind of the learned justice whose opinion we are considering that it would not do to hold

that the failure of congress to legislate touching the duties and obligations of common carriers engaged in interstate commerce left the public without any law for its protection, and therefore the suggestion is made that:

"The failure of congress to legislate can be construed only as an intention not to disturb what already exists, and is the mode by which it adopts, for cases within the scope of its power, the rule of the state law."

The rules prevailing in the different states may be variant or antagonistic. A delivery of goods may be made to a common carrier in California, for transportation to New York. Do the legal relations, duties, and obligations existing between the shippers and carrier vary and change as the shipment passes state boundaries, so as to accord with the local law of each state through which the carrier may choose to take them? Upon such a theory, what becomes of the principle that the exclusive control of foreign and interstate commerce was committed to congress in order to secure a uniform rule touching the same? I would amend the statement of Mr. Justice Matthews so that it should read:

"The failure of congress to legislate can be construed only as an intention not to disturb what already exists; and as, at the time of the adoption of the constitution, common carriers, under the principles of the common law, were subject to certain duties and obligations, the failure on the part of congress to legislate thereon evinces the legislative intent to leave the rules and principles of the common law in full force, as controlling and defining the relations, duties, and obligations of common carriers engaged in interstate commerce."

It will be further noticed that it is suggested in the opinion that it might be implied that congress has supplied a law or rule governing foreign and interstate commerce. Is there not as good ground to be found in the provisions of the constitution, and the statutes based thereon, for implying the recognition of the principles of the common law, as there is for implying the recognition of the law of nations, or the maritime law as applied to foreign commerce? Suppose a merchant or manufacturer residing in the United States makes a shipment of goods by land into the dominion of Canada, and another shipment of goods to England by sea, in both instances the goods being delivered to common carriers for transportation and delivery; would not the duty and obligations resting upon the steamship line to which the goods destined for England were delivered be measured by the law maritime? What express provision of the constitution or of the statutes of the United States declares that shipowners engaged in foreign commerce are subject to the law maritime? Has congress ever adopted a code of laws declaring what the rules and principles are that are applicable to foreign commerce carried on over the high seas or the navigable waters of the country? It has adopted specific provisions modifying the general principles of the law, but it has always recognized the existence of the general system. Can it be contended that, in the absence of legislation by congress expressly adopting the law maritime, foreign shipments upon the ocean are without legal protection; that, from the acceptance of the goods for trans-

portation and delivery, no implied contract is created; that the respective rights and duties of the parties are such, and such only, as may be created by express contract between the parties? Even if an express contract is entered into, by what rules and principles are its provisions to be construed? That the law maritime has been in force, and is now in force, in the United States, cannot be questioned; and yet it was not created or expressly enacted in the constitution or any act of congress. That system of law was in existence when the constitution was adopted, and its existence is recognized in the constitution, and provision is made for enforcing the same by conferring admiralty jurisdiction upon the courts of the United States. From this the inference, and the only inference, is that it was not the intent of the constitution to abrogate the then existing maritime law, but, recognizing its existence, to provide for its enforcement in all matters to which it is applicable, including foreign commerce. There is no doubt, therefore, that, as to that part of foreign commerce which is carried on through the agency of common carriers upon navigable waters, there is a system of law applicable thereto, and courts having jurisdiction to enforce the principles of the system. How is it, in regard to that part of foreign commerce carried on with neighboring countries, where the transportation is by land, as in the case supposed of a shipment of goods to Canada? It is said that the common carrier engaged in foreign commerce cannot be held subject to the principles of the common law, because congress has not expressly adopted the common law, and therefore it cannot be applied to shipments made to foreign countries. Is not the existence of the common law as fully recognized in the constitution, and the laws of congress based thereon, as is the existence of the law maritime? Do not the constitution and the judiciary act confer upon the courts of the United States full common-law jurisdiction? Are not the courts of the United States, therefore, authorized to enforce the principles of the law maritime and the common law in all cases to which they are applicable, and which are within the jurisdiction of the federal courts? Suppose a shipment of goods is made from San Francisco, through New York, to England. The carrier receives the goods to be sent by land to New York, and thence by ship to England. No special contract is made. This shipment is a matter of foreign commerce. When placed on shipboard at New York for transportation to England, is there any doubt that the law maritime is applicable thereto, and that, if litigation should arise regarding the ocean transportation, the courts of the United States would apply the principles of the law maritime thereto? If litigation with the common carrier should arise touching the land transportation, would not the courts of the United States have the right to apply the principles of the common law thereto? Upon what fair principle of construction can it be held that the constitution so far recognizes the law maritime that it must be held to be in force, but that the recognition of the common law is not sufficient to keep it in force in matters of national concern?

In *Swift v. Railroad Co.*, 58 Fed. 858,—a case decided by the United States circuit court for the northern district of Illinois,—it is held that the law of the state of Illinois could not be applied to contracts for shipments of property into other states; that interstate commerce cannot be controlled by the local law of the state, either statutory or common; that, previous to the enactment of the interstate commerce act by congress, there was no act of congress regulating interstate commerce; that the United States had never adopted the common law; that, previous to the adoption of the interstate commerce act in 1887, there was therefore no law controlling the relations of carriers and shippers in regard to interstate commerce. If it be true that the principles of the common law are not in force in this country in regard to such matters as are placed under national control, then it is difficult to escape the conclusions reached by Judge Grosscup in the case just cited; but I cannot concur in the proposition that the principles of the common law have no existence in this country, as applicable to national affairs, or that these principles have only a local existence, due to their adoption by the several states. It is certainly a novel proposition that up to the date of the enactment of the interstate commerce act, in 1887, all the foreign and interstate commerce of the country was without the pale of law, and that there were no legal rules or principles which governed or controlled the relations between the shippers or carriers engaged in that business; and yet such seems to be the conclusion in *Swift v. Railroad Co.* In *Railway Co. v. Osborne*, 3 C. C. A. 347, 52 Fed. 912,—a case involving the construction of the interstate commerce act,—Mr. Justice Brewer, speaking for the court, held:

"It was the first effort of the general government to regulate the great transportation business of the country. That business, though of a quasi public nature, and therefore subject to a governmental regulation, has, as a matter of fact, been carried on by private capital through corporations. The fact that it was a public business always prevented the owners of capital invested in it from charging, like owners of other property, any price they saw fit for its use. A reasonable compensation was all they could exact, and he who felt aggrieved by a charge could always invoke the aid of the courts to protect himself against it."

Mr. Justice Brewer is here speaking of the condition of affairs before the enactment of the interstate commerce act, and he expressly declares that, prior to that act, common carriers engaged in interstate commerce were bound to charge only a reasonable compensation, or, in other words, they were subject to the principles of the common law.

It is further argued that it has been repeatedly decided that the inaction of congress, up to 1887, in passing any law regarding interstate commerce, shows that the intent was to leave such commerce free from all restraint, and therefore common carriers assumed no common-law liability in undertaking shipments of goods from one state to another. The decisions of the supreme court in the numerous cases involving the validity of state laws affecting foreign and interstate commerce have always held that the inaction of congress could not be construed to mean that the states were

at liberty to legislate in regard to these subjects in the absence of congressional legislation, but that such inaction evidenced that it was the intent of congress to leave commerce, foreign and interstate, free from all legislative restrictions. It has never been held, however, that the freedom of commerce meant that those engaged in carrying it on were not under legal restraints and obligations growing out of the relations of carriers and shippers. If the theory now contended for by the defendant company be correct, then from the foundation of the government up to April 4, 1887, when the interstate commerce act took effect, it was open to all the common carriers engaged in foreign or interstate commerce to act as they pleased in regard to accepting or refusing freights, in regard to the prices they might charge, in regard to the care they should exercise, and the speed with which they should transport and deliver the property placed in their charge. What more disastrous restraint upon the true freedom of foreign and interstate commerce could be devised than the adoption of the doctrine that the inaction of congress left the carriers engaged therein entirely free to accept and transport the property of one man or corporation, and to refuse to accept the like property of another, or to transport the products of one locality, and to refuse to transport those of another; to charge an onerous toll upon the property of one, and carry that of his neighbor for nothing? Can it be possible that the transcontinental railways and other federal corporations engaged in foreign and interstate commerce, in the absence of congressional legislation, were not under any legal restraints, and that the citizen, in his dealings with them, was without legal remedy or protection? In the absence of congressional legislation, what law could be applied to them, with regard to matters under the exclusive control of the national government, except the principles of the common law or the law maritime? I cannot yield assent to the broad proposition that, as to those subjects over which congress is given exclusive legislative control, there is no law in existence if congress has not expressly legislated in regard thereto. The true doctrine, in my judgment, is that the constitution of the United States, when it was adopted, gave full recognition to the existing systems of the law of nations, of admiralty and maritime, of the common law, and equity. It apportioned to the national government, then created, control over certain subjects, exclusive as to some, concurrent as to others. This apportionment of control over certain subjects necessitated the exercise of both legislative and judicial powers, and provision was made for the former in the creation of congress, and for the latter in the creation of the supreme court, and by conferring authority on congress to create other courts. The courts thus created were vested with jurisdiction in admiralty and at common law and in equity. If there is no common-law jurisdiction to be exercised, and no common-law principles to be enforced, why create courts for that purpose? But it is said in *Swift v. Railroad Co.*, and the same thought is found in other cases, that "the courts of the United States have had many occasions to enforce the common law, but in every instance it has been

as the municipal law of the state by which the subject-matter was affected." This may be generally, but it is not universally, true. In *Mississippi Mills v. Cohn*, 150 U. S. 202, 14 Sup. Ct. 75, we find a case which was originally brought in a court of the state of Louisiana, in which state the civil, and not the common, law is in force. The suit was removed into the United States circuit court, and was by that court dismissed for want of jurisdiction, upon the ground that, being a suit in equity, it could not be maintained, because the remedy at law was sufficient. The supreme court reversed the ruling, holding that even if, under the law of the state of Louisiana,—that is, the civil law,—the remedy at law was sufficient, yet that fact would not defeat the jurisdiction in equity of the federal court, for the reason "that the inquiry, rather, is whether, by the principles of common law and equity, as distinguished and defined in this and the mother country at the time of the adoption of the constitution of the United States, the relief here sought was one obtainable in a court of law, or one which only a court of equity was fully competent to give." In this ruling the supreme court was certainly not enforcing the municipal law of the state of Louisiana. If courts of the United States can only recognize and enforce the principles of the common law when the same form part of the municipal law of the state, how comes it that the supreme court directed the circuit court in Louisiana to apply the principles of the common law and of equity, as they existed when the constitution was adopted, to the decision of the question of jurisdiction arising in that case? Suppose a state should enact that all questions of title to realty should be triable only in a court of equity, and in accordance with the principles of equity; would that enactment confer upon the courts of the United States the same jurisdiction, and thus permit a question of strict legal title to be tried in equity in the courts of the United States, if, according to the principles of the common law in force when the constitution was adopted, an action in ejectment would afford an ample remedy? Clearly, the federal court could in such case entertain only the common-law action, and in so doing it would be acting under and enforcing the principles of the common law, not the municipal law of the state, for it would be disregarding that, but the common law brought by our ancestors from the mother country.

Perhaps the most forcible illustration of the fact that the government of the United States does recognize and enforce the principles of the common law with regard to subjects wholly within national control, and not as part of the municipal law of any state, is found in connection with the organization and proceedings of the court of claims. This court is not a court in and for the district of Columbia, nor is it a court of any district or circuit. It has jurisdiction over cases arising in any of the states or territories. It has jurisdiction to hear and determine cases against the United States. Of all the courts in the Union, it is the one dealing with matters of national concern, arising under the constitution and laws of the United States, and not under the local law of the several states. The form of procedure is statutory, supplemented

by rules of its own adoption. As to this court thus organized, and clothed with a jurisdiction wholly national in its character, the express ruling of the supreme court is to the effect that the general law controlling its action is the common law. To repeat a quotation already made from the opinion of the supreme court in *Moore v. U. S.*, 91 U. S. 270, in regard to the court of claims:

"In our opinion, it must be governed by law; and we know of no system of law by which it should be governed other than the common law. * * * The great majority of contracts and transactions which come before the court of claims for adjudication are permeated and are to be adjudged by the principles of the common law."

To the same effect is the ruling in *U. S. v. Clark*, 96 U. S. 37, and there are no decisions to the contrary. There is no act of congress which adopts the common law as the rule of action for the court of claims. The reasons which declare the common law to be the system governing its action apply equally to the other courts of the United States. By the provisions of the act of congress of March 3, 1887, concurrent jurisdiction with the court of claims is conferred upon the district and circuit courts of the United States. Many of the claims against the United States arise out of implied contracts; that is, the facts are such that, according to the principles of the common law, an obligation to pay for the use of property is implied, in the absence of an express contract. Thus, in *U. S. v. Palmer*, 128 U. S. 262, 9 Sup. Ct. 104, the judgment of the court of claims awarding to Palmer the sum of \$2,256.75 as a reasonable compensation for the use, by the government, of certain patented military equipments, was sustained by the supreme court, it being said that "we think an implied contract for compensation fairly arose under the license to use, and the actual use, little or much, that ensued thereon." In this case there was no express agreement for compensation nor for the amount thereof. Applying the principles of the common law to the facts, the court of claims held that the law would imply a contract to pay a reasonable compensation, and the supreme court affirmed the judgment. Had Palmer brought the suit in a circuit court of the United States instead of in the court of claims, is it possible he would have been defeated on the ground that the local law of the state did not apply, and that the common law could not be invoked in a circuit court of the United States, and therefore there was no law applicable to the situation in the absence of an express contract? The right of recovery in such cases is not dependent upon the court in which the action may be brought, but upon the question of the principles of law—that is, the system of law—which are applicable to the situation, and which define the rights and obligations of the parties. Under the principles of the common law, as the same existed at the time of the separation between the colonies and Great Britain, common carriers of goods assumed certain duties and obligations to their patrons. The adoption of the constitution of the United States certainly did not change the relation existing between the carrier and the public, nor in any way affect the obligations assumed by the carrier. The constitution conferred

legislative control over foreign and interstate commerce upon congress, reserving to the several states legislative control over intrastate commerce. This division of legislative control did not, however, abrogate the common-law principle then in force. Thus, in *Boyce v. Anderson*, 2 Pet. 150, the question presented was whether the strict rule of the common law in regard to liability for goods lost could be applied in the case of slaves; and it was held that it would not be applied, as slaves were human beings having a volition of their own; but it was held that "the ancient rule that the carrier is liable only for ordinary neglect still applies to them." In determining the rights of the parties in this case, the supreme court, speaking by Marshall, C. J., relied upon the common law for its guidance. In *Bank of Kentucky v. Adams Exp. Co.*, 93 U. S. 174, the question arose as to the liability of the express company for certain packages of money sent from New Orleans, La., to Louisville, Ky., and which were destroyed by fire while in transit, the bills of lading containing stipulations in respect to the liability of the company. It will be noticed that the shipment was from one state to another, and therefore was of the nature of interstate commerce. In the course of the opinion it is said:

"We have already remarked that the defendants were common carriers. * * * Having taken up the occupation, its fixed legal character could not be thrown off by any declaration or stipulation that they should not be considered such carriers. The duty of a common carrier is to transport and deliver safely. He is made, by law, an insurer against all failure to perform this duty, except such failure as may be caused by the public enemy, or by what is denominated the 'act of God.' * * * The exception or restriction to the common-law liability introduced into the bills of lading given by the defendants. * * *

Thus we have the express declaration that a common carrier engaged in interstate commerce is subject to the common-law liability pertaining to his occupation. Many other cases of like import are to be found in the Supreme Court Reports, in which it is assumed that the principles of the common law are applicable to common carriers engaged in foreign or interstate commerce; and I can see no good reason for holding that the duties and obligations imposed upon a common carrier by the common law are not operative when he undertakes the transportation of property from state to state. It is said in argument that the obligations imposed upon common carriers are largely based upon considerations of public policy; that each state determines for itself what its public policy demands; and that the courts of the United States can recognize and enforce only the public policy of the state. There is a public policy of the nation as well as that of the several states. As to all such matters as are reserved to the states, and are therefore without the plane of national control, it may well be that it is for each state to determine what public policy dictates with regard thereto. The rule of the common law is that no one can lawfully do that which is injurious to the public, or which conflicts with the prevailing sentiment or interest of the community. In determining whether a given act or course of conduct is injurious to the public interests, regard must be had to the circumstances.

That which the public interests may demand in one locality may not be suited to the interests of another locality. There are many matters of a local nature which it is for each state to regulate and control for itself, either by legislation, or by judicial declarations of the results derivable from the application of common-law principles to the existing surroundings. On the other hand, there are many matters which affect the entire country, which are therefore of national importance, and which must be dealt with accordingly. In deciding legal questions arising out of the latter class of cases, courts are not confined to the inquiry whether the particular state in which the court may be sitting, has an established public policy touching the subject-matter, but they will apply the recognized principles of general jurisprudence, to wit, the principles of the common law, or of the law of nations, or of the law maritime, as the nature of the particular case may demand. Thus, in *Oscanyan v. Arms Co.*, 103 U. S. 261, the supreme court held that a contract entered into between a consul general of the Ottoman government residing at New York, and a company engaged in supplying arms, whereby the former was to be paid a commission upon all contracts secured through his aid was void, even though it might be valid in Turkey, it being said:

"But admitting this to be otherwise, and that the Turkish government was willing that its officers should take commissions on contracts obtained for it by their influence, that is no reason why the courts of the United States should enforce them. Contracts permissible by other countries are not enforceable in our country if they contravene our laws, our morality, or our policy."

The variety of cases in which this doctrine is applied may be seen by reference to *Marshall v. Railroad Co.*, 16 How. 314; *Tool Co. v. Norris*, 2 Wall. 45; *Trist v. Child*, 21 Wall. 441; *Meguire v. Corwine*, 101 U. S. 108; *Texas v. White*, 7 Wall. 700; *Hanauer v. Doane*, 12 Wall. 342; *Thomas v. City of Richmond*, Id. 349; *Woodstock Iron Co. v. Richmond & D. Extension Co.*, 129 U. S. 643, 9 Sup. Ct. 402. In these cases, and others of similar import, the supreme court does not base the rulings upon the local law of any state, for in the majority of the cases the question arose in connection with matters outside the plane of state control. Thus, in *Trist v. Child*, *supra*, a bill in equity was filed to enforce an agreement for services rendered in getting through congress a bill for payment to Trist of a remuneration for his services to the United States in negotiating the treaty of Guadalupe Hidalgo with Mexico. Mr. Justice Swayne, speaking for the court, declared that:

"It is a rule of the common law, of universal application, that where a contract, express or implied, is tainted with either of the vices last named as to the consideration on the thing done, no alleged right founded upon it can be enforced in a court of justice."

Applying this rule of the common law to the facts of the case, the agreement sought to be enforced was held void.

The conclusion I reach upon this subject is that at the time of the separation of the colonies from the mother country, and at the time of the adoption of the constitution, there was in existence a com-

mon law, derived from the common law of England, and modified to suit the surroundings of the people; that the adoption of the constitution and consequent creation of the national government did not abrogate this common law; that the division of governmental powers and duties between the national and state governments provided for in the constitution did not deprive the people who formed the constitution of the benefits of the common law; that, as to such matters as were by the constitution committed to the control of the national government, there were applicable thereto the law of nations, the maritime law, the principles of equity, and the common law, according to the nature of the particular matter; that, to secure the enforcement of these several systems when applicable, the constitution and congress, acting in furtherance of its provisions, have created the supreme court of the United States and the other courts inferior thereto, and have conferred upon these courts the right and power to enforce the principles of the law of nations, of the law maritime, of the system of equity, and of the common law in all cases coming within the jurisdiction of the federal courts, applying, in each instance, the system which the nature of the case demands; that, as to all matters of national importance over which paramount legislative control is conferred upon congress, the courts of the United States (the supreme court being the final arbiter) have the right to declare what are the rules deducible from the principles of general jurisprudence which control the given case, and to define the duties and obligations of the parties thereto; that the common law now applicable to matters committed to the control of the national government is based upon the common law of England, as modified by the surroundings of the colonists, and as developed by the growth of our institutions since the adoption of the constitution, and the changes in the business habits and methods of our people; that the binding force of the principles of this common law, as applied to matters affecting the entire people, and placed under the control of the national government, is not derived from the action of the states, and is no more subject to abrogation or modification by state legislation than are the principles of the law of nations or of the law maritime. The transactions out of which the present controversy arises pertain to interstate commerce. The defendant company, when engaged in transporting the grain and cattle of plaintiff from Iowa to Chicago, Ill., was acting as a common carrier of property, and assumed all the duties and obligations pertaining to that occupation. In determining the obligations assumed by a common carrier engaged in interstate commerce, the court has the right to apply the rules of the common law, unless the same have been changed by competent legislative action, and therefore, in the present case, all shipments made before the adoption of the interstate commerce act are governed by the common law, and those made since the adoption of that act by the common law as modified by that act.

A further point is made in support of the demurrer, to the effect that this court succeeds only to the jurisdiction of the state court in which the action was originally brought, and that state courts

have no jurisdiction over cases arising out of interstate commerce, the argument being that, as the state cannot legislate touching interstate commerce, the state courts are without power to determine cases of the like character. This position is not well taken. The limitations upon the legislative power of the nation and of the several states do not necessarily apply to the judicial branches of the national and state governments. The legislature of a state cannot abrogate or modify any of the provisions of the federal constitution nor of the acts of congress touching matters within congressional control, but the courts of the state, in the absence of a prohibitory provision in the federal constitution or acts of congress, have full jurisdiction over cases arising under the constitution and laws of the United States. The courts of the states are constantly called upon to hear and decide cases arising under the federal constitution and laws, just as the courts of the United States are called upon to hear and decide cases arising under the law of the state, when the adverse parties are citizens of different states. The duty of the courts is to explain, apply, and enforce the existing law in the particular cases brought before them. If the law applicable to a given case is of federal origin, the legislature of a state cannot abrogate or change it, but the courts of the state may apply and enforce it; and hence the fact that a given subject, like interstate commerce, is beyond state legislative control, does not, ipso facto, prevent the courts of the state from exercising jurisdiction over cases which grow out of this commerce. Had this action remained in the state court in which it was originally brought, that court would have had jurisdiction to hear and determine the issues between the parties, because congress has not enacted that jurisdiction over cases of this character is confined exclusively to the courts of the United States, and therefore the jurisdiction of the state court was full and complete.

The demurrer also presents the question of the statute of limitations, it being claimed that, under the provisions of the statute of Iowa, all right of action is barred in five years from the date of the shipments on which it is claimed unjust charges were made. The petition contains five counts. In each the real ground of complaint is that the defendant company charged plaintiff unjust, excessive, and unreasonable rates upon the shipments made by him. It is averred that the defendant company was performing the same service for other parties at less rates, thus discriminating against the plaintiff; but, as I construe the counts of the petition, the averments of discrimination are made as evidence in support of the charge that the rates exacted of the plaintiff were excessive and unreasonable. The action was commenced on the 25th day of August, 1892, and on part of the defendant it is claimed that the statute bars the suit as to all shipments made prior to August 25, 1887. In the petition it is charged that the unreasonable rates were exacted during the years from 1875 to 1891, both inclusive, it being further averred that, from time to time, plaintiff, when about to make shipments, made inquiry of the station

agent of the defendant at Belle Plaine for the lowest rates, and was assured by such agent that the published rates were the lowest given; that no secret rebates or commissions were allowed to other parties; that the rate demanded of plaintiff was the same, and as favorable, as that demanded of all others making like shipments; that these representations were in fact false; that the defendant company was giving other shippers rebates and concessions, keeping the fact secret, which amounted to \$25 per car; that plaintiff, relying upon the assurances made him, paid the rates demanded, which were in fact excessive, and greater than those paid by other shippers, and that plaintiff did not discover the fact that rebates had been allowed others until within a year last past. There can be no doubt that whatever cause of action exists in favor of the plaintiff, by reason of the charge of excessive or unreasonable rates, accrued to him as each shipment was made. If the facts are as is alleged in the petition, then, upon the payment by plaintiff of the excessive charges upon each shipment, a right of action accrued to the plaintiff for the recovery of the damages thus caused him, which was then as full and complete as it is at the present time. The ordinary rule is that the statute begins to run when the right of action is completed. Does the case fall within any exception to this rule? The provision of the statute applicable to the case is the general one, to wit, "and all other actions not otherwise provided for in this respect, within five years." Section 2529, Code Iowa. By section 2530, Id., it is declared that "in actions for relief on the ground of fraud or mistake, and in actions for trespass to property, the cause of action shall not be deemed to have accrued until the fraud, mistake or trespass complained of shall have been discovered by the party aggrieved;" but it is settled that this statutory exception is not applicable to cases of the character of that now under consideration. *District Tp. v. French*, 40 Iowa, 601; *Carrier v. Railway Co.*, 79 Iowa, 80, 44 N. W. 203. It is, however, claimed by plaintiff that, under the principles of the common law, it will not be held that the cause of action has accrued until actual discovery of the fraud or concealment has been had. In *District Tp. v. French*, supra, the supreme court of Iowa held that where a treasurer of the district, by false and fraudulent entries upon his books, concealed the fact of a misappropriation of a sum of money coming into his hands, the statute did not begin to run until discovery of the fraud thus practiced. In *Carrier v. Railway Co.*, supra, the supreme court of Iowa held the common-law exception applicable in an action of a similar character to that now before the court, upon the authority of *District Tp. v. French*; stating, however, that, "if the question was before us for the first time, we might hesitate to declare the rule announced in *District Tp. v. French*." The conclusion reached in *Carrier v. Railway Co.* is followed and affirmed in *Cook v. Railway Co.*, 81 Iowa, 551, 46 N. W. 1080. These decisions are based, not upon a construction of the provisions of the Iowa statute, but upon the view therein taken of the rule of

the common law; and the conclusion reached is not, therefore, binding upon the courts of the United States when they are called upon to construe the common law, and apply its principles to cases arising between citizens of different states. *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914.

As already stated, this action is not based upon the fraudulent representations made. It is not an action in the nature of trespass on the case or of deceit, according to the common-law form of procedure, and based upon the false assertions or representations, and for the recovery of the damages caused thereby, but rather in the nature of an action for money had and received to recover back the alleged excessive part or portion of the rates charged and paid. A right of recovery would be established by proof showing that the plaintiff had been compelled to pay an unreasonable rate, even though it might appear that the plaintiff knew at the time that the rate was unreasonable, for a shipper may be so circumstanced that he is compelled to ship, and cannot exercise an option to ship or not; and, if he cannot ship except by paying the unreasonable charge, he may do so, and may then sue to recover back the excess wrongly exacted from him. *Robertson v. Frank Bros. Co.*, 132 U. S. 17, 23, 10 Sup. Ct. 5. Where the action is not founded upon the alleged fraud or concealment, but is in the nature of an action for money had and received, the decided cases are not in accord upon the question whether concealment of the fact of an excessive charge will prevent the running of the statute. Where a party seeks relief on the ground of fraud, either in the nature of a proceeding in equity for the purpose of canceling the transaction, and restoring the parties to their original position and rights, or by means of an action at law for the damages, there is certainly strong ground for holding that the same principle should be applied to either form of action, and that the statute should not be held to apply except from the discovery of the fraud which constitutes the basis of the action; and this is the conclusion of the supreme court in *Bailey v. Glover*, 21 Wall. 342. The form of the action is not, therefore, the determinative consideration, but the question is whether, in an action at law to recover the amount of the excessive charges made by defendant, or of the damages caused thereby, the bar of the statute can be avoided by showing that the defendant fraudulently concealed the fact that lesser rates were charged upon like shipments of property made by other parties. Technically, the action is not based upon the fraudulent concealment of the fact that rebates were allowed other parties, but upon the fact that unreasonable rates were exacted of the plaintiff. No case decisive of this question in this court has been cited by counsel. Other cases of like character are pending in the court, and the expense of trying the same upon the facts will be great. In view of this fact I deem it most desirable that the question of the applicability of the statute of limitations should be finally settled before further expense is made in these cases, and, as the question presented by the demurrer can be readily presented to the court of appeals at small cost, and with little

delay, I shall sustain the demurrer on the question of the statute of limitations, to the end that the parties may secure a ruling from the court of appeals upon the questions involved before incurring the expense necessarily attending a jury trial.

ANDERSON v. LOUISVILLE & N. R. CO.

(Circuit Court, D. Kentucky. June 4, 1894.)

1. CIVIL RIGHTS — DISCRIMINATION AGAINST NEGROES — SEPARATE RAILROAD CARS.

Act Ky. May 24, 1892, requiring separate cars to be furnished for white and colored passengers on railroads of the state, but prohibiting any discrimination in the quality, convenience, or accommodations in the cars set apart for each, does not contravene the fourteenth amendment of the United States constitution, which secures equality of rights, not the joint and common enjoyment of rights.

2. INTERSTATE COMMERCE—REGULATION BY STATES.

But as the language of the act is so comprehensive as to embrace all passengers, whether their passage commences and ends within the state or otherwise, its provisions dividing them into classes according to color violate the interstate commerce clause of the United States constitution, and render the entire act invalid.

This was an action by Anderson against the Louisville & Nashville Railroad Company for damages for ejection from defendant's trains. Defendant demurred to plaintiff's petition.

John Feland & Son and J. H. Lott, for plaintiff.

Wilbur F. Browder and Reuben A. Miller, for defendant.

BARR, District Judge. The plaintiff, who is a colored man and a citizen and resident of the state of Indiana, sues the defendant, the Louisville & Nashville Railroad Company, a Kentucky corporation, which is operating, as a common carrier, a railway between St. Louis, Mo., and Nashville, Tenn., and several other railways in the state of Kentucky, for an alleged wrongful act in putting him and his wife off of its trains on two separate occasions. He alleges that he and his wife, who desired to go from Evansville, Ind., to Madisonville, Ky., purchased, at Evansville, two full first-class railroad tickets on defendant's road from Evansville to Madisonville, and then entered the defendant's car, at Evansville, usually designated the ladies' car, where they had a right to be, and that this right was recognized by the conductor of the train by taking up their tickets and exchanging them for the usual conductor's check. He alleges that they remained seated in said car undisturbed so long as the train was without the state of Kentucky, but, when the train came into that state, said conductor required of plaintiff and his wife to give up their seats in said car, and go into a compartment in a car immediately in front, which had been set apart for colored persons exclusively. He alleged that he and his wife refused to occupy said compartment, and thereupon said conductor wrongfully refused to carry them further on said train, and put

them off, without right and against their consent. In the second paragraph the plaintiff alleges that on another occasion he and his wife purchased over defendant's railroad two full first-class tickets from Henderson, Ky., to Madisonville, in same state, and that they entered the defendant's train, and seated themselves in the car designated for white persons exclusively, and that afterwards the conductor of the train took up their tickets and exchanged them for the usual conductor's checks, and then required that they should give up their said seats, and go into a compartment of a car which was and had been designated for colored persons exclusively; but that plaintiff and his wife refused to go into said compartment, and thereupon said conductor refused to carry them any further, and wrongfully put them off said train at Robard's Station, which was 30 miles distant from Madisonville, the place of his destination. The defendant has demurred to both of these paragraphs of plaintiff's petition, and thus raises the question of the constitutionality of an act of the Kentucky legislature entitled "An act to regulate the travel or transportation of the white and colored passengers on the railroads of this state," approved May 24, 1892. The 1st, 2d, 3d, 5th, 6th, and 7th, sections of that statute are as follows:

"Section 1. Any railroad company or corporation, person or persons, running or otherwise operating railroad cars, or coaches by steam or otherwise, on any railroad line or track within this state, and all railroad companies, person or persons, doing business in this state, whether upon lines of railroads owned in part or whole, or leased by them; and all railroad companies, person or persons, operating railroad lines that may hereafter be built under existing charters, or charters that may hereafter be granted in this state; and all foreign corporations, companies, person or persons organized under charters granted or that may hereafter be granted by any other state; who may be now, or may hereafter be engaged in running or operating any of the railroads of this state, either in part or in whole, either in their own name or that of others, are hereby required to furnish separate coaches or cars for the travel or transportation of the white and colored passengers on their respective lines of railroads. Each compartment of a coach divided by a good and substantial wooden partition, with a door therein, shall be deemed a separate coach, within the meaning of this act, and each separate coach or compartment shall bear in some conspicuous place, appropriate words in plain letters, indicating the race for which it is set apart.

"Sec. 2. That the railroad companies, person or persons, shall make no difference or discrimination, in the quality, convenience or accommodations in the cars or coaches, or partitions, set apart for white and colored passengers.

"Sec. 3. That any railroad company or companies, that shall fail, refuse, or neglect to comply with the provisions of sections 1 and 2 of this act, shall be deemed guilty of a misdemeanor, and upon indictment and conviction thereof shall be fined not less than five hundred, nor more than fifteen hundred dollars for each offense."

"Sec. 5. The conductors or managers on all railroads shall have power, and are hereby required, to assign to each white or colored passenger his or her respective car or coach or compartment; and should any passenger refuse to occupy the car, coach or compartment to which he or she may be assigned by the conductor or manager said conductor or manager shall have the right to refuse to carry such passenger on his train, and may put such passenger off the train; and for such refusal, and putting off the train, neither the manager, conductor nor railroad company shall be liable for damages in any court.

"Sec. 6. That any conductor or manager on any railroad, who shall fail or refuse to carry out the provisions of section 5 of this act, shall, upon conviction,

tion, be fined not less than fifty nor more than one hundred dollars for each offense.

"Sec. 7. The provisions of this act shall not apply to employes of railroads, or persons employed as nurses, or officers in charge of prisoners."

This statute makes no discrimination in favor of white passengers, since any discrimination in the quality, convenience, or accommodations in the cars and compartments set apart for white and colored passengers is prohibited. It may be that some of the railroad companies of this state fail to provide equal accommodations for its colored passengers as they provide for white passengers, but this difference is not authorized by this statute, but prohibited. The fourteenth amendment to the constitution of the United States prohibits discrimination by a state because of race or previous condition of servitude, and, indeed, secures to all of its citizens certain fundamental rights as against state action, but it does not secure the joint and common enjoyment of such rights. It is the equality of right which is secured, and not the joint and common enjoyment of such right. *Civil Rights Cases*, 109 U. S. 3, 3 Sup. Ct. 18; *U. S. v. Buntin*, 10 Fed. 730; *Claybrook v. Owensboro*, 16 Fed. 297.

The next inquiry is whether this statute is in violation of the commerce clause of the constitution of the United States, which gives congress the exclusive right to "regulate commerce with foreign nations, and among the several states." Const. art. 1, § 8. If this statute be construed to include the internal commerce of the state of Kentucky, and not to apply to interstate commerce, it is a proper exercise of the police power of the state, and is constitutional, as has been settled in the case of *Louisville, etc., R. Co. v. Mississippi*, 133 U. S. 587, 10 Sup. Ct. 348. See, also, *Railroad Commission Cases*, 116 U. S. 307, 6 Sup. Ct. 334, 348, 349, 388, 391, 1191. The case of *Louisville, etc., R. Co. v. Mississippi* came to the supreme court upon the question whether or not the railroad company was obliged, under the requirements of the statute of the state of Mississippi, to furnish separate cars or compartments for colored passengers whose passage commenced and ended in the state, and a majority of the court did not attempt to decide whether the statute would have been constitutional if it had applied to interstate commerce. There was, however, a dissent by Justices Harlan and Bradley, because they considered that statute as an attempt to regulate interstate commerce. The Kentucky statute has never been construed by the court of appeals of the state, and we must determine whether it includes interstate commerce as well as internal commerce. The title of the act is to regulate the travel or transportation of white and colored passengers on the railroads of this state, and in terms it applies to all companies, corporations, or persons operating railroads, by steam or otherwise, within the state, and to all conductors of trains thus operated; and it requires all such conductors, under penalty of a fine, to assign to each white and colored passenger his or her respective car or compartment. This language is so broad and comprehensive that we conclude it must embrace all passengers, whether their

passage commences and ends in the state of Kentucky, or commences in a foreign country or another state of this Union, and ends elsewhere than in this state. The act seems to divide all persons traveling on railroads in this state, without regard to the place whence they came or whither they go, into classes, and that on the color line; all white passengers being in one class, and all other passengers in another. If this be the correct construction of the act, the question as to the constitutionality of the entire act arises, as the court cannot separate one part of the act from another, and leave the constitutional part valid and enforceable. Where the provisions of an act are distinct and separate, and the court can determine by construction the constitutional parts of an act from the unconstitutional parts, and can presume the legislature would have enacted the constitutional part of the act without the unconstitutional part, it may declare a part of an act unconstitutional and the other enforceable; but this cannot be done with this act. *Baldwin v. Franks*, 120 U. S. 678, 7 Sup. Ct. 656, 763, and cases cited.

The transportation of passengers is commerce, and the regulation of commerce "with foreign nations and among the several states" is exclusively in congress; yet there are many state laws that incidentally affect foreign and interstate commerce which have been held constitutional. The supreme court has declined to attempt to lay down a definite rule by which may be determined what is a regulation of foreign and interstate commerce, and how far the several states may legislate upon the subject. It is often most difficult to determine the line of demarkation which separates the power of congress from that of state legislatures, but we think the principle which determines the case under consideration has been decided by the supreme court in *Hall v. De Cuir*, 95 U. S. 485. In that case the Louisiana statute, as the state court construed it, forbade common carriers of passengers to separate the passengers carried by them on account of race or color while in their charge in that state, and authorized a recovery of exemplary as well as actual damages by any passenger who was thus separated without his or her consent. The supreme court held the act unconstitutional as affecting foreign and interstate commerce, although *De Cuir*, who was a woman of color, took passage upon the steamer *Governor Allen* at New Orleans to *Hermitage*, which was a landing within the state of Louisiana. She was refused accommodations, on account of her color, in a cabin of the boat specially set apart for white persons, and brought suit therefor, and recovered damages in the state court. Chief Justice Waite said:

"If each state was at liberty to regulate the conduct of carriers while within its jurisdiction, the confusion likely to follow could not but be productive of great inconvenience and unnecessary hardship. Each state could provide for its own passengers, and regulate the transportation of its own freight, regardless of the interests of others. Nay, more, it could prescribe rules by which the carrier must be governed within the state in respect to passengers and property brought from without. On one side of the river or its tributaries he might be required to observe one set of rules, and on the other another. Commerce

cannot flourish in the midst of such embarrassments. No carrier of passengers can conduct his business with satisfaction to himself, or comfort to those employing him, if on one side of a state line his passengers, both white and colored, must be permitted to occupy the same cabin, and on the other be kept separate. Uniformity in the regulations by which he is to be governed from one end to the other of his route is a necessity in his business, and, to secure it, congress, which is untrammelled by state lines, has been invested with the exclusive legislative power of determining what such regulations shall be. If this statute can be enforced against those engaged in interstate commerce, it may be as well against those engaged in foreign; and the master of a ship clearing from New Orleans for Liverpool, having passengers on board, would be compelled to carry all, white and colored, in the same cabin during his passage down the river, or be subject to an action for damages, 'exemplary as well as actual,' by any one who felt himself aggrieved because he had been excluded on account of his color."

Neither this language nor decision has been modified or changed by the court in Louisville, etc., *R. Co. v. Mississippi*, 133 U. S. 587, 10 Sup. Ct. 348. The court in that case, after quoting a part of the opinion in *Hall v. De Cuir*, said:

"So the decision was by its terms carefully limited to those cases in which the law practically interfered with interstate commerce. Obviously, whether interstate passengers of one race should, in any portion of their journey, be compelled to share their cabin accommodations with passengers of another race, was a question of interstate commerce, and to be determined by congress alone. In this case the supreme court of Mississippi held that the statute applied solely to commerce within the state; and that construction, being the construction of the statute of the state by its highest court, must be accepted as conclusive here. If it be a matter respecting wholly commerce within a state, then, obviously, there is no violation of the commerce clause of the federal constitution. Counsel for plaintiff in error strenuously insists that it does affect and regulate interstate commerce, but this construction cannot be maintained."

It cannot be doubted that under this latter decision the state of Kentucky could constitutionally pass a law which would require separate cars or compartments for white and colored passengers when their travel commences and ends in the state. See, also, *Wabash, etc., Ry. Co. v. Illinois*, 7 Sup. Ct. 4; *Louisville, etc., Ry. Co. v. State*, 66 Miss. 662, 6 South. 203; *State v. Judge*, 44 La. Ann. 770, 11 South. 74; *Ex parte Plessy*, 45 La. Ann. 80, 11 South. 948. The trend of recent cases in the supreme court has been to fully sustain the doctrine of the exclusiveness of the power of congress over interstate and foreign commerce. Thus in the case of *Wabash, etc., Ry. Co. v. Illinois*, 118 U. S. 557, 7 Sup. Ct. 4, the court held unconstitutional a statute of Illinois which enacted that if any railroad corporation shall charge, collect, or receive for the transportation of any passenger or freight of any description upon its railroad, for any distance within the state, the same or a greater amount of toll or compensation than is at the same time charged, collected, or received for the transportation in the same direction of any passenger or like quantity of freight of the same class over a greater distance of the same road, all such discriminating rates, charges, collections, or receipts, whether made directly or by means of rebate, drawback, or other shift or evasion, shall be deemed and taken against any such railroad corporation as *prima facie* evidence of unjust discrimination, which was pro-

hibited under penalty by the act. In *Robbins v. Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592, the court held an act of Tennessee unconstitutional that required that drummers and all persons not having a regular licensed house of business in the taxing district of Shelby county, offering for sale or selling goods, wares, or merchandise therein by sample, shall pay to the county trustee the sum of \$10 per week, or \$25 per month, for such privilege. This was because it applied to persons soliciting the sale of goods on behalf of individuals and firms doing business in another state, and so far was a regulation of commerce among the states. In the case of *Minnesota v. Barber*, 136 U. S. 313, 10 Sup. Ct. 862, the court held a statute of Minnesota which required, as a condition of sales in that state of fresh beef, veal, mutton, lamb, or pork, for human food, that the animals from which such meats are taken shall have been inspected in that state before being slaughtered, unconstitutional and void as an interference with interstate commerce. And again, in the case of *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. 851, the court held an act of the Kentucky legislature which provided that the agent of an express company not incorporated by that state should not carry on business in the state without first obtaining a license from the state, and that he could not obtain such license until he satisfied the auditor of the state that the company he represented had an actual capital of at least \$150,000, was unconstitutional and void. The court said in that case:

"But the main argument in support of the decision of the court of appeals is that the act in question is essentially a regulation made in the fair exercise of the police power of the state. But it does not follow that everything which the legislature of a state may deem essential for good order of society and the well-being of its citizens can be set up against the exclusive power of congress to regulate the operations of foreign and interstate commerce. We have lately expressly decided in the case of *Lelsy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, that a state law prohibiting the sale of intoxicating liquors is void when it comes in conflict with the express or implied regulation of interstate commerce, by congress declaring the traffic in such liquors as articles of merchandise between the states shall be free."

These and other cases show that the supreme court has had occasion and has given the subject of this exclusive power of congress to regulate foreign and interstate commerce much consideration, and has insisted upon the exclusiveness of this power even as against the exercise of the police power by the several states of this Union. Whether or not a regulation of the defendant company that there should be separate cars or compartments for white and colored passengers, and the passengers be thus separated, is proper and reasonable, cannot arise on this demurrer, as there is nothing in the record showing any regulation or rule by the company. The question of the reasonableness of such a regulation of the company can only arise when the regulation is shown to have been made by the company. *Railroad Co. v. Williams*, 55 Ill. 185. The defendant's demurrer to the petition must be overruled, and it is so ordered.

UNITED STATES v. VAN LEUVEN (fifteen cases).

(District Court, N. D. Iowa, E. D. June 4, 1894.)

Nos. 3,494, 3,495, 3,498, 3,499, 3,501, 3,502, 3,504, 3,507, 3,520, and 3,526-3,531.

1. EXCESSIVE FEES IN PENSION CASES—INDICTMENT—REQUISITES.

In an indictment under the act of July 4, 1884, § 3, for demanding and receiving compensation for prosecuting a pension claim before such claim is allowed, it is unnecessary to aver that the amount so received was in excess of the sum legally chargeable, or to negative the existence of a contract in regard to the fees.

2. SAME.

An indictment for violating the statute regulating fees for prosecuting pension and bounty land claims (Act July 4, 1884) need not aver that the applicant for a pension had been in the military or naval service of the United States.

3. SAME.

An indictment charging the receipt of a fee exceeding \$10 for prosecuting an application for an increase of pension because of an increase of disability need not negative the existence of a contract; for under the act of July 4, 1884, it was unlawful to receive, even by contract, a fee exceeding \$10.

4. CONSTITUTIONAL LAW—REGULATION OF CONTRACTS—FEES IN PENSION CASES.

Congress has constitutional power to regulate the amounts which claimants under the pension laws may contract to pay to their solicitors, even though both parties are citizens of the same state.

These were indictments against George M. Van Leuven for demanding or accepting excessive fees for prosecuting pension claims, contrary to the act of July 4, 1884. Defendant demurred to the various indictments.

Cato Sells, U. S. Atty., and M. D. O'Connell, for the United States.
John Day Smith, for defendant.

SHIRAS, District Judge. It will probably aid in arriving at a clear understanding of the questions presented by the demurrers to the indictments to briefly state the provisions of the statutes regulating the matter of the fees legally chargeable by attorneys acting for persons applying for pensions.

By section 3 of the act of July 4, 1884 (23 Stat. 98), section 4785 of the Revised Statutes is re-enacted and amended so as to read as follows:

"No agent or attorney or other person shall demand or receive any other compensation for his services in prosecuting a claim for pension or bounty land, than such as the commissioner of pensions shall direct to be paid to him, not exceeding twenty-five dollars; nor shall such agent, attorney or other person demand or receive such compensation in whole or in part, until such pension or bounty land claim shall be allowed, * * *."

By section 4 of this act, section 4786 of the Revised Statutes is amended; and, as amended, it provides for the filing with the commissioner of pensions of duplicate articles of agreement, setting forth any contract existing between the attorney and claimant in regard to the fee to be paid; it being provided that if no agreement is filed with the commissioner the fee to be paid shall be

\$10, and no more. And by section 6 it is declared that "the commissioner shall have power subject to review by the secretary, to reject or refuse to recognize any contract for fees herein provided for, whenever it shall be made to appear that any undue advantage has been taken of the claimant in respect to such contract;" it being also further provided that "any agent or attorney or other person instrumental in prosecuting any claims for pension or bounty land, who shall directly or indirectly contract for, demand or receive or retain any greater compensation for his services or instrumentality, in prosecuting a claim for pension or bounty land than is herein provided, or for payment thereof at any other time or in any other manner than is herein provided, * * * shall be deemed guilty of a misdemeanor." It is also provided in this act that "no greater fee than ten dollars shall be demanded, received or allowed in any claim for pension or bounty land granted by special act of congress, nor in any claim for increase of pension on account of the increase of the disability for which the pension has been allowed." By the provisions of the act of March 3, 1891 (26 Stat. 1081), the compensation for services rendered in securing an increase of pension on account of the increase of disability for which the original pension was granted is reduced to two dollars; it being, however, provided "that the foregoing provisions in relation to fees of agents or attorneys shall not apply to any case now pending where there is an existing lawful contract express or implied."

Thus we find that for the protection of pension claimants the statutes of the United States regulate the matter of the fees to be paid to agents, attorneys, and others instrumental in prosecuting claims, in two important particulars: First, as to the amount legally chargeable; second, as to the time of payment. Upon the question of the amount, the law is, and has been since the adoption of the act of July 4, 1884, that the agent or attorney shall be entitled to such compensation as the commissioner shall direct to be paid him, not exceeding \$25; that the agent or attorney, by a contract fairly entered into, and duly executed in the presence of, and certified by, some officer competent to administer oaths, may agree with the claimant as to the fee to be paid him, not exceeding the sum of \$25, and upon this agreement being filed with the commissioner the sum agreed upon may be paid by the commissioner, in accordance with the provisions of sections 4768 and 4769 of the Revised Statutes; that if no agreement thus executed is filed with the commissioner the fee shall be \$10, and no more, and since the adoption of the act of March 3, 1891, the fee for service in procuring an increase of pension for an increase of the original disability is the sum of \$2, and no more. Therefore, any agent, attorney, or other person who, since the 4th day of July, 1884, has demanded or received for services in and about securing an original pension, or increase thereof, for another, a sum in excess of \$25, or who since that date has demanded or received for services in and about securing an original pension, or increase thereof, for another, a sum in excess of \$10, unless the same has

been demanded or received in accordance with a contract executed and filed with the commissioner of pensions as provided for in section 4 of the act of July 4, 1884, or who since that date, and previous to March 3, 1891, has demanded or received for services in and about securing an increase of pension for another, on account of the increase of the disability for which the pension was originally allowed, a sum in excess of \$10, or who, since the adoption of the act of March 3, 1891, for services of the character last mentioned, has demanded or received a sum in excess of \$2 for such service, has thereby violated the provisions of the law, has been guilty of a misdemeanor, and is liable to the punishment by the statute provided.

Upon the question of the terms of payment of legal fees the statutes are explicit. By the provisions of section 3 of the act of July 4, 1884, amending section 4785 of the Revised Statutes, it is declared that the agent, attorney, or other person must not demand or receive compensation, in whole or in part, for the services by him rendered, until the pension shall be allowed; and by section 4 of the act it is made a misdemeanor to contract for, demand, or receive payment of the compensation at any other time or in any other manner than that provided for in the other portions of the act. Thus an agent, attorney, or other person rendering services in aid of the procurement of a pension, or the increase thereof, may be guilty of a misdemeanor by directly or indirectly contracting for, demanding, receiving, or retaining a compensation in excess of the legal amount, or he may be guilty of a misdemeanor by contracting for, demanding, or receiving his compensation before the allowance of the pension, or in a manner other than that provided in the statute.

Indictments to the number of 13 have been found against the defendant, George M. Van Leuven, charging him with violation of the statutes, in that in some instances he demanded and received payment of compensation for services rendered, as agent or attorney, in procuring pensions, or an increase thereof, before the pension or increase was allowed, and in other instances he demanded and received sums in excess of the legal amount.

To these indictments general demurrers are interposed, and in support thereof it is urged that the several indictments are lacking in the averment of the facts essential to sustain a conviction. Touching indictments in cases Nos. 3,494, 3,495, 3,498, 3,499, 3,501, 3,502, first count 3,504, 3,507, 3,520, 3,526, 3,527, 3,528, 3,529, 3,530, and 3,531, which charge the receiving payment of compensation before the allowance of the pension touching which the services were rendered, I think all the necessary facts are properly and sufficiently set forth, and that the defendant is thereby fully informed of the charge which he is required to meet. In regard to this class of cases, it is not necessary to aver or show that the amount received by the defendant is in excess of the amount which might be lawfully demanded or received by the defendant, for the charge is not that an unlawful amount was received, but that the amount, whether excessive or not, was received at an unlawful time. The

fact, therefore, of the existence of a contract in regard to the fees to be paid, is wholly immaterial on the question of the time of payment. It is not necessary, therefore, to negative the existence of a contract, in order to make out a charge of receiving payment at an unlawful time, because the parties cannot, by contract, make lawful, payments made to the agent or attorney before the allowance of the pension in the given case.

In some of these indictments, it is not averred that the party on whose behalf application for a pension was made had been in the military or naval service of the United States; and exception is taken thereto on the ground that, to constitute a violation of the statute, it must be averred and be proven that the applicant had been in fact in the military or naval service. The statute does not so provide in express terms, nor can such a requirement be implied from the language of the statute, as applied to the subject-matter. The protection of the statute is thrown about all applicants for pensions, even though they may fail in proving that they had been in the military or naval service, within the meaning of the pension laws. The sections of the statute restricting the fees legally demandable by agents or attorneys have a double purpose,—the one being the protection of the applicant; the other, the protection of the government against fraudulent claims, which might be greatly multiplied if no restrictions in regard to the amount or time of payment of fees were provided. It would greatly narrow the real purpose of the statute if we should read into the same the restriction that its provisions are applicable only in cases wherein a soldier or sailor who had actually been in service was the applicant. Whenever an agent or attorney undertakes to render service in aid of an application for a pension, or for an increase thereof, he then comes within the purview of the statute, and must act within its provisions.

The second count in indictment 3,502 and indictments 3,504 and 3,507 are based upon the charge of receiving excessive fees for services rendered in connection with applications for an increase of pension by reason of an increase of the disability for which the original pension was granted. The sums charged to have been received in each of the cases named in these indictments exceed in each instance the sum of \$10. These payments could not, under any circumstances, have been legally contracted for. It is charged in each case that the payment was received at dates subsequent to March 3, 1891; and hence it is argued that it should be shown whether there was or was not a contract in existence in regard to the fees, in order to show whether the proviso in the act of March 3, 1891, is applicable or not. That proviso is to the effect that the reduction of the fee from ten to two dollars for services in connection with an increase of pension shall not apply to any case pending, wherein there is an existing, lawful contract, express or implied. If the law were such that at the time the payments in question were made the parties might have lawfully contracted for the payment of the sums received, then it might well be that the indictments should contain an averment showing the nonex-

istence of such contract; but the law is now, and was so at the date of the payments in question, that under no circumstances could the parties, by contract, lawfully agree to payment in excess of \$10. The averments in the indictments are sufficient, without any statements negating the existence of contracts, to show conclusively that the reception of the sums charged to have been received by the defendant was in each case a violation of the statute, and that is all that is necessary.

The next contention on behalf of the defendant is that these acts of congress for the regulation of contracts in regard to the fees to be paid for services in connection with pension matters between the parties—they being citizens of the same state—are unconstitutional, the argument being that the United States government is one possessing only enumerated powers, all others being reserved to the states; that the right to restrict the general power to contract possessed by the citizen belongs to the state; that the money paid by the claimants to the defendant was part of their own money, and not part of any pension payment received from the United States, and hence the claimants could pay it, if they so desired, to the agent or attorney. It cannot be questioned that the general subject of the payment of pensions to persons who are, or have been, in the service of the United States is one within the powers conferred upon the federal government. Of necessity, the regulation of the mode to be followed in applying for a pension belongs to the government of the United States. The pensioners are deemed to be recipients of the bounty of the general government, and the extent to which congress has gone in legislating for the protection of pensioners is fully set forth by Mr. Justice Clifford, speaking for the supreme court, in *U. S. v. Hall*, 98 U. S. 343, wherein it was held that congress had the power to provide for the punishment of a guardian who should embezzle pension money paid to him for his wards. Persons acting as agents or attorneys in regard to pension claims are governed by strict rules adopted by the pension office, and when they seek the privilege of practicing in that office they become subject to all the statutory and office rules regulating the business they engage in. It has never been doubted that congress can regulate the fees demandable by the clerks or marshals of the courts of the United States for services rendered the individual citizen in the prosecution of claims in the courts, although such claims may be wholly private in their nature, and not be part of the public bounty, as in the case with pensions. The right of congress to regulate the amounts demandable of pensioners or pension claimants for services rendered in connection with the procurement of pensions, or an increase thereof, has two substantial grounds of support, to wit, the necessity of protecting the citizens who are seeking the bounty of government from all imposition and extortion, and the necessity of protecting the government against false, fictitious, or greatly magnified claims, worked up by agents who have contracted for, or expect to get, a large share of the claim that may be allowed. The right of congress to legislate on this subject seems to me clear, beyond question.

Finding no substantial merit in any of the objections urged against the validity of the indictments in the cases now under consideration, the demurrers thereto are overruled.

UNITED STATES v. KESSEL (three cases).

(District Court, N. D. Iowa, E. D. June 4, 1894.)

Nos. 3,512, 3,513, and 3,517.

1. VIOLATION OF PENSION LAWS—BRIBERY—INDICTMENT.

A member of a board of examining surgeons is a person acting in behalf of the United States in an official capacity, under the pension office, which is an office of the government within the meaning of Rev. St. § 5501; and hence such member is subject to indictment under that section for receiving a bribe.

2. SAME.

An indictment under Rev. St. § 5501, charging that defendant, a member of a board of surgeons, did unlawfully ask a "gratuity, the nature of which is unknown," with intent to have his official action influenced, is bad, in that it fails to sufficiently inform defendant of what he is to meet in evidence.

These were indictments under the pension laws against George Kessel for accepting bribes to influence his official action as a member of a board of examining surgeons. Defendant demurred to the indictments.

Cato Sells, U. S. Dist. Atty., and M. D. O'Connell, for the United States.

Lyon & Lenehan, H. T. Reed, and W. H. Barker, for defendant.

SHIRAS, District Judge. The indictments in cases Nos. 3,512, 3,513, and 3,517 are based upon the provision of section 5501 of the Revised Statutes; and in cases Nos. 3,512 and 3,513 it is charged that the defendant, Kessel, did knowingly and unlawfully receive from the person named the sum of \$10, with the intent to have his official decision influenced in a matter pending before him, he being a person acting on behalf of the United States government in an official function, as a member of a board of surgeons duly organized at Cresco, Howard county, Iowa, by the commissioner of pensions, which board and the defendant, as a member thereof, were acting under the authority of the office of the United States commissioner of pensions, and charged with the duty of examining persons prosecuting claims for pensions, or increase thereof, who might be ordered by the commissioner to appear before them, and to make a certificate and report of the results of such examination to the commissioner; it being also averred that the person from whom the money was received had a claim for pension pending, and had been ordered to appear before the board of surgeons for examination by the commissioner of pensions, and did so appear. The objections urged, that a member of a board of surgeons is not a person acting under any official capacity, and that the pension office is not an "office of the government," within the meaning of

section 5501, have already been passed upon in the cases just decided, and need no further attention. The indictments in cases 3,512 and 3,513 are sufficient in form and substance, and charge offenses within the meaning of section 5501, and the demurrers thereto are overruled.

In case No. 3,517 it is charged that the defendant did knowingly and unlawfully ask a gratuity, the nature of which is unknown to the grand jurors, with intent to have his official action influenced. Section 5501 provides for the punishment of every officer or person, acting on behalf of the United States, "who asks, accepts, or receives any money, or any contract, promise, undertaking, obligation, gratuity, or security, for the payment of money, or for the delivery or conveyance of anything of value, with intent," etc. The question arises whether the word "gratuity" is not limited by the words, "for the payment of money, or for the delivery or conveyance of anything of value," just the same as are the preceding and succeeding words in the sentence. Under this section it would not be sufficient to charge in an indictment that the defendant had asked a contract or a promise or an undertaking or an obligation, the nature of which was to the grand jury unknown. The indictment must show that the contract or promise or undertaking is for the payment of money, or for the delivery or conveyance of something of value; and I do not well see how any other construction can be applied to the word "gratuity," as it is used in this section. But, even if it were permissible to separate the word from the others in the sentence, I do not think the indictment would be held to be sufficient, in that it does not charge the nature of the gratuity, and the defendant is not informed of what he is to meet in evidence. It is not charged that the defendant asked a gratuity of money or of property, or of anything of value. Certainly, to secure a conviction under this section, it would have to be shown in the evidence that the defendant had asked a gift of something of value, or otherwise he would not have solicited a gratuity. The averment in the indictment is that the defendant asked a gratuity, the nature of which is to the grand jury unknown; and therefore it is not charged that the defendant asked a gratuity of money or of property, or of anything of any value whatever. If the asking in a given case was such as to leave it doubtful what was asked for, it might be charged in one count that it was a gratuity of money; in another, a gratuity of property; and, in another, a gratuity of something of value. And if the trial jury, from the mode of asking and the entire evidence, were satisfied that the defendant intended to ask either money, or some kind of property, or something of value, it might be that the indictment could be sustained, and a conviction could be had on some one of the counts. But when all that is charged is that the defendant asked a gratuity, of an unknown nature, I do not think sufficient is averred to bring the case within the section on which it is based, and the demurrer thereto must be, therefore, sustained.

UNITED STATES v. KESSEL (seven cases).

(District Court, N. D. Iowa, E. D. June 4, 1894.)

Nos. 3,511, 3,514, 3,515, 3,518, 3,520, 3,521, and 3,536.

1. VIOLATION OF PENSION LAWS—INDICTMENT.

An indictment under Rev. St. § 5421, averring in substance that defendant transmitted to the commissioner of pensions a falsely altered certificate made by the board of surgeons in relation to a claim for pension of a named person, is bad, in that it fails to show that such certificate was transmitted in support of, or in relation to, any specified account or claim pending in a named department, bureau, or office.

2. SAME.

An indictment under Rev. St. § 5421, merely charging, in the words of the statute, that defendant, with intent to defraud the United States, did utter and publish as true a certain falsely altered certificate of the board of surgeons, in the matter of the pension claim of a person named, is fatally defective, in that it fails to show how or to whom the certificate was published, or that it was published to obtain, or aid in obtaining, money from the United States, or could result in defrauding the United States.

These were indictments charging George Kessel with violating the pension laws. Defendant demurred to the indictments.

Cato Sells, U. S. Dist. Atty., and M. D. O'Connell, for the United States.

Lyon & Lenehan, H. T. Reed, and W. H. Barker, for defendant.

SHIRAS, District Judge. By section 5421 of the Revised Statutes, it is declared that "every person * * * who transmits to, or presents at, or causes or procures to be transmitted to, or presented at, any office or officer of the government of the United States, any certificate, receipt, or other writing, in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged or counterfeited, shall be imprisoned," etc. By the indictments filed in cases Nos. 3,511, 3,514, 3,515, 3,520, 3,521, and 3,536, the defendant herein is charged with violations of this section. Within the meaning of this section, I hold that the commissioner of pensions is an officer of the United States; that the pension office is an office of the government; that a claim or application for a pension, or for an increase thereof, is a claim against the United States; that the finding or report of a surgeon, or board of surgeons, of the result of an examination of an applicant for a pension, is a certificate or writing in relation to a claim; and that the transmitting or presentation of such a report or writing to the commissioner of pensions, in relation to a pension claim, knowing the same to be false, altered, forged, or counterfeited, with the intent to defraud the United States, is a violation of the statute; and the contentions of defendant to the contrary of these propositions are overruled.

A more serious question arises upon the objection made that the indictment failed to aver that the altered reports were transmitted to the commissioner of pensions in support of, or in relation to, a pending claim.

This averment is wanting, and it seems to me to be a fatal omission. It is well settled that all the elements necessary to constitute the complete offense must be affirmatively and directly charged, it not being sufficient that these elements, or any one of them, might be inferred from the recitals in the indictment. *U. S. v. Carll*, 105 U. S. 611; *Pettibone v. U. S.*, 148 U. S. 197, 13 Sup. Ct. 542. These indictments, in substance, charge that the defendant transmitted to the commissioner of pensions a falsely altered certificate, made by the board of surgeons, in relation to a claim for pension of a named person. The averment is that the certificate was made in relation to a claim, but it is not averred that it was transmitted in support of or in relation to a pending claim of A. B. The section on which these indictments are based is aimed at efforts to defraud the United States by transmitting, or procuring to be transmitted or presented, any false, altered, forged, or counterfeited deed, power of attorney, order, certificate, receipt, or other writing in support of or in relation to any account or claim against the United States, the party transmitting or presenting the same knowing it to be false, altered, forged, or counterfeited. To make out a case under the section, it must appear that there is an account or claim against the United States, and that in support thereof, or in relation thereto, the defendant knowingly transmitted, or procured to be transmitted or presented, a false, altered, forged, or counterfeited deed, etc. If a person knowingly transmitted a false or altered deed or other writing, but did not do so in support of or in relation to some existing account or claim, how could the United States be defrauded? Furthermore, the defendant is entitled to be informed, in advance of the trial, of all the essential facts expected to be alleged against him, in order that he may be prepared to meet the same. These indictments do not inform him touching the account or claim in regard to which the government charges that the altered certificates were forwarded, nor in what department, bureau, office, or other place they are pending. Under the direct averments in the indictments, it might be that the altered certificates were forwarded in relation to a claim of the board of surgeons. If each indictment charged that the altered certificate was transmitted to the commissioner of pensions in relation to any existing or pending claim for pension of A. B., then the defendant is informed in relation thereto, and may be prepared to show that no such claim is pending or exists, or that the certificate was not forwarded in relation to that claim.

For these reasons the demurrers to the first and second counts of the indictment in case No. 3,511, and to the indictments in cases Nos. 3,514, 3,515, 3,520, 3,521, and 3,536, must be sustained.

The third count in the indictment in case No. 3,511 charges that the defendant, with intent to defraud the United States, did utter and publish as true a certain falsely altered certificate of the board of surgeons of Howard county, Iowa, in the matter of the pension claim of one Theron F. Anchmoody. The indictment uses the language of that portion of section 5421 upon which it is based, but it does not aver how or to whom the certificate was uttered or pub-

lished, nor that it was uttered or published to obtain, or aid any other person in obtaining, any money from the United States, or any one else. It is simply averred that the defendant, knowing its falsity, did utter and publish an altered certificate, showing wherein it was altered, with intent to defraud the United States. No fact or facts are averred, showing that the United States would be defrauded by the uttering or publishing. The fact of the uttering or publishing is an essential in the offense. How can the defendant prepare to meet this charge in the indictment? Were the uttering and publishing consummated by a publication in a newspaper, by delivering it to the pension claimant, by sending it to the pension office, or to the secretary of the interior, or to congress, in aid of an application for a special act? Must the defendant be prepared to meet evidence tending to show every possible mode of uttering and publishing? The rule applicable to such cases is found in the decisions of the supreme court in *U. S. v. Hess*, 124 U. S. 483, 8 Sup. Ct. 571; *U. S. v. Cruikshank*, 92 U. S. 542; *Pettibone v. U. S.*, 148 U. S. 197, 13 Sup. Ct. 542. In *U. S. v. Cruikshank*, it is said:

"The object of the indictment is—First, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent, and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances."

What facts are averred from which the court can determine whether, in truth, the defendant did utter or publish the altered certificate, or did utter or publish the same in such a manner as to defraud the United States? As is said in *U. S. v. Hess*, supra:

"Undoubtedly, the language of the statutes may be used in the general description of an offense; but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged."

The count in question is clearly lacking in these particulars. It does not aver facts, but solely conclusions of law, in the language of the statute; and it is therefore insufficient, and the demurrers thereto must be sustained.

The fourth count in the indictment in case No. 3,511 is based upon the first clause of section 5421, and charges the defendant with falsely making a surgeon's certificate in relation to a pending pension claim of one Horace B. Nichols. I think this count sufficiently sets forth the facts necessary to constitute the offense intended to be charged against the defendant.

The same is true in regard to the indictment in case No. 3,518, which charges the altering and forging of a certificate of the board of surgeons in regard to the pension claims of one Libeus G. St. John; and the demurrer to the fourth count of the indictment in case No. 3,511, and to the indictment in case No. 3,518, will therefore be overruled.

UNITED STATES v. VAN LEUVEN (fourteen cases).

(District Court, N. D. Iowa, E. D. June 4, 1894.)

Nos. 3,496, 3,503, 3,505, 3,506, 3,508-3,510, 3,516, 3,522-3,524, 3,532, 3,535, and 3,537.

These were indictments under Rev. St. § 5440, against George M. Van Leuven, for conspiracy. Defendant demurred to said indictments.

Cato Sells, U. S. Dist. Atty., and M. D. O'Connell, for the United States.
John Day Smith, for defendant.

SHIRAS, District Judge. In cases Nos. 3,496, 3,503, 3,505, 3,506, 3,508, 3,509, 3,510, 3,522, 3,523, 3,524, 3,532, 3,535, and 3,537 the indictments charge the defendant Van Leuven with the crime of conspiracy, under the provisions of section 5440 of the Revised Statutes; it being averred that the said Van Leuven and the other persons named in the several indictments did conspire and combine together for the purpose of corruptly offering and giving to the members of the board of surgeons appointed at Cresco, Howard county, Iowa, to examine applicants for pensions, sums of money, to influence the official decision and action of the board in the matter of the certificate to be made by the board to the commissioner of pensions in regard to the physical condition of the pension claimants examined by the board. The questions argued in support of the demurrers to these indictments have been considered and passed upon in the cases already decided; the principal objections being that the pension bureau is not an office of the government, nor do the boards of surgeons, or the members thereof, act in an official capacity, or perform an official function, within the meaning of sections 5451 and 5501 of the Revised Statutes. As I do not consider these propositions well taken, the demurrers to these indictments are overruled.

In cases 3503 and 3508 the indictments charge the defendant with the transmitting of false and forged affidavits to the commissioner of pensions, in support of or in relation to certain pending pension claims; and the objections urged in support of the demurrers to these indictments are that the papers described in the indictments are not affidavits, and are not shown to be false or counterfeited in any material particular. These objections are without substantial merit, and the demurrers are therefore overruled.

UNITED STATES v. VAN LEUVEN et al. (two cases).

(District Court, N. D. Iowa, E. D. June 4, 1894.)

Nos. 3,503 and 3,516.

1. OFFICERS OF THE UNITED STATES—PENSION OFFICE—EXAMINING SURGEONS.

A member of a board of examining surgeons appointed by the commissioner of pensions, though not an "officer of the United States," is yet a "person acting for or in behalf of the United States" in an "official capacity," and under authority of an "office of the government," within the meaning of Rev. St. § 5501, relating to bribery. *U. S. v. Germaine*, 99 U. S. 508, distinguished.

2. SAME—"DECISION OR ACTION"—WHAT CONSTITUTES.

The certificate which a board of examining surgeons is required to make out is a "decision or action on" a "question, matter, cause, or proceeding," within the meaning of Rev. St. § 5501, relating to bribery.

3. INDICTMENT FOR CONSPIRACY TO DEFRAUD UNITED STATES—SUFFICIENCY.

In an indictment under Rev. St. § 5440, for conspiracy to defraud the United States by bribing a member of a board of examining surgeons to make a false report to the commissioner of pensions, it is unnecessary to aver that the commissioner had authority to grant pensions, for such authority is given by general statutes, of which the court will take judicial notice. *U. S. v. Reichert*, 32 Fed. 142, distinguished.

4. SAME.

A conspiracy to procure, by bribery, the making of a false certificate by the board of examining surgeons, whereby the commissioner of pensions may be induced to allow a fraudulent increase of pension, is a conspiracy to defraud the United States, within the meaning of Rev. St. § 5440.

5. INDICTMENT—JOINDER OF PARTIES—CONSPIRACY.

There is no impropriety in joining in one indictment, under Rev. St. § 5440, a charge of conspiracy against a private individual, and against a member of a board of examining surgeons appointed by the commissioner of pensions. *U. S. v. McDonald*, Fed. Cas. No. 15,670, 3 Dill. 543, distinguished.

These were indictments under Rev. St. § 5440, against George M. Van Leuven and George Kessel, for conspiracy to defraud the United States by securing the allowance of a fraudulent pension or increase of pension. Defendants demurred to the indictments.

Cato Sells, U. S. Dist. Atty., and M. D. O'Connell, for the United States.

H. T. Reed, John Day Smith, and Lyon & Lenehan, for defendants.

SHIRAS, District Judge. Section 5440 of the Revised Statutes declares that:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner, or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable," etc.

Section 5438 enacts that:

"Every person * * * who enters into any agreement, combination or conspiracy to defraud the government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim * * * shall be imprisoned," etc.

Section 5501 declares that:

"Every officer of the United States, and every person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or office of the government thereof * * * who asks, accepts or receives any money * * * with intent to have his decision or action on any question, matter, cause, or proceeding which may, at any time, be pending, or which may be brought, before him in his official capacity, or in his place of trust or profit, be influenced thereby, shall be punished," etc.

Section 5451 provides that:

"Every person who promises, offers or gives or causes or procures to be promised, offered or given, any money or other thing of value, * * * to any officer of the United States, or to any person acting for or on behalf of the United States in any official function, under or by authority of any department or office of the government thereof, * * * with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending or which may by law be brought before him in his official capacity or in his place of trust, or profit, or with intent to influence him to commit or aid in committing, or to collude in, or allow any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be punished," etc.

Section 4746 enacts that:

"Every person who knowingly or willfully in any wise procures the making or presentation of any false or fraudulent affidavit concerning any claim for

pension or payment thereof, or pertaining to any other matter within the jurisdiction of the commissioner of pensions * * * shall be punished," etc.

Under the provisions of this section, it is a criminal offense to knowingly procure the making or presentation of any false or fraudulent affidavit concerning a claim for a pension; and a conspiracy to procure the making or presentation of any false or fraudulent affidavit concerning a pension claim would be a conspiracy to commit an offense against the United States, within the meaning of section 5440. So, also, a conspiracy or combination between two or more persons to violate the provisions of section 5451 or of section 5501 would be a conspiracy to commit an offense against the United States, within the meaning of section 5440.

In the first count of the indictment in No. 3,503, it is charged that the two defendants "did then and there, corruptly, unlawfully, and feloniously, combine, conspire, and confederate and agree together and with each other to procure to be offered and given by one Titus Heer a sum of money, to wit, ten dollars, to the said George Kessel, who was then and there a person acting on behalf of the United States, in an official function, as a member of a board of surgeons duly organized, appointed, and qualified by the commissioner of pensions of the United States, and acting under the authority of the office of said United States commissioner of pensions, which was then and there an office of the government of the United States, to influence the official decision and action of the said George Kessel in a matter which was pending before said board of surgeons, in his official capacity as a member of said board, and with the intent to influence him, the said George Kessel, to make opportunity for the commission of a fraud on the United States, and to induce him to do an act in violation of his lawful duty as a member of said board, and to thereby defraud the United States;" it being further charged that said Kessel had been duly appointed a member of a board of examining surgeons at Cresco, Howard county, Iowa, by the commissioner of pensions; that it was the duty of said board and of said Kessel, as a member thereof, to examine persons who had claims pending for pensions, and to make a report of the result thereof; that the defendants conspired together to procure one Titus Heer, who had a claim pending for a pension, and who had been ordered by the commissioner of pensions to appear before said board, at Cresco, for examination, to give to said Kessel the sum of \$10, with the intent to influence the official action of said Kessel as a member of said board, and thereby secure the allowance of a pension, and of a larger pension than would otherwise have been obtained; and that in pursuance of such conspiracy the said defendant Van Leuven did ask and procure the said Titus Heer to pay said sum of \$10, and the defendant Kessel did receive and accept said sum, with the intent to have his official decision and action influenced thereby, and thereby make an opportunity for the commission of a fraud upon the United States.

In support of the demurrer to this indictment, it is claimed, upon the authority of *U. S. v. Germaine*, 99 U. S. 508, that the defendant Kessel does not come within any of the descriptions of persons

included within the provisions of section 5501. In the case just cited it was held that an examining surgeon appointed by the commissioner of pensions was not an officer of the United States, within the meaning of section 12 of the act of 1825 (4 Stat. 118), which declared that "every officer of the United States who is guilty of extortion under color of his office shall be punished," etc.; it being further held that officers of the United States included persons appointed by the president, by the courts of law, or by the heads of departments, under the authority of an act of congress to that effect; this conclusion being reached upon consideration of the provisions of section 2, art. 2, of the constitution of the United States. It was also held in the same case that the commissioner of pensions is not the "head of a department," within the meaning of the term as used in the section of the constitution just cited. The language of section 5501 of the Revised Statutes is:

"Every officer of the United States and every person acting for or on behalf of the United States, in any official capacity under or by virtue of the authority of any department or office of the government thereof."

Under the ruling in *U. S. v. Germaine*, supra, an examining surgeon is not an officer of the United States; but, in my judgment, he is a person acting for or on behalf of the United States in an official capacity, under and by virtue of the authority of an office of the government, to wit, the department of pensions.

It is urged in argument that this provision of the statute requires that the person must act in an official capacity, and that this requirement can only be met when the person is an "officer," as that term is defined in *U. S. v. Germaine*. This construction would wholly destroy the force of the second definition in section 5501. If no person can act in an official capacity, except an officer, and no one can be an officer, except one appointed in the mode provided in section 2, art. 2, of the constitution, then it was useless to place in section 5501 any other definition than that of the opening words, to wit, "Every officer." It is clear, however, that congress intended to include within the section persons other than those who were technically "officers of the United States," as that term is defined by the supreme court. The section includes all persons acting for or on behalf of the United States, under or by virtue of the authority of any department or office of the government, in an official capacity. The commissioner of pensions is appointed by the president, with the approval of the senate. Section 470, Rev. St. He is therefore, technically, an officer of the United States, although not the "head of a department," as that term is used in section 2, art. 2, of the constitution. The branch of the public service placed under his management is an office, and is so repeatedly designated in the statutes of the United States. See sections 4721, 4747, 4748, 4776, Rev. St. By section 4 of the act of July 25, 1882, the commissioner of pensions is authorized to appoint surgeons to examine pensioners and claimants for pensions, or increase thereof; and he is authorized to organize boards of surgeons, to consist of three members, at such points in the states as he may

deem necessary. Thus, we find that the commissioner of pensions is an officer of the government in charge of the office of the government which deals with pension matters; that the commissioner has the authority to appoint examining surgeons, and to organize examining boards of surgeons. Therefore, the persons thus appointed act under or by virtue of the authority lawfully exercised by the pension office through its head, the commissioner, the same being an office of the government. The authority under which they act is derived from the office of pensions, and their action is official, in that they act on behalf of an office of the government; and they act in an official capacity, because they are representatives of the pension office, and their services are in aid of the official duties committed to that office. A person may act in an official capacity because he is an officer lawfully appointed and qualified, and acts as such, or he may act in an official capacity because he lawfully performs duties which are of an official character. I hold, therefore, that members of boards of surgeons appointed by the commissioner of pensions under the provisions of the act of July 25, 1882, come within the provisions of section 5501, and the indictment in question cannot be held bad on the theory that such boards, and the members thereof, are not acting in an "official capacity," as defined in that section.

It is further urged on behalf of the defendants that under the provisions of the act of July 25, 1882, the examining surgeons or boards are not required to render any official decision, and therefore the case is not brought within the section (5501) on which it is based. The language of the section is, "With intent to have his decision or action on any question, matter, cause or proceeding," etc., and the indictment charged that the money was paid and received with intent to have the decision and action of the board, and of said Kessel, as a member thereof, influenced, in such sense that a false report of the condition of the claimant would be made. The act of July 25, 1882, provided that "all examinations shall be thorough and searching, and the certificate contain a full description of the physical condition of the claimant at the time; which shall include all the physical and rational signs, and a statement of all structural changes." It is true, as is urged on behalf of defendants, that the board of surgeons cannot decide the question of the granting or increasing of a pension, nor do they finally decide the rating of the applicant; but they are required to thoroughly examine the claimant, and to give a certificate containing a full description of the physical condition of the claimant, and of all structural changes. This requires of the board a proper consideration of the symptoms or evidences of disease or disability, and the result thereof is a decision of the board upon the question of the claimant's physical condition. The certificate which the board is required to make out, in effect, is both a decision of the board and action by the board, and the members thereof, upon a question or matter submitted to them for their official action and decision, within the meaning of section 5501.

In further support of the demurrer, it is said the indictment does not charge a conspiracy to defraud, and that it is not averred that the commissioner of pensions is authorized to allow pension claims; and in support of this contention the ruling of Mr. Justice Field in *U. S. v. Reichert*, 32 Fed. 142, is cited. In that case the indictment was for a conspiracy to commit an offense against the United States by making a false claim by means of fraudulent and fictitious field notes of a pretended survey of certain public lands, which claim it was intended should be presented to the United States surveyor general in California for his approval and allowance; but the indictment did not charge that the surveyor general had any authority to allow or approve the claim in case it had been presented, and it was held that this was a fatal defect. It is, however, the settled rule that the law, aside from private statutes and the like, need not be alleged. If the facts alleged are such that, read in connection with the provisions of the statutes applicable thereto, they fully state all the essential elements of the offense, then the indictment is sufficient. It is charged in this indictment that one Titus Heer had made an application for a pension from the United States, and that this claim for a pension was then pending before the commissioner of pensions. The court is bound to take judicial knowledge of the existence of the statutes authorizing the payment of pensions upon proper application and proof being made by the applicant, and also of the statutes creating the office of commissioner of pensions, and defining his duties and powers.

The facts averred in the indictment clearly show that Titus Heer had made an application for a pension from the United States; that this application was pending before the commissioner of pensions; that the commissioner had directed said Heer to appear for examination before the board of surgeons at Cresco, Howard county, Iowa; that the defendants entered into a conspiracy to secure the payment of money by said Heer to the defendant Kessel in order to thereby influence the official decision and action of said Kessel and the board of which he was a member, and to secure a report from said board favorable to the granting of a pension larger than would otherwise be obtainable; that the defendant, Van Leuven, in aid of said conspiracy, did procure the payment of the sum of \$10 to said Kessel; and that the latter did receive the same. The matter of the extent of the authority and power of the commissioner of pensions over claims pending in his office is a question arising under the general statutes, which need not be pleaded. In the opinion of Mr. Justice Field in *U. S. v. Reichert*, supra, the exact ground for the decision is not stated; but I assume it to be that there is not a general statute authorizing the surveyor general of California to allow or approve claims for services in surveying the public lands, and therefore need existed for averring the facts by which the existence of the authority would be established. In respect to the commissioner of pensions, in addition to the section of the statutes which authorizes him to appoint examining surgeons and boards, it is provided in section 4698½ of

the Revised Statutes, that in all cases, "the certificate of an examining surgeon, or of a board of examining surgeons shall be subject to the approval of the commissioner of pensions."

It cannot be doubted that the certificates of the board of examining surgeons are intended to be submitted to the commissioner of pensions for his approval, and the facts and statements therein certified to are intended to guide and influence his action in regard to the applications for pensions pending before him. Certainly, therefore, a conspiracy intended to procure the making and presentation of a false certificate on part of the board of surgeons, whereby the commissioner of pensions may be induced to allow a fraudulent pension, or a fraudulent increase of an existing pension, is a conspiracy to commit a fraud upon the United States.

It is also urged in support of the demurrer that the conspiracy charged against Kessel is merged in the complete offense charged against him, and in support thereof the ruling of Mr. Justice Miller in *U. S. v. McDonald*, 3 Dill. 543, Fed. Cas. No. 15,670, is relied upon. As I understand that case, it holds—First, that the doctrine of merger does not apply to cases of misdemeanor; and, second, that if an indictment charges that two or more parties conspired to cheat the government, the means employed being set out at length, and then, in addition, charges that the defendants did thus cheat and defraud the government, so that, in effect, a misdemeanor and a felony are both charged against all the defendants, it might, in certain cases, be held that the lower offense was merged in the higher, completed offense. The indictment in this case does not charge that the two defendants did defraud the government by finally securing the allowance of an illegal or excessive pension, and hence the point considered in *U. S. v. McDonald* does not arise. The completed act charged against Kessel, to wit, the reception of a sum of money to influence his action in the premises, is but one step towards the completion of the fraud upon the United States. It is not charged that the conspiracy was to secure the payment of the money to Kessel, but to commit a fraud upon the United States, by aiding to secure the allowance of a fraudulent claim for a pension, and hence the case does not come within the doctrine of merger. In view of the fact that the only criminal offenses against the United States are those declared by acts of congress, and that there is no statutory definition of "felonies," as distinguished from "misdemeanors," it is a question whether the grade of the punishment must not be resorted to, in determining whether one offense is of a higher grade than another, so that the latter may be deemed to be merged in the former. That is the test for determining whether a crime is or is not infamous, it having been held in *Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. 935, and *Mackin v. U. S.*, 117 U. S. 348, 6 Sup. Ct. 777, that the term "infamous," as used in the constitution and statutes, defines offenses punishable by imprisonment in a state prison or penitentiary. As the offenses described in sections 5440, 5451, and 5501 are all infamous, within these rulings,—being all punishable by imprisonment for a term in excess of one year, and therefore rendering a

defendant liable to imprisonment in a state prison or penitentiary, —they are certainly, in some senses, offenses of the same grade; but it is not necessary, in this case, to pass upon the question suggested.

It is further urged that the ruling of Mr. Justice Miller in *U. S. v. McDonald*, *supra*, to the effect that it is improper to join in one indictment, a charge of conspiracy against officers and private citizens, is applicable to this case. In that case the indictment charged a conspiracy on part of the officers of the government under the provisions of section 3169 of the Revised Statutes, and also charged a conspiracy against the private citizens under section 5440; and it was held an improper joinder, mainly by reason of the difference in the punishments provided in the two sections. In the case now under consideration the indictment for conspiracy is based alone upon section 5440, and the ruling relied upon has no application.

In my judgment the indictment in question, and also that in case No. 3,516, are not open to the objections urged against them, and the demurrers thereto are therefore overruled.

UNITED STATES v. VAN LEUVEN (four cases).

(District Court, N. D. Iowa, E. D. June 4, 1894.)

Nos. 3,497, 3,500, 3,508, and 3,525.

1. VIOLATION OF PENSION LAWS—FALSE AFFIDAVITS—INDICTMENT.

An indictment under Rev. St. § 4746, for procuring the making or presentation of a false or fraudulent affidavit in support of a pension claim, need not charge that it was made for the purpose of defrauding the United States.

2. SAME.

An indictment under Rev. St. § 5418, for transmitting to the office of the commissioner of pensions a false and altered affidavit, with intent to defraud the United States, is fatally defective, where it fails to charge that the affidavit was transmitted with relation to, or in support of, a claim against the United States, or to aver facts from which the court can find that the United States could be prejudiced in any way thereby.

These were indictments against George M. Van Leuven for violating the pension laws. Defendant demurred to the indictments.

Cato Sells, U. S. Dist. Atty., and M. D. O'Connell, for the United States.

John Day Smith, for defendant.

SHIRAS, District Judge. In case No. 3,497 the indictment charges that the defendant "did then and there, knowingly, willfully, unlawfully, and feloniously, procure the presentation of a certain false, forged, and counterfeited affidavit to the United States commissioner of pensions, by some means to these grand jurors unknown, which said false, forged, and counterfeited affidavit was in the following words and figures." The affidavit is

then set out in full; followed by a charge that the same was false and forged, in that a certain portion thereof (recited at length) was added to the affidavit after it had been signed and sworn to by the witnesses before the notary public, without their knowledge and consent; it being further charged that "said false, forged, and counterfeited affidavit was procured to be presented to the office of the commissioner of pensions in support of and concerning a claim of one Joseph E. Radford for pension from the United States, by said George M. Van Leuven, as aforesaid, willfully, and well knowing that the said affidavit was a false, forged, counterfeited, and fraudulent affidavit, contrary to the form of the statute," etc. In support of the demurrer to this indictment, it is urged that the same is fatally defective, in that it is not charged that the presentation of the altered or forged affidavit was made for the purpose of defrauding the United States. If the indictment was based upon the provisions of sections 5418, 5421, or 5479 of the Revised Statutes, the failure to aver the intent or purpose of defrauding the United States would probably be fatal to the indictment, as these sections are alike in the provision that the acts named therein must be done with the purpose of defrauding the United States; and under the ruling of the supreme court in *U. S. v. Staats*, 8 How. 40-45, the purpose to defraud the United States is one of the essentials in the definition of the crime. I do not understand, however, that the indictment in question is based upon either one of these sections, but upon the provisions of section 4746, which declares that "every person who knowingly or willfully in any wise procures the making or presentation of any false or fraudulent affidavit concerning any claim for pension, or payment thereof, or pertaining to any other matter within the jurisdiction of the commissioner of pensions * * * shall be punished," etc. The gist of this offense is not in an effort to defraud the United States, but it consists in knowingly procuring the making or presentation of a false or fraudulent affidavit concerning a claim for pension, or the payment thereof, or other matter within the jurisdiction of the commissioner of pensions. The statute does not, in terms, make an intent or purpose to defraud the United States an element in the offense, and the facts necessary to fully make out the crime can be averred without charging the intent to defraud the United States.

To the indictments found in cases Nos. 3,500 and 3,508, and which charge the defendant with transmitting, or causing to be transmitted, to the office of the commissioner of pensions, certain false, forged, and pretended affidavits in support of pension claims, with intent to defraud the United States, it is excepted that the papers set forth in the indictments are not affidavits, nor are they false, forged, or counterfeited in any material matter. The papers purport to be affidavits, and in form are such. If they are not in fact, it is because they are false and forged in the particulars charged in the indictments, and these particulars are clearly shown to be in matters of substance. The exceptions to these indictments are therefore overruled.

The indictment in No. 3,525 is for the transmitting to the office of the commissioner of pensions a false and altered affidavit with the intent to defraud the United States, and is based upon section 5418. It does not aver that it was so transmitted with relation to or in support of any claim against the United States, nor are any facts averred from which the court can find that the forwarding of the affidavit, even though false and forged, could in any way operate to the prejudice of the United States. The demurrer to this indictment is therefore sustained.

THE NORTH STAR.

NORTHERN STEAMSHIP CO. v. BROWN et al.

(Circuit Court of Appeals, Sixth Circuit. May 8, 1894.)

No. 105.

1. COLLISION—APPLICATION OF RULES.

As Act March 3, 1885, by which the revised international rules for preventing collisions at sea were adopted for the navigation of United States vessels on the high seas and coast waters, expressly excepted navigation on "harbors, lakes, and inland waters," Rev. St. § 4233, continued in force as to navigation on the Great Lakes.

2. SAME—STEAMERS MEETING IN FOG.

Under Rev. St. § 4233, rule 21, requiring every steam vessel approaching another so as to involve risk of collision to slacken speed, or, if necessary, stop and reverse, and, when in a fog, to go at a moderate speed, a steam vessel, in a fog, approaching another, whose whistle bears a few points off either bow, should stop, and, if necessary, reverse, until the exact position and course of the other vessel can be ascertained, unless such circumstances present themselves at the time as would lead a reasonably prudent and skillful navigator to the confident belief that no risk of collision exists.

3. SAME—CONFUSION OF SIGNALS.

Two steamers, the N. and the S., approaching each other on nearly opposite courses in a fog, when a mile or less apart, exchanged repeated double-blast signals; but the S., mistaking some of the signals of the N. for single blasts, without stopping to ascertain the N.'s exact position and course, herself gave a single blast, ported, and, running across the bows of the N., was sunk by collision with her. *Held*, that the S. was guilty of reckless navigation and gross negligence. 43 Fed. 807, affirmed.

4. SAME—FAILING TO STOP AND REVERSE—RATE OF SPEED.

The whistle of the S., as first heard from the N., bore but a point on the starboard bow, and was placed by the master of the N. only half a mile away, and there was no widening of the bearing of the S.'s subsequent whistles. *Held*, that the N. was also in fault, in failing to stop and reverse, especially after the cross signal of the S., and in keeping up a speed of eight to ten miles an hour, at which she could not have stopped in the distance at which, in the fog, she could have seen an approaching vessel, while she could steer at four miles an hour or less. 43 Fed. 807, affirmed.

5. SAME—EVIDENCE.

The rules that the burden on the manifest wrongdoer is greater than merely to show by a preponderance of evidence that the other vessel was guilty of fault, and that a slight fault is no ground for dividing damages, do not apply where the faults of such other vessel are shown by the allegations and proofs on her part, and where, but for her faults, the collision would have been avoided.

6. SAME—APPEAL—INTEREST ON DAMAGES.

The appellate court, when differing from the conclusions of the court below as to the grounds on which that court allowed interest on the damages awarded for collision, may modify the decree by excluding such interest. 44 Fed. 492, affirmed.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

Libel by Harvey H. Brown and others against the steamer North Star (the Northern Steamship Company, claimant) for a collision between said steamer and the steamer Sheffield. The district court found both vessels in fault, and decreed that the damages should be divided (43 Fed. 807); and, after a hearing of exceptions to the report of the commissioner on the question of damages (44 Fed. 492), a decree was entered for libelants. Claimant appealed.

This was an appeal from a decree of the circuit court of the eastern district of Michigan affirming the decree of the district court, which held that two steamers, the Charles J. Sheffield and the North Star, were both at fault in a collision between them on Lake Superior, and divided the damages.

Harvey H. Brown, E. M. Peck, Fayette Brown, and C. J. Sheffield, the owners of the Sheffield, which was sunk by the collision, began the litigation by filing their libel in the district court against the North Star. The libel alleged that on the 14th day of June, A. D. 1889, the Sheffield was bound on a voyage from South Chicago, Ill., to Two Harbors, Minn., with no cargo; that having passed Whitefish Point, on Lake Superior, and adopted a course W. N. W., she encountered foggy weather, with a strong southerly breeze; that it was not a steady fog, but would light up at intervals, affording a view for several miles ahead; that, to overcome the effects of the southerly wind, she was kept up a quarter of a point from about 1 to about 4 o'clock p. m. on that day, when the wind shifted ahead, moderating to a light breeze, the fog gradually setting in denser, and more steady; that from the time the wind began shifting the Sheffield was steered by compass W. N. W.; that her fog signal of one blast was blowing regularly, as required by law and the circumstances; that the water was smooth, and the wind, at the time of the collision about to be described, was light. The collision is then described in the libel as follows: "That about 4:40 o'clock the whistles of two steamers were heard. One, a loud whistle, was comparatively near; but, at first sounding nearly abeam, it passed, and required no further attention. The other was the faint, far-away sound of the steamer's whistle, nearly ahead, which steamer proved to be the North Star, and with which last-mentioned steamer the Sheffield, fifteen minutes later, came in collision, as hereinafter shown. The Sheffield's engine was at once checked, and close attention was paid to locate the direction of the whistle when it should sound again. It was heard again, a little on the starboard bow. The Sheffield was thereupon, the second time, checked, and to a speed so slow that, as afterwards appeared, she had not good steerageway, and a passing signal of two distinct blasts was blown to the approaching steamer. No answer was received. The signal was repeated by the Sheffield, and she was starboarded half a point. The approaching steamer then replied with one blast, still a long distance away. To make certain whether this was blown as a fog signal, or as a passing signal in response to her own blast, the Sheffield, two or three times, blew the signal of two blasts, to each of which signals the approaching steamer responded directly with a distinct signal of one blast. Thereupon, the Sheffield, acquiescing in the proposal or demand of the approaching steamer to pass port to port, also blew a passing signal of one blast, and ported her wheel. The vessels were then a mile and a half to two miles apart, the North Star then being less than a point on the Sheffield's starboard bow. The Sheffield was not steadied until she headed about northwest by north. In executing the maneuver, it was seen that she had not sufficient steerageway, for which reason her speed was slightly increased, enough to give her steerageway. The whistle of the North Star was thereafter heard on the Sheffield's port bow, each vessel blowing to the other passing signals of one blast, which signal was exchanged repeatedly, the

Sheffield proceeding as last above described; and the vessels being—as, in accordance with said signal, they should be—on such courses that the sound of the North Star's whistle was broadening each time off the port, until she was well off on the port side of the Sheffield, and all risk of collision seemed to be past. In this situation, those on the Sheffield, for the first time, heard a signal of two blasts, for starboard helm, from the North Star, sounded fully four points off the Sheffield's port bow, the vessels being now too close to change sides by starboarding. The Sheffield answered with one blast, and hard ported. Again the North Star blew two blasts, which were answered again by one, and then the North Star swung up through the fog, heading for the Sheffield, two lengths or more distant on the port side, and coming at great speed; those forward on her hailing the Sheffield to go ahead strong, while the master of the Sheffield was at the same time signaling the engine room for full steam, and ordered her wheel amidships. The North Star came on at so great speed that she struck the Sheffield at about a right angle, by her port mizzen rigging, crushing in her side, and after that cutting into her a distance of six to eight feet, inflicting such damage that within five minutes the Sheffield sank, and became and is a total loss." The libelants allege that the North Star was in fault—First, in that, after selecting a mode of passing and establishing an understanding to pass port to port, by passing signals of one blast, she improperly departed from that course, and attempted the opposite mode of passing, to wit, starboard to starboard, when it was too late to safely make or attempt the change; second, in that she improperly starboarded; in that she was proceeding at an unnecessary, excessive, and illegal rate of speed; and, third, in that she did not adopt seasonable and proper means for avoiding the collision.

The Northern Steamship Company appeared as claimant, and filed its answer. The answer averred that at about 5 o'clock p. m., Buffalo time (27 minutes faster than Cleveland time), the North Star was proceeding on a course of S. E. $\frac{1}{2}$ E., the usual course from Manitou island, to take her well off Whitefish Point, and that she was running under check, at a moderate and safe rate of speed, the wind being light from about N. W., and the sea nearly smooth. The collision, and the circumstances which led up to it, are thus described: "While running along in this way, shortly after 5 o'clock, the lookouts heard, and reported to the master, a signal of a steam vessel bearing about three-quarters of a point from the starboard bow. The signal was heard by the master at the same time, and, although indistinctly, it was made out to be two blasts of a steam whistle, from some vessel approaching. At the moment when the said two blasts on the whistle were heard as aforesaid, it was well known to those in charge of the North Star that the said signal was a passing signal of some vessel bound up Lake Superior, and in all probability in a parallel course with that of the North Star, and that if each of the vessels pursued her respective course no collision could occur, as the vessel which blew the signal was well off the starboard bow, inland, with miles of open lake between her and the nearest land to the south. The signal of the approaching vessel was promptly answered by two clear and distinct blasts of the steam whistle of the North Star. In less than a minute after the North Star so answered as aforesaid, the second signal of two blasts was heard from the same vessel, still on the starboard bow of the North Star. This was again answered by two clear and distinct blasts of the North Star's whistle. Again the approaching vessel blew a signal of two blasts, and again the North Star answered with two blasts. As there appeared to be no disagreement between the vessels as to their signals, or the mode of passing, and as the approaching vessel was still on the starboard, there seemed to be no reason why any danger of collision should be feared. After the last two blasts of the North Star, mentioned above, were given, the approaching steamer, which afterwards proved to be the Sheffield, suddenly blew a signal of one blast of her whistle, still off the North Star's starboard bow. As soon as this was blown, danger of collision was apprehended, and the North Star promptly answered this signal last blown by the Sheffield by adhering to her passing signal of two blasts; and her master immediately took the precaution to check down still further the speed of the North Star, which was then moderate. The Sheffield, however, again blew a signal of one blast of her whistle, still on the North Star's starboard bow, but closer. The engine of

the North Star was then immediately stopped, and while this order was being obeyed the Sheffield hove in sight, near to, and heading across, the North Star's bow and course, from starboard to port. The vessels were then so close to each other that a collision seemed inevitable, but notwithstanding this, the master of the North Star immediately ordered her wheel to port, so that she might swing under the stern of the Sheffield, and possibly pass her, and ordered the engine to back, and immediately followed this order to back strong; and, in response to this order, every available pound of steam was given the engine, and the steamer was backing with full power. But, notwithstanding these precautions (there remaining sufficient headway), the Sheffield, which was still crossing her bows, threw herself in the North Star's way, so that the latter collided with and struck her just forward of the port mizzen rigging, and her great weight imparted such energy to the blow that she cut into the Sheffield's side four or five feet. At the time of the collision the North Star was backing strong, but knowing that the Sheffield was so injured that she could not float, and knowing that her crew were in danger, the master of the North Star stopped the engine of the latter, and then ordered it ahead, so that the bow of the North Star might be kept in the breach made by the collision until the crew of the Sheffield could be taken on board. When this had been accomplished, the North Star backed out of the breach, and in a few moments thereafter the Sheffield sunk."

The answer alleged that "the collision was brought about solely on account of those in charge of the Sheffield failing to observe the signals of the North Star, which had been blown in answer to the former's signal to pass starboard and starboard, and improperly, and without sufficient warning, and in too close proximity to the North Star, attempting to cross the latter's bow, so that it became impossible for those on the North Star to avoid a collision with her."

After the hearing in the district court the claimant and respondent filed an amendment to the answer, as follows: "That at the instant the Sheffield's signal of one blast (i. e. the first cross signal) was heard, as aforesaid, the orders to check, stop, back, and back strong were given by the master of the North Star, almost simultaneously, and were promptly obeyed, and that no perceptible period of time elapsed between the first order to check, and the final order to back strong."

The district judge (now Mr. Justice Brown), after hearing the evidence, reached the conclusion, with the aid of nautical assessors (see *The North Star*, 43 Fed. 807), that the Sheffield was guilty of four manifest faults, in failing to stop at four different times when by reason of the signals of the North Star, her officers must have been uncertain as to the course which the North Star was pursuing. One good reason for uncertainty on their part he found to be that the fog signal and the signal announcing a porting of the helm were single blasts, differing only in length, so that it necessarily involved a risk of collision for the Sheffield's master to assume that single signals from the North Star indicated an agreement to pass port to port, and thereupon to port his helm on that assumption, without stopping to ascertain definitely its correctness. He held that the North Star was at fault in failing to stop and reverse at the first cross signal of the Sheffield, and also in running at a speed which was not moderate. The question of damages was referred to a commissioner, who reported that the damage suffered by the owners and crew of the Sheffield amounted, with interest to the date of report, to \$177,214, and that the damage to the North Star amounted to \$7,110.65; and the court awarded to the libelants the sum of \$85,051.67, being the one-half of the total damages arising out of said collision, including interest to the date of the decree. The decree in the circuit court was entered by Mr. Justice Brewer, without a hearing, for \$95,895.75, which included interest on the amount of the decree of the district court to the date of the decree in the circuit court.

Robert Rae and Charles E. Kremer, for appellant.
Harvey D. Goulder, for appellees.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Section 4233 of the Revised Statutes provides that "the following rules for preventing collisions on the water shall be followed in the navigation of vessels of the navy and of the mercantile marine of the United States." Rule 21 following, is: "Every steam vessel, when approaching another vessel so as to involve risk of collision, shall slacken her speed, or if necessary, stop and reverse; and every steam vessel shall when in a fog, go at a moderate speed."

By act of March 3, 1885 (23 Stat. 438), congress provided "that the following revised international rules and regulations for preventing collisions at sea shall be followed in the navigation of all public and private vessels of the United States upon the high seas and in all coast waters of the United States except such as are otherwise provided for, namely." Then follow 27 rules for navigation. Section 2 provides "that all laws and parts of laws inconsistent with the foregoing revised international rules and regulations for the navigation of all public and private vessels of the United States upon the high seas, and in all coast waters of the United States, are hereby repealed, except as to the navigation of such vessels within the harbors, lakes and inland waters of the United States."

By act of August 19, 1890 (26 Stat. 320), congress enacted that "the following regulations for preventing collisions at sea shall be followed by all public and private vessels of the United States upon the high seas and in all waters connected therewith by sea going vessels;" and then follow 31 articles for the navigation of vessels. Section 2 of that act provides that all laws or parts of laws inconsistent with the foregoing regulations for preventing collisions at sea, for the navigation of all public and private vessels of the United States upon the high seas, and in all waters connected therewith, navigable by seagoing vessels, are hereby repealed. Section 3 of the act provides that this act shall take effect at a time to be fixed by the president, by proclamation for that purpose. The president has never issued his proclamation, and the act of 1890 is not yet in force. *The Britannia v. Cleugh*, 14 Sup. Ct. 795, decided by supreme court of United States, April 23, 1894. Moreover, the collision in this case occurred in June, 1889, so that the act could not apply, even if it were in force. The act of 1885 only repealed the previous navigation rules so far as they affected the navigation by United States vessels of the high seas and coast waters, but it expressly excepted from its application the navigation of such vessels within the harbors, lakes, and inland waters of the United States. Now, it is true that the supreme court of the United States has construed the term "high seas," as it is used in Rev. St. § 5346, denouncing certain offenses "upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty jurisdiction of the United States, and out of the jurisdiction of any state," to include the open, uninclosed waters of the Great Lakes; but we do not think it can be given

such a meaning in the act of 1885, where there is a special exception in reference to navigation on "harbors, lakes, and inland waters." This exception manifestly includes the Great Lakes, and leaves section 4233 in force, as to navigation upon them. It follows that section 4233, Revised Statutes, furnishes the navigation rules applicable to the collision we have here to consider.

The first paragraph of rule 21 of section 4233, given above, is identical with article 18 of the British navigation rules, and the second paragraph is found in another article. Many English cases involving the proper construction of the language of rule 21 are found in the Law Reports, and are here directly applicable.

The leading case on the subject in England is *The Ceto*, 14 App. Cas. 670. In that case the *Lebanon* and the *Ceto*—two steamships—were approaching each other, in the open sea, in a dense fog. The *Lebanon* had reduced her speed to "easy," while the *Ceto*, which had already been crippled by another vessel in the same fog, was going "dead slow." The master of the *Ceto* first heard the whistle of the *Lebanon* about a mile away, and from what seemed to be four points upon his port below. He ported her helm, and edged off to starboard about two points. The *Lebanon's* whistle, notwithstanding the *Ceto's* change of helm, continued to draw nearer, and appeared to bear, as at first, four points from the *Ceto*. A collision resulted, and the discussion of the house of lords was as to the proper construction of article 18. Lord Watson states the effect of the article as follows:

"When the approaching vessels are enveloped in fog, and cannot see each other, the rule must, in my opinion, apply with greater stringency. Their respective officers are in that case guided solely by their sense of hearing, which may enable each of them to speculate with more or less accuracy as to the position of the other vessel at the time when its fog whistle is heard. But the direction from which the whistle comes can afford no indication of the course of the approaching vessel, unless the sound is repeated and its bearing is, on each repetition, carefully observed. Even then the bearing of the vessel, and its course, are more or less matters of speculation, and cannot be ascertained with the same certainty as if her hull or lights were in view. When two steamships, invisible to each other by reason of a thick fog, find themselves gradually drawing nearer, until they are within a few ship's lengths, they are, in my opinion, within the second direction of rule 18; and each of them ought at once to stop and reverse, unless the fog signals of the other vessel have distinctly and unequivocally indicated that she is steered on a relatively safe course, and will pass clear, without involving risk of collision. In the absence of such indications, it humbly appears to me that to negative the necessity for stopping and reversing when the vessels are near to each other, though still unseen, would be to thwart the very purpose for which the rule was enacted."

Lord Watson quotes with approval this language of the master of the rolls in *The John McIntyre*, 9 Prob. Div. 135, as follows:

"It may be laid down as a general rule of conduct that it is necessary to stop and reverse, not, indeed, every time that a steamer hears a whistle or fog horn in a dense fog, but when, in such a fog, it is heard on either bow, and approaching, and is in the vicinity, because there must then be a risk of collision."

And then continues:

"When the approaching vessel is nearly ahead, the duty to stop and reverse is obvious; but it appears to me to be equally imperative when the

other vessel is drawing near, upon either bow. It matters not whether the bearing of the approaching ship be one point or four. Either position is fraught with danger of collision, if it continues to advance without change of bearing."

Lord Herschel put the rule in this way:

"I think that, when a steamship is approaching another vessel in a dense fog, she ought to stop, unless there be such indications as to convey to a seaman of reasonable skill that the two vessels are so approaching that they will pass well clear of one another."

The same principle is laid down in the cases of *The Kirby Hall*, 8 Prob. Div. 78; *The John McIntyre*, 9 Prob. Div. 135; *The Dordogne*, 10 Prob. Div. 6; *The Ebor*, 11 Prob. Div. 25; *The Lancashire* [1894] App. Cas. 1.

Said Mr. Justice Brown in the case of *The City of New York*, 147 U. S. 72-84, 13 Sup. Ct. 211:

"There is no such certainty of the exact position of a horn blown in a fog as will justify a steamer in speculating upon the probability of avoiding it by a change of the helm, without taking the additional precaution of stopping until its location is definitely ascertained." Citing *The Ceto*, 14 App. Cas. 670.

See, also, *The Martello v. The Willey*, 14 Sup. Ct. 723, decided by the supreme court of the United States April 16, 1894, where the same learned justice referred with approval to the English cases above cited.

In this connection, it is useful to refer to rule 16 of the act of 1890 (26 Stat. 320) which, though not governing the conduct of the masters of the vessels in this case, as a positive law, is significant, as showing the views of congress, and the experienced navigators who prepared it, in respect to the duty of vessels in a fog. The part of the rule here material is as follows:

"A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines and then navigate with caution until danger of collision is over."

It, after all, comes to this,—and such is the proper construction of rule 21: That where a steam vessel is approaching another vessel in a fog, so that the bearing of the whistle of the one is a few points off either bow, it is the duty of the master of the approaching vessel to stop his vessel, and, if necessary reverse, until the exact position and course of the other vessel can be ascertained, unless such circumstances present themselves to him at the time as would lead a reasonably prudent and skillful navigator to the confident belief that no risk of collision exists.

Having thus, as definitely as may be, formulated the standard of due care by which the conduct of a steam vessel colliding with another in a fog is to be measured and its legal responsibility for the resulting damage fixed, we come now to apply it to the facts of this case.

Lord Watson, in giving judgment in the house of lords in *The Ceto*, 14 App. Cas. 670, 687, reports Lord Esher, the master of the rolls, to have said in the court of appeals, in the same case, that "You can never try an admiralty case, so as to get at the truth, unless you look with great scepticism at the evidence on both sides."

This remark has full application to the evidence given here by the officers and crews of the two colliding steamers; but the case at bar differs from most collision cases, in that the respondent, in corroboration of the story of its officers and crew, has summoned, from the deck of a third vessel, witnesses, who, so far as this record shows, are entirely indifferent between the parties. The great conflict of evidence in the case is in regard to the signals which were given by the two steamers as they approached the point of collision. The Badger State, a steamer of the Western Line, was sailing on Lake Superior from Manitou island to Whitefish Point, on a course very nearly parallel with that of the North Star, on the afternoon of the collision. It is contended on behalf of the North Star that the Badger State was near enough to the point of collision to enable her officers and crew to say what signals were exchanged between the North Star and the Sheffield. We think the evidence fully supports this contention. The mate and the lookout of the Badger State testified that when the fog lifted for a time, about 1 o'clock in the afternoon, they saw a steamer of the Northern Steamship Line three points off their port quarter; that she was sailing a parallel course with that of their own steamer; that they saw her again when the fog lifted, between 3 and 4 o'clock; that early in the afternoon she was three or four miles away, but that at 4 o'clock she had gained on the Badger State, and was considerably nearer. It was conceded that the steamers of the Northern Steamship Line had peculiarities in their spars and rigging which easily distinguished them from other vessels at such distances. During the afternoon, when the fog was dense, the whistle of this vessel was constantly heard by the mate, the lookout, the captain, and the wheelman of the Badger State, over the port quarter. Their estimate is that, from 4 o'clock on, there was not more than a mile or a mile and a half of clear water between their courses, and that the following vessel was not more than two miles astern. The North Star was the only east bound vessel of the Northern Steamship Line which was where the crew of the Badger State could have seen her, or heard her whistle, on that afternoon. The Badger State had a chime whistle, made by a union of three whistles, and its sound was easily distinguishable from that of a single or "solid" whistle. Some four of the witnesses from the deck of the North Star testify to having heard the chime whistle, which was a peculiarity of the boats of the Western Line, during the afternoon, until shortly before the collision. Its bearing was somewhere about three points over the starboard bow of the North Star. The time of the collision was fixed by the witnesses for the libelants at 4:57 p. m., Cleveland time, or 5:24, Buffalo time. It was fixed by the witnesses from the North Star at about 5:30 p. m. The men of the Badger State say that about 5 o'clock, Buffalo time,—probably between 5 and half past 5,—they exchanged single-blast signals with a steamer going by them on their port side, on the usual course from Whitefish Point to Manitou, at full speed, a half a mile or a mile away. One or two of the witnesses saw her smoke, but the fog was too dense to see the vessel. This vessel

continued her fog signals after she had passed a mile astern of the Badger State, when those upon the deck of the latter heard her give a blast of two whistles, which was answered by two whistles from the boat of the Northern Steamship Line following the Badger State. The double blasts were exchanged twice again, or three times in all; then came a single blast from the west-bound vessel; and then all was still. The cross signal was observed and commented on at the time by the captain of the Badger State, in the hearing of the other witnesses, from her deck. When the Badger State arrived at Sault Ste. Mary's river, the next day, those on board of her were informed of the collision. The account of the exchange of double blasts, and the cross signal of one blast from the west-bound vessel, corresponds in many respects with the story given by the men of the North Star. In the protest of the master of the Sheffield, made at Sault Ste. Mary's on the day after the collision, he states that just about the time when he first heard the whistle of the North Star, three-quarters of a point on his starboard bow, some miles away, he heard the whistle of a vessel on his port side, nearly abeam, and comparatively near. On the stand, the Sheffield's witnesses deny that this was a chime whistle; but as they profess to have heard it only once or twice, and to have given little attention to it when they did hear it, because then all danger from it was past, and their ears were strained to hear the signal of the North Star, nearly ahead, we may dismiss this discrepancy as of small moment.

Counsel for libelants attempted at the trial to show that the Badger State could not have been at the point of collision, because of the time at which she reached Whitefish Point. Her officers say that she passed there at about 2 o'clock next morning, after stopping for an hour, and running the rest of the time at half speed, or $5\frac{1}{2}$ miles an hour. The argument was that, in the eight hours and a half between half past 5—the time of the collision—and 2 o'clock the next morning, she could only have gone between 40 and 45 miles, while the collision is said to have taken place about 60 or 65 miles from Whitefish Point. We do not regard this evidence as of any great weight. It depends on the memory of the mate and captain of the Badger State as to the speed of their vessel during a certain eight hours of a long trip, with respect to which they might much more easily be mistaken than they could as to the circumstances that they were followed within a few miles by the North Star that afternoon, that the Sheffield passed them, that double signals were exchanged, and that then a cross signal followed, all of which must have been deeply impressed in their minds, both by the unusual character of the occurrence, and by the fact of the collision of which they learned the next day. The log of the Badger State, produced in the circuit court, shows that the memory of her officers, as to her speed, was defective. More than this, the location of the collision itself depends on measurement of distance by the estimated speed of the Sheffield, and her time from Whitefish Point, which is by no means exact. On the whole, we think the proximity

of the Badger State to the place of the collision is as satisfactorily established as such a fact can be. The testimony of the witnesses who stood upon her deck is therefore to be accepted as applicable to the collision in controversy, and it clearly makes the evidence for the North Star preponderate, in so far as the men of the North Star and the Badger State agree. The chief point of agreement is that the Sheffield and the North Star exchanged double blasts a short time before the collision, as an agreement to pass starboard to starboard, and that subsequently this agreement was broken by a cross signal from the Sheffield. The story from the Sheffield is that she first heard the whistle of the North Star three-fourths of a point on her starboard bow, five miles away, that she blew two single blasts and then, reducing her speed to four miles an hour, and starboarding a half point, she blew four or five double blasts, at a minute apart; that she heard three single blasts in answer from the North Star, and that then, when two miles away from the North Star, she ported from a course N. by W. $\frac{1}{2}$ N. three points and a half to one N. W. by N.; that, on this latter course, she exchanged seven blasts of one whistle with the North Star; that the bearing of the North Star widened on her port bow from three points, immediately after porting, until it was six points; that then, suddenly, a blast of two whistles was heard from the North Star, to which she gave a response of one, hard ported, and swung around to a course N., or E. of N., and was struck by the Star at right angles, just abaft the mizzen rigging. The evidence from the Badger State satisfies us that the Sheffield's witnesses put her double blasts much further from the collision, in point of time, than the fact justified, and that, when she did blow double blasts, they were answered by double blasts from the Star. The exchange of seven single blasts after the Sheffield ported, and the great widening off her port bow of the North Star whistle, till it reached six points, we do not believe. To say that the Star's whistle was six points off the port bow of the Sheffield puts her in a perfectly impossible position, and discredits all this part of the Sheffield's story. The learned district judge thought there was exaggeration in this statement as to the number of one-blast signals after the Sheffield ported, and we fully concur with him. The recklessness of the Sheffield, in porting, instead of stopping and reversing, to ascertain with certainty the position and course of the North Star, appears greater as the time and place of the porting is found to be nearer to the collision. There was an obvious motive on the part of the Sheffield's witnesses, therefore, to make the time between their porting and the collision as great as possible. This is the explanation of the exchange of seven single blasts a minute apart, just preceding the collision, made so prominent a part of the Sheffield's story. The attempt to sustain it by the evidence of King, the porter of the North Star, who had been discharged for drunkenness, failed because of his previous contradictory statement, his manifest motive, and his insufficient opportunities for observation. His story comes to this: That the Star was taking one course, and was giving repeated

signals to the Sheffield that she was taking another. We cannot accept this as credible until it is established by indubitable proof. Neither master can be supposed to have sought a collision, and yet misleading signals, repeated five times, could have no other explanation.

For the same reason, we cannot believe that the Sheffield ported her helm, and then blew signals to indicate that she was keeping her course. The only reasonable explanation is that suggested by the district judge,—a confusion of signals. The Sheffield mistook a double blast from the Star for a single blast, or perhaps two of them, and, without stopping to ascertain the Star's exact position and course, recklessly took it for granted that she was going to port, and herself ported, and thus ran across the bows of the Star. Of course, this was reckless navigation, and gross negligence, for which she must be condemned. On her own story, the district judge thought the Sheffield guilty of three or four faults. As we find the fact to be, we think her recklessness and negligence even greater. She has not appealed from the decree against her; but it is claimed in her behalf that the appeal of the North Star gives this court the right to modify the decree below so as to enter a full decree against the Star for all the damages. This is denied by counsel for the North Star, who contend that the decree, in so far as it fixes the faults of the Sheffield, not being appealed from, is *res judicata*, and cannot be disturbed. The question of practice thus presented, we do not feel called upon to decide, because, if the question is open to us, we have no hesitation in convicting the Sheffield of gross fault.

The much more doubtful question is as to the conduct of the North Star. As we have already said, we think that there was an exchange of double-blast signals between the two vessels when they were a mile or less apart, but that the Sheffield mistook some of the answers by the Star for single blasts, and ported. It is probable, also, that those navigating the Star did not at once perceive the change of signal by the Sheffield. The question is, had the master of the Star reason to doubt whether the Sheffield was keeping a course to the starboard of him? If so, then there was risk of collision, requiring him to stop and reverse. The bearing of the Sheffield's whistle when the master of the Star says he first heard it was three-fourths to one point over the starboard bow. He places the Sheffield only half a mile away at that time. If so, their courses, assuming them to have been nearly parallel, were only 500 feet apart. He then starboarded his helm half a point, and a minute later heard the approaching whistle a point and a half over the starboard bow. This was not a widening off his bow, which could indicate to him that the Sheffield was on a course which would certainly go by him, because he had starboarded half a point, and that change in his own course was nearly enough to account for the change in the bearing of the Sheffield. A minute later, he says, he heard another whistle, still only a point and a half off the starboard bow. If his judgment of the bearing was correct, this was conclusive evidence that the Sheffield was on a course drawing

nearer and nearer to his own. The next signal, a minute later, he recognized as a single whistle that bore only a point and a quarter off his bow, and at the next one the Sheffield hove in sight, and shot across his bow. It is true that two North Star witnesses, in their evidence, widen the bearing of the whistles more on the starboard bow, with each recurring whistle, than does the master; but they are by no means positive in their recollection, and he is explicit on this subject. Moreover, they did not communicate to him their judgment of the bearing of the approaching whistles. He was responsible for the navigation of the North Star, and his responsibility is to be determined by that which he saw and heard. The event showed that his judgment as to the bearing of the whistles was correct.

It is true that the agreement to pass starboard to starboard, if it had certainly been established, would have been good ground for the master of the Star to suppose that the Sheffield would keep off to starboard, but could he be certain that the agreement had been safely established? With a vessel only five minutes away from him, in a dense fog, and but a point off from dead ahead, it was his duty to note with care the bearing of each whistle. Says Marsden on Collisions (2d Ed. p. 350):

"In practice, one of the most usual indications of risk of collision is that the approaching ship remains upon the same bearing from the observing ship for an appreciable length of time."

In article 16 of the act of 1890, to prevent collisions at sea (26 Stat. 320), appears the following:

"Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change, such risk shall be deemed to exist."

The act in which this language appears is not, as we have found, applicable to the collision in this case, but it is evidently only declaratory of a well-understood rule of prudent navigation, and is useful here as such. The master of the North Star could not be certain that he had correctly placed the whistle, nor could he, as is evident from what happened, be sure that he had correctly interpreted the signals of the approaching vessel. The vessel was getting nearer and nearer. The bearing was suspicious, to say the least. There was a risk of collision when he heard what he took to be the third double blast of the Sheffield. He ought then to have stopped his engines. If he had done so, there would have been no collision. We think that reasonable care on his part required this course. To go on was to risk collision, and that was a violation of the twenty-first rule. Even if he was not required to stop, under such circumstances, he should at least have reduced his speed to the lowest point consistent with retention of control of the vessel. The North Star would steer at a speed of four miles, and perhaps less. It is conceded by the witnesses that at this time she was running at least five miles an hour, and probably a half mile or a mile more. A reduction of speed at the time of the third whistle heard from the Sheffield, by a mile and a half or two miles an hour, would have enabled the Star to stop her headway before the Sheffield was

struck, if it is true, as claimed by the witnesses for the Star, that her headway, at the time of the collision, was not more than a mile an hour.

The master of the North Star says in his protest that the first whistle he heard from the Sheffield was a fog whistle, and that the double blasts came afterwards. This accords with the probabilities, because, until the Sheffield began to blow double blasts, she had been blowing single blasts. She was doing this as she passed the Badger State, and until she had passed a mile astern of that vessel. It would be singular if some of these blasts had not been heard by those upon the North Star. A light breeze was blowing from W. N. W., but certainly not enough to prevent the North Star's men from hearing whistles several miles to leeward. Otherwise, how could the Star have heard the chime whistle of the Badger State, three points off her starboard bow, nearly down to the time of collision? We do not think the evidence of the North Star witnesses to the contrary overcomes the evidential weight of the statement in the protest, or of the inferences to be drawn from the testimony of those on the Badger State, that the double blasts from the Sheffield were not the first whistles heard by those on the North Star, but that single blasts must have been heard before. The moment such a single blast was heard, the master of the North Star should have reduced her speed to the lowest point, and even the subsequent double blasts, with their suspicious bearing, would not have justified any increase of it.

It has been pressed on us with great force that we should not apply the same rule in this case as was applied in the English cases cited, because of the very marked difference in the circumstances. It is said—with what accuracy it is not necessary to discuss—that in all those cases the collisions occurred where the usual courses of vessels crossed, while here the master of the North Star knew that the vessel approaching was necessarily on a course parallel, or nearly parallel, with his own, and that she would naturally pass to his starboard if she kept on her course, and did not port. When, therefore, he established an agreement to pass starboard to starboard, it is said he had the right to feel entirely secure. Considering the uncertainty of sound in a fog, we cannot concede that the master of the Star had sufficient ground for a feeling of entire security when the first whistle he says he heard showed the vessel only half a mile away from him, and but 500 feet off his course, and the bearing of the subsequent whistles showed, not parallel, but converging, courses.

But suppose that we have been too stringent in respect to the conduct of the master of the North Star when he thought he was in agreement with the Sheffield. How was it when he heard the first cross signal from the Sheffield? In the answer for the North Star, the averment is that at the first cross signal the speed was only checked, that the engines were not stopped until the second cross signal, and that they were not reversed until the vessel hove in sight, a little later. On the stand the witnesses for the North Star, except one, said that the signals to check, to stop, to back, and

to back strong, were given together, with only space enough between them to distinguish them, and that they were given at the first cross signal. After the hearing in the district court the answer was amended to include such an allegation. One of the North Star witnesses says that the signal to check was given at the time of the first signal, and that the signals to stop, back, and back strong did not come for half a minute afterwards. The signal to check was three bells, the signal to stop was one bell, the signal to back was two bells, and to back strong was two bells. The signal to stop and reverse strong could have been given with just two bells, without any intermediate signals. We fully concur with the district judge in thinking that the original answer, and the character of the signals which were given, establish the fact to be that at the first cross signal the only order was to check, and that the signals to stop and to back were not given until the second single blast of the Sheffield. This delay was a fault. The cross signal of the Sheffield meant imminent danger of collision, and nothing but a signal to stop and back strong would satisfy the requirement of the situation. If the time between the first and second cross signals was but half a minute, the use of this time in reversing would have saved the Sheffield, if, as claimed by respondent, the headway of the North Star was but a mile an hour when she struck. It is suggested that the first cross signal was near enough to the collision to make what was done at that time in extremis, so that the master of the North Star could be charged with an error of judgment only, in checking instead of stopping and reversing. It is said that he could not then know whether it was safer for him to go on than to stop and reverse. We cannot agree with this. The rule requires that when there is risk of collision a steamer shall stop and reverse, and the rule is to be followed, unless the circumstances justify and require a departure from it. The approaching vessel was heard approaching from a direction but little more than a point off the starboard bow, and the rule had full application at that time. The nearer the vessels came to each other, under such circumstances, the more necessary it became to stop and reverse, for the master had not reasonable ground to suppose that the approaching vessel would go under his stern if he went on.

Much evidence is contained in the record in reference to the speed of the North Star. Her full speed was 12 miles an hour. The district judge found that just before the collision her speed was nearly 10 miles an hour. She could steer at 4 miles an hour or less. Rule 21 requires her speed to be moderate in a fog. It is conceded that in going at 10 miles, or even at 8 miles, an hour, she could not have stopped in the distance in which, in that fog, she could have seen an approaching vessel. Eight or 10 miles an hour, when a vessel was approaching her from a direction only a point off her bow, would therefore be excessive speed. *The Bolivia*, 1 U. S. App. 26, 30, 1 C. C. A. 221, 49 Fed. 169; *The Nacoochee*, 137 U. S. 330, 11 Sup. Ct. 122. What was the fact concerning her speed? The evidence of the Star's own witnesses on this subject is by no means

satisfactory. The chief engineer's statement as to the reduction effected by one check was that it reduced the revolutions from 74 to anywhere from 38 to 50. The North Star was running under one check. What that check usually was, her engineer could not give, with any exactness. The second engineer, who was on watch during the afternoon, says that the captain sent him word to go more slowly between half past 4 and 5, and that at 5 o'clock her revolutions were "somewhere along" about 35 or 36. This would be from $5\frac{1}{2}$ to 6 miles an hour. The evidence of the other witnesses is of that vague and general character which much detracts from its weight. The mate says he thinks she was going five miles and a half an hour but would not be positive that she was not going seven or eight miles. All the witnesses on the Sheffield say that the North Star was turning up the water in front of her cutwater as she came into the Sheffield, while this is denied by the lookout and the watchman, who say they looked over her bow just before the collision. She could not thus carry "a bone in her teeth" (as the sailors' phrase is), except when running at a speed of eight miles an hour, and upward. The log of the Badger State shows that she was running nine or ten miles an hour nearly all the afternoon before the collision. If so, this must have been the speed of the North Star, for the two vessels were in company during that time. It is claimed that there are erasures in the log of the Badger State which show a change from a lower speed to higher speed. It is difficult to discover any motive for mutilation of the record by the persons in whose custody the log was, and we are inclined to think that the erasures were nothing but the work of those who originally made the record, at the time of making it. The protest of the North Star's master fixes the place of the collision about 70 miles from Keweenaw Point, and so does the evidence of the Sheffield. If so, she ran 12 of these miles between 3 and 4 at full speed, and the rest under check in five hours and a half, for she left Keweenaw Point at about 11 o'clock. This would make her speed under check between 8 and 10 miles an hour. While it is true that she might have run at greater speed during the afternoon, and slackened her speed just before she heard the Sheffield to half of 10 miles an hour, we do not think it probable. We are therefore not disposed to differ from the district judge in this finding. Expert evidence was taken to show that if the North Star had been going more than five miles an hour, when she checked, stopped, and reversed, the penetration of her bow into the Sheffield would have been much deeper. Other experts called by the libelants took a different view, and made a conflict. It seems to us, from an examination of this evidence, that it is largely conjectural, and is not to be depended upon, because of the very vague knowledge which the experts could have of the character of the hole made in the Sheffield's hull, and the amount of its metallic resistance to the blow. On the whole case, we cannot find enough in the record, contrary to the findings of the district judge, to warrant us in setting aside his decree, in so far as it holds both vessels at fault, and liable to share the loss.

We have been pressed with the argument in this case that in view

of the recklessness which both the district court and this court have found in the navigation of the *Sheffield*, and which is, in itself, sufficient to account for the collision, all reasonable doubt should be resolved in favor of the *North Star*. It is said that the burden upon the manifest wrongdoer is greater than merely to show by a preponderance of evidence that the other vessel was guilty of fault, and, further, that a slight fault is no ground for dividing the damages. It may be conceded that the principles of law involved in the foregoing propositions are supported by authority. *The City of New York*, 147 U. S. 72-85, 13 Sup. Ct. 211; *The Great Republic*, 23 Wall. 20. But, for the reasons given above, we are of opinion that the faults of the *North Star* are sufficiently established by the proof, within the rule suggested, and that but for them the collision would have been avoided. The faults of the *North Star* are chiefly shown by the evidence from her own deck, and the learned district judge based his conclusions in regard to them almost entirely on the case as stated in the protest of her captain, and the pleadings of her owners. Giving to the findings of the district court the weight in such a discussion they are necessarily entitled to, we are unable, in view of all the circumstances, to dissent therefrom.

The district judge allowed interest on the total value of the *Sheffield*. He stated his reasons as follows:

"With reference to the allowance of the item of \$12,000 interest upon the total value of the *Sheffield* (which the commissioner puts at \$160,000), I have felt more doubt. The *Sheffield* was guilty of so many faults in connection with this catastrophe that I have been strongly disposed to reject this item of interest, as its allowance is a matter of discretion; but, upon reflection, I am satisfied that with regard to the main fault, viz. the failure to stop and reverse,—a fault but for which the collision would not have occurred,—the steamers were equally to blame. In addition to this, there was a frankness upon the part of the *Sheffield* officers and crew, in admitting their faults, which, while it does not disarm criticism with respect to their conduct, inclines one to take as favorable a view of their case as the facts will warrant. Upon the other hand, there was such a marked discrepancy between the testimony of the men upon the *Star*, and the statements made by them in their protest, and even in their answer, and such obvious improbabilities upon the face of their testimony, that there is raised in my mind something more than a suspicion that their intention was to make the testimony, so far as possible, fit the exigencies of their case, as they had been developed by the libellant's evidence,—a practice very common in collision cases, and one which the English rule with regard to the filing of preliminary acts was intended to provide against. Upon the whole, I have concluded not to disturb the report of the commissioner upon this point."

We are constrained to differ with the foregoing, both in respect of the comparative delinquency of the two vessels, and of the credibility and candor of the two crews. It seems to us that the fault of the *Sheffield*, in porting so near the point of meeting, and crossing the bows of the *North Star*, involved gross recklessness, while the faults of the *North Star* were more excusable. Moreover, we are convinced that the story of those from the deck of the *Star* is much nearer the truth than that of the *Sheffield*'s witnesses. With respect to circumstances, their account of which was manifestly impossible, the officers and crew of the *Sheffield* preserved a uniformity of statement only to be explained by previous agree-

ment. If the district judge's conclusions that the faults of the two vessels were equal, and that the Sheffield's witnesses were more truthful than those of the North Star, justified him in exercising a discretion to allow interest which otherwise he might have withheld, it would seem that we, differing from his conclusions in these respects, and hearing the case *de novo*, as we do in admiralty appeals, should exercise our discretion, and modify the award of damages by excluding the item of interest. It is well settled in this country that the question whether interest shall be allowed by the court of first instance, or by the appellate court, in admiralty, on the amount of damages awarded in a collision case, is one in the discretion of the court. *Hemmenway v. Fisher*, 20 How. 258; *The Ann Caroline*, 2 Wall. 538; *The Scotland*, 118 U. S. 507, 6 Sup. Ct. 1174.

We shall therefore modify the decree of the circuit and district courts, and divide the damages, exclusive of any interest on the reported value of the Sheffield, and award half the costs of the court below and of this appeal to each party. Let a decree be entered accordingly.

THE FOUNTAIN CITY.

WESTERN TRANSIT CO. v. BENHAM.

(Circuit Court of Appeals, Sixth Circuit. May 8, 1894.)

No. 102.

1. COLLISION—TRIAL—NAUTICAL ASSESSORS.

In a collision case, there is no error in the district judge calling to his assistance a navigator of experience as nautical assessor.

2. SAME—BETWEEN STEAMERS—FOG.

The steamer *Fountain City* collided with the tug *Samson* on a starlight night, when there was considerable fog on the water, so that neither vessel was visible from the deck of the other. The captain of the steamer testified that he first heard one blast of the tug's whistle, about one point on the port bow, and answered it, indicating that the vessels would pass port to port. Next he heard three blasts from the same point, indicating that the tug had a tow; and he answered with a single blast, and ported his helm, to give her a wider berth. At this time the mate reported from the crosstrees that the tug was on the port beam. He then heard two blasts from the tug, and answered them, and starboarded his helm. Then the tug gave a single blast, which he answered, and stopped his engines; but in a moment the tug was discovered ahead, and the collision occurred. *Held* that, as the position of the tug was doubtful,—her whistle sounding ahead, and the steamer's mate reporting her abeam,—the steamer was in fault, for not reversing when the captain heard the double blast, indicating a change of the agreement to pass port to port.

3. SAME.

The steamer *Fountain City* collided with the tug *Samson* in the nighttime, when fog on the water made each invisible from the deck of the other. The tug's lookout on top of the pilot house discovered the steamer about one point on the starboard bow. The tug gave two blasts, which were answered by the steamer, and starboarded her helm a little. A second signal of two blasts was answered from the same quarter, but the tug's third signal was not answered; and, though her officers became uneasy at this, she kept on until the collision occurred. *Held*, that the tug was in fault, for not stopping and reversing when her signal was not answered.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio.

This was a libel for collision filed by C. E. Benham against the steamer Fountain City (the Western Transit Company, owner and claimant). There was a decree for libellant. Claimant appealed.

This was an appeal in admiralty. C. E. Benham, the owner of the steam-tug Samson, filed his libel in the district court for the northern district of Ohio against the steamship Fountain City, to recover damages for a collision. His libel averred that about 1:30 o'clock on the morning of the 10th of May, 1887, the Samson was proceeding under check, at the rate of not more than three or four miles an hour, from Ashtabula to Buffalo, in Lake Erie, off Long Point, in a fog; that the men in charge of the Samson heard the whistle of a steamer, which proved to be the Fountain City, and sighted her masthead light through the fog at a considerable distance ahead, and on the starboard bow of the Samson; that the Samson blew a passing signal of two blasts, which was answered by the Fountain City by a signal of two blasts, and that these signals of two blasts were repeated by each vessel; that the Samson then changed her course one point, and the vessels continued on their respective courses, which were taking them a wide distance apart, starboard to starboard; that, suddenly, the Fountain City violating the agreement thus established, swung rapidly to starboard on a hard a-port wheel, and, proceeding at a great speed, crossed the bows of the Samson at nearly a right angle; that, as soon as those in charge of the Samson saw this change in the course of the Fountain City, they caused the Samson's engines to be reversed, and took every possible precaution to prevent the collision; and that, notwithstanding this, the Fountain City's forward gangway, on the port side, struck the Samson's stem, and raked across it, breaking it entirely off at the water line, and twisting it around to the port side, damaging the apron, and causing the Samson to spring a leak. The faults charged to the Fountain City were those of keeping no proper watch, proceeding at the too high and reckless speed of 9 or 10 miles an hour in a fog, in changing her course as above stated, and in not stopping and reversing. The Western Transit Company appeared as claimant of the Fountain City, and made answer. The answer averred that just before the collision the Fountain City was proceeding slowly on a course S. W. by W. $\frac{1}{2}$ W., at a speed through the water not exceeding — miles per hour, when those on board of her heard one blast of a whistle from a direction a little off the port bow, indicating that the steamer which afterwards proved to be the Samson was on the port side of the Fountain City, and would pass her on the port side; that the night was clear and starlit overhead, with considerable fog on the water, which was sufficient to conceal the tug from those on board the Fountain City, and the wind was light and north; that the steamer answered with one blast of the whistle, to indicate that the signal of the tug was understood by her, and ported about one point, so as to give the tug a wide berth; that the tug then sounded three blasts of her whistle, indicating that she had a tow; that this was from about the same direction that the first signal was heard; that the steamer responded with one blast, and ported another point, which put her on a course of about due west; that the tug drew closer to the steamer; that the tug then sounded two blasts of her whistle, and the steamer answered immediately with two blasts, and put her wheel to starboard; that then the tug sounded one blast, and the steamer responded with one blast, and put her wheel to port, and stopped her engines; that the tug was then seen close to the steamer, and showed a bright and green light, and was apparently nearly broadside to the steamer, and standing up the lake; that thereupon the steamer's wheel was put hard a-port, and its engine was signaled to start ahead; that almost instantly, and before the steamer swung to starboard more than a point, the tug, rapidly swinging to starboard, ran into the steamer, and struck her a slight glancing blow on the port side, near the forward fender; that the steamer was immediately stopped, and the tug drifted back of the stern of the

steamer, and disappeared in the fog. The district judge called to his assistance a nautical assessor, and found that the Fountain City was in fault—First, in that her mate, who was sent to the crosstrees to observe the tug, carelessly misjudged her position, and entirely misled his captain; second, in that the Fountain City was proceeding at too great a speed; and, third, in that the captain failed to stop and reverse when the signals he heard from the tug, and the report of the mate as to her position, were so at variance. The commissioner reported \$965 damages, with interest thereon from the 1st of June, 1887; and a decree was entered for \$1,278.53, together with the costs of the action.

Hoyt & Dustin and Hermon A. Kelley, for appellant.

H. D. Goulder, for appellee.

Before TAFT and LURTON, Circuit Judges, and BARR, District Judge.

TAFT, Circuit Judge, after stating the case, delivered the opinion of the court.

It is assigned for error that the district judge called to his assistance a nautical assessor, who was a captain of long experience in sailing the lakes. It has been the practice in this circuit, and particularly in that court over which so experienced and able an admiralty judge as Mr. Justice Brown presided for nearly 20 years, for the district judge to call to his assistance navigators of experience as nautical assessors. It was based on the practice, followed by the English admiralty judges, of advising with the elder brethren of Trinity House as to practical questions of seamanship and navigation. It has been approved by the supreme court of the United States, and it is of such long continuance that it is too late now to question its validity. In *The Hypodame*, 6 Wall. 216–224, Mr. Justice Grier, in commenting on the weight to be given to the finding of facts by the district courts in admiralty cases, uses this language:

"The district courts have better opportunities for examining such cases, and forming a correct conclusion, than any other. They may examine witnesses *ore tenus*, and, although they may not have Trinity masters to assist them, yet, in difficult cases, depending on nautical experience, the judge may call to his aid experienced masters of vessels (as is done in one district at least), whose report will greatly assist the court in coming to a correct conclusion."

The district referred to by the learned justice was the eastern district of Pennsylvania, as shown by footnote. We think the practice an admirable one, and one well adapted to assist the trial judge in reaching the right conclusion in an admiralty case.

The collision in this case occurred four years before the evidence was taken, and it is not surprising that there is great confusion among the witnesses as to what occurred. The statement of the master of the Fountain City is that after hearing a signal of three blasts from the approaching steamtug, which was nearly ahead, and a little off the port bow, he received a report from the mate that the tug was abeam, on the port side, and going up the lake in the same direction with the Fountain City; that thereafter a blast of two signals was heard from the tug, still but a point off the port bow, which he answered with two blasts, putting his wheel to starboard; that then he heard one blast from the tug, to which he responded

with one blast, hard a-ported his wheel, and stopped his engines. The mate of the *Fountain City* says that he saw the lights of the tug on the port beam, and reported them to the captain after all the signals had been blown, and not before the signals of two whistles, as stated by the captain. On the captain's evidence, there is not the slightest question that he was guilty of a fault, in not stopping and reversing, after hearing from the mate that the tug was on his port beam, and hearing from the tug signals of two blasts off his port bow, and nearly ahead. We considered, in the case of the *North Star*, 62 Fed. 71, the duty of steam vessels, when approaching each other in a fog, under rule 21 of section 4233 of the Revised Statutes, and held that a proper construction of the rule requires a steam vessel approaching another in a fog so that the bearing of the other's whistle is ahead, or but one or two points off either bow, to stop and reverse until the course and position of the other vessel can be definitely ascertained, unless the circumstances known to those in charge of the first vessel are such as would justify, in a careful and skillful navigator, the confident belief that the position and courses of the vessels will make them pass each other well apart. If we accept the statement of the captain of the steamer, it is clear that the position of the tug with reference to his steamer was not definitely ascertained when he heard the report of his mate that the tug was on his port beam, and then heard her double blasts nearly dead ahead. He had then every reason to fear that if he proceeded there was danger of collision. It became his duty, therefore, to stop and reverse. If the mate's statement is true, the captain failed in his duty, in not reversing when he stopped his engines at hearing the one-blast whistle from the tug. The one-blast whistle was a change from the agreement established by the exchange of two signals to pass port to port, and necessitated a reversing of the helm of the *Fountain City*. The one-blast whistle of the tug sounded less than a point off the port bow of the steamer, and they were nearing each other, so that in a few moments thereafter the tug became visible to the steamer. A change from one side to the other, with the tug but two or three minutes away, was obviously fraught with danger. It was clearly the duty of the captain, under these circumstances, not only to stop, but to reverse. Had he done so, there would have been no collision.

The argument is pressed upon us by counsel for appellant that the positions of the two vessels, at the time the one-signal blasts were said to have been exchanged, were those of vessels whose courses crossed, and that, by the rules prescribed by the board of inspectors of steam vessels for navigation, it was the duty of the *Samson* to port her wheel, and go under the stern of the *Fountain City*, while it was the duty of the *Fountain City* to keep her course or port her helm, if necessary to avoid collision, and that she had no right, therefore, to reverse. We think the rules referred to have no application to the situation of these two vessels, in a fog, and so near together, when neither knew the course or exact position of the other. But if they have

application the Fountain City was at fault, in not keeping her course, instead of stopping. *The Britannia v. Cleugh* (decided by the supreme court April 23, 1894) 14 Sup. Ct. 795; *The Northfield v. The Hunter*, 4 Ben. 112, Fed. Cas. No. 10,326. She should have done one thing or the other. She should have treated the situation as that of vessels in a fog approaching each other nearly head on, or as that of vessels whose courses were crossing, with the duty upon the tug to keep out of the way, and of the Fountain City to keep her course. The Fountain City did not follow the rules prescribed for either situation.

We fully concur with the district judge in his conclusion that the Fountain City was at fault in this collision, and that her fault was a contributing cause thereof; but we differ with the district judge in his conclusion that the tug was without fault, and we reach this result from the statements of the men upon the Samson. Their evidence is that, as their vessel was proceeding down the lake, they heard the whistle of the Fountain City, 10 or 15 minutes before the collision; that a lookout was sent up to the top of the pilot house, and through the mist, far above the water, caught a glimpse of the masthead light of the Fountain City, less than a point off their starboard bow; that the Samson then blew two blasts, which were answered by two from the Fountain City, still but a little off the starboard bow; that the Samson starboarded her helm a point, and then blew another blast of two whistles, which the Fountain City answered, still off the starboard bow, and widening a little; that then the Samson blew a third blast of two whistles, which was not answered, and that she starboarded another point, and kept right along under a slow check; and that a few minutes after her third signal she saw first the masthead light, and then the red light, of the Fountain City, less than a point off her starboard bow, swinging under what appeared to be a hard-a-port wheel across her bow. We think it very evident, from the testimony of the mate in charge of the tug, and her captain, who was in his room, and of her lookout, that the failure of the Fountain City to answer the third double blast, properly caused all who noticed it anxiety and alarm as to what the Fountain City was doing, where her exact position was, and what her course was. The mate was asked:

"How long after the third signal was it that you saw the masthead light of the Fountain City? A. Shortly afterwards. Q. How long would you say? Five minutes? A. A couple of minutes, probably. Q. That last signal, you say, you did not hear any response to? A. They never answered me but twice. Q. You never heard any blast or signal from the Fountain City after your second signal was blown,—after he replied to your second signal? A. No, sir. Q. When was it that you stopped the engine,—before or after you saw the masthead light? A. I stopped the engine just when I saw his masthead light."

The lookout said:

"We had already blown two whistles, and we got two from the Fountain City. We ran on for about a minute or two, and our mate blew two whistles, and we got two back. Q. Where did they bear? A. Off on our starboard bow. We went on a little while longer, and blew two, and we didn't get any from the Fountain City. Q. Go ahead. A. Well, then I heard the mate

say to the man at the wheel, 'Starboard half a point.' Before the man had starboarded her he said, 'Let her go a point.' So we ran along, and I was down forward at the time."

The captain of the tug was in his room, off duty. His evidence was as follows:

"Q. Now will you tell the court—starting with the time of your hearing two blasts blown on your whistle, and two blasts answered by some other vessel—all you know about the collision? A. Well, I think I heard the signal answered twice, if I remember right, and then I heard us give another signal; and it was not replied to, and I got out on deck. Q. What signal? A. Passing signal. Q. How many blasts? A. Two blasts. I did not hear it answered, and I came out on deck. Q. I wish you would, in your own mind, go right back there to your coming on deck, and tell the court how you came on deck? A. I came out of the door, which was on the port side, and walked forward only a short distance before I asked the mate, 'What is the trouble?' He says, 'There is a boat across our bow.' With that, I saw the outline of the boat in the fog myself."

On cross-examination he said, in answer to the question:

"Q. How long would you say that it was between the time of the last signal of two blasts and the boats coming together? A. Well, it might have been two and three minutes. Q. How long after that last signal was given were you on deck? A. As soon as I could get out there. It did not take a great while. Q. Had you taken your clothes off? A. Yes, sir; I did not wait to dress when I went on deck."

The lookout also says that the captain came running on to the deck.

It is very clear from this evidence that the failure of the Fountain City to reply to the third signal carried doubt as to her course to the minds of the mate, the captain, and the lookout. Counsel for appellee admits in his brief that there was then uneasiness on the part of those navigating the tug as to where the Fountain City was, and what she was doing. That uneasiness was born of uncertainty, and uncertainty in a fog, when the vessels are so close together, imperatively requires that they shall stop and reverse. A minute—perhaps two minutes—would have been gained, had the tug, instead of starboarding, stopped and reversed, when the Fountain City failed to answer. This would certainly have prevented the collision, because, as it was, the steamer struck the tug but a grazing blow. We think, therefore, that both vessels were at fault. We shall therefore enter a decree in this court dividing the damages found between the two vessels, and dividing the costs of the court below and of the appeal.

THE DECATUR H. MILLER.

HITCH v. MERCHANTS' & MINERS' TRANSP. CO.

MERCHANTS' & MINERS' TRANSP. CO. v. HITCH.

(Circuit Court of Appeals, Fourth Circuit. May 22, 1894.)

No. 62.

1 COLLISION BETWEEN STEAMERS—LIGHTS—EVIDENCE.

The steam barge *Susie Hitch*, while on her voyage up Chesapeake bay, about 7 o'clock in the evening, was struck and sunk by the steamship

Decatur H. Miller. When sighted by the Hitch, the Miller was about five minutes away, on the starboard bow, showing her green light. The Hitch blew two blasts of her whistle, and starboarded her helm. Hearing no response, she blew two more blasts. The Miller then shut out her green, and showed her red light, blew one blast, and at once came into the Hitch. The Hitch's side lights were set at 6 o'clock; were burning brightly at half past 6. Witnesses for the Miller testified that they saw no lights on the Hitch; but her mate testified in the circuit court that he saw them burning five minutes before the collision. In his testimony in the district court, he did not fix the interval between the time he saw the lights and the collision within half an hour; but, in the protest made immediately after the accident, it was stated that he saw the lights five minutes before the collision. *Held*, that the Hitch was not in fault. Jackson, District Judge, dissenting.

2. **SAME.**

The steamship Decatur H. Miller, bound down Chesapeake bay about 7 o'clock in the evening in October, struck and sunk the steam barge Susie Hitch. The Miller, when sighted by the Hitch, about five minutes before the collision, was in Craighill channel, headed southeast by east, her proper course. The Hitch was off her starboard bow, in shoal water. Witnesses on the Miller testified that they saw no lights on the Hitch, and heard no blasts from her whistle. When the collision occurred, the vessels were in less than three fathoms of water, out of the channel, and the Miller was headed west, so that she would shortly have gone aground. *Held*, that the Miller was in fault.

Appeal from the Circuit Court of the United States for the District of Maryland.

John H. Thomas, for Hitch.

Wm. Pinkney Whyte, for the Decatur H. Miller.

Before GOFF and SIMONTON, Circuit Judges, and JACKSON, District Judge.

SIMONTON, Circuit Judge. These are an appeal and cross appeal from the decree of the circuit court of the United States for the district of Maryland in a cause of collision. The case was heard in the district court, and his honor, the district judge, holding both parties in fault, divided the damages. An appeal was taken to the circuit court, where further testimony was adduced, and a pro forma decree was entered, concurring in the finding of the district court, from which appeals were taken to this court.

The libellant is the owner of a steam barge called the Susie Hitch. This steam barge plies between Hamilton, N. C., and the port of Baltimore, engaged principally in transporting lumber. She is 168 feet in length over all, 22½-feet beam, with a 6-foot hold. Her pilot house, 11 feet wide, is 115 feet from her stem. The boxes for her side lights were on each side of the after part of the pilot house, the inboard screen being 4 feet, leaving 3 feet clear. On the evening of the 11th of October, 1888, the Susie Hitch was on her voyage from Hamilton to Baltimore, and was proceeding up Chesapeake bay, moving at the rate of 2½ to 3 miles an hour, with the wind dead ahead and high, the sea rough. The tide was about slack-water ebb. She was a half or three-quarters of a mile below Sandy Point light, out of and west of the channel in shoal water, when she came in collision with the Decatur H. Miller, a large passenger steamer

on the regular line between Baltimore and Norfolk, on her regular voyage to the last-named city. The Miller was going at the rate of 10 miles an hour, her usual speed. She struck the Susie Hitch with her bow on the starboard side about 30 feet from her stem, penetrating about 8 or 9 feet, cutting through a bulk of 5,000 feet of lumber, and into a longitudinal bulkhead. The Susie Hitch was supplied with lights,—one masthead light, bow light, back aft light, all of which were white, and the side lights green and red. She had made frequent voyages up and down Chesapeake bay, and navigators on other vessels in that bay had frequently observed her lights without difficulty. The side lights were six by eight globes, which had been inspected and passed by the local inspectors, and which are still in use. The duty of trimming and caring for them devolved upon one man of the crew, and he took them down, trimmed them, and put them up every day. On the day of the collision, he trimmed these lights, and cleaned the glasses, between 1 and 2 o'clock. Aided by another of the crew, who testifies also, he put them up about 6 o'clock, lighted them, and saw that they were then burning brightly and were in good order, and so left them. The master saw them a half hour afterwards, and they were burning brightly and seemed in good order. The mate of the Susie Hitch, a licensed pilot of the Chesapeake bay, saw the lights within five minutes before the collision, and they were in good order. This man had been examined before the district judge, but he did not fix the interval between his observation of the lights and the collision within a half hour. This was one of the grounds on which the district judge held the Hitch in fault. The witness was recalled before the circuit court, and then he fixed the interval within five minutes. Ordinarily, this testimony, introduced under these circumstances, would be open to grave suspicion, and would be disregarded. But the protest of the master and crew made upon arrival in Baltimore immediately after the collision makes the statement that the mate saw the lights within five minutes before the collision and found them bright and burning. This shows that the testimony before the circuit court was not an afterthought. All the witnesses on the Miller—the mate, quartermaster, and lookout—swear that just previous to the collision these lights on the Hitch were not in fact burning; that they never saw any red or green lights on her at all. This may be so. It is possible that the lights, or at least the green light, may have gone out after the mate had examined it. It was on the weather side of the barge, and the night was rainy. But we are examining into the negligence of those on the barge, and ascertaining if they were in fault. If they had seen to it that the lights were bright, burning, and in order when put up at 6 o'clock, were in good order likewise at half past 6, and were in like good order at a few minutes after 7, within 5 minutes of the collision, surely it would be holding them to too strict an accountability if we say that they were in fault for not knowing that they were not burning within those few minutes. We are of the opinion that the testimony introduced before the circuit court removed the difficulty experienced by the district judge as to the lights, and that these lights either were burning at

the time of the collision, or had gone out just before the collision, without fault on the part of the Susie Hitch. When the Miller was first seen by the Susie Hitch, the latter was a little below Sandy Point. The Miller was showing her green light and masthead light, and was off the starboard bow of the Hitch. She was apparently coming out of the Craighill channel, and was about three-quarters of a mile off, less than five minutes away. At that point the Hitch blew two blasts of her whistle. As the Miller was to the windward in a strong wind, these were not heard on her. The Hitch then starboarded her wheel. Hearing no response, she blew two more blasts, to which no reply was made. Up to this time the Miller showed only her green light. Suddenly she shut out her green light, showed her red light, blew one blast of her whistle, and immediately came into the Susie Hitch. Now, when the Susie Hitch saw the green light of the Miller off her starboard bow, and her helmsman had, as we have seen, every reason to believe that the barge was showing to the steamship her green light, she naturally supposed that the two vessels could pass without collision. Starboarding her wheel threw the bow of the Hitch more to port, and so obviated any liability to error or confusion. See order in council adopted 30th July, 1868, commented on by Judge Brown in *The Manitoba*, 2 Flip. 241, Fed. Cas. No. 9,029; followed in *New York* in *The Sylvester Hale*, 6 Ben. 523, Fed. Cas. No. 13,712, and *The America*, 3 Ben. 424, Fed. Cas. No. 281; and finally adopted by congress 19th August, 1890 (26 Stat. 322).

As the persons on the Miller in control of her navigation say that they did not hear the two blasts of the Hitch or see her colored lights, they were not mislead by her maneuvers. We cannot concur in the conclusion reached by the district judge, affirmed pro forma by the circuit court; and, under the special circumstances of this case, we hold that the Susie Hitch was without fault. We concur in the decree of the circuit court confirming the finding of the district court that the Decatur H. Miller was in fault. She drew 16 feet aft and 14 feet forward, and was in the channel. The Susie Hitch drew 6 feet, and was in shoal water. The Miller went towards and came into collision with her at a point over a half mile from the channel, in water $2\frac{1}{2}$ fathoms in depth. The true course of the Miller, and the course she was on just before the collision, was down the channel southeast by east. When she struck the Susie Hitch, her course was nearly due west, heading on to the western shore, "which she would have struck had she gone where she was going." These facts, with those stated by the district judge, show that the Decatur H. Miller was in fault.

It is ordered that so much of the circuit decree holding the libellant responsible for half the damages and costs be reversed; that the case be remanded to the circuit court, with instructions to enter a decree against the stipulators of the Decatur H. Miller in the full amount of the damages and costs found in the circuit decree.

JACKSON, District Judge (dissenting). I cannot agree with the conclusions of the court in this case. The evidence before the

district court satisfied his honor, the judge, that it was a case of mutual fault. I deem it unnecessary to enter upon a full discussion of the evidence, as the case turns upon the fact whether the steamer *Susie Hitch* had her side lights burning previous to the disaster, and, if so, how long before the collision occurred. On the hearing before the district court there was no evidence that showed that the lights were burning at the time of, or shortly before the collision. After the decision of the district judge, the mate of the *Hitch* was recalled, and testified before the circuit court that he saw the lights burning about five minutes before the collision. I place but little reliance upon the statement made by this witness, as he knew at that time that it was one of the reasons assigned by the district judge for holding the *Hitch* in fault. There is but little, if in fact any, difference in the weight of evidence on this point. Some consideration is given to the fact that the protest stated that the lights of the *Hitch* were burning at the time of the collision. I think that fact is of little consequence, as we find from experience that all protests, when it is deemed essential, contain that most important fact. If the lights were burning so that the *Miller* could see them, and still she steamed directly on until the collision occurred, she would be guilty, not only of gross, but of criminal, negligence. She could not have seen the lights. It is impossible to believe that the officers in charge of a large steamer of her size would run a boat down under the circumstances claimed by the libellant in this case. There was no apparent motive for such conduct, and, before we should judge the *Miller* to be wholly in fault, we must find, not only that there was no negligence upon the part of the *Hitch*, but that the officers of the *Miller*, seeing all the lights burning on the *Hitch*, heedlessly and needlessly produced the collision. This conclusion can only be reached after we are satisfied that there was no motive for self-preservation, or that there existed some malice on the part of the officers of the *Miller* against the officers or owners of the *Hitch*. The law of self-preservation always exists, and there is no evidence of malice.

It is claimed by the *Hitch* that the *Miller* was out of the usual track for steam vessels of her size. This fact may be conceded, but it is not of itself a fault, and does not amount to even contributory negligence. I know of no law that restricts her in her right to pursue any route up and down the bay that she thinks will best promote her interest. There is really but one solution to this case, and that is to hold both responsible. I cannot believe the lights were burning. It is simply the old case of each crew standing by their boat, with no controlling circumstance to determine who is right or wrong. It is a rule of the courts of admiralty, in collision cases, founded not only on their experience, but upon justice, that, when the evidence is so conflicting as to render it uncertain as to who was at fault, to divide the loss between the parties. For the reasons assigned, I am of opinion to affirm the decree of the district court.

IMPERIAL LIFE INS. CO. v. NEWCOMB.¹

NEWCOMB v. IMPERIAL LIFE INS. CO.

(Circuit Court of Appeals, Eighth Circuit. May 7, 1894.)

Nos. 343 and 369.

APPEAL—OBJECTIONS NOT RAISED BELOW—TRIAL BY REFEREE.

On writ of error to review a judgment entered on a referee's report in an action at law, where there is no written stipulation waiving a jury, and nothing showing a reference under the state statute, and where there is no bill of exceptions, and no specific exception was taken to the overruling of exceptions to the referee's report, or to the judgment thereon at the time it was entered, although these rulings were assigned as grounds of a motion for a new trial, no question is presented for review.

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

This was an action by Charles M. Newcomb against the Imperial Life Insurance Company for services and expenses. A demurrer to the complaint was overruled. 51 Fed. 725. On trial before a referee, he reported in favor of plaintiff. Exceptions to the report were overruled, and judgment for plaintiff was entered thereon. Both parties brought error.

Hiram J. Grover, for plaintiff, Newcomb.

Charles Nagel and Charles W. Bates, for defendant, Imperial Life Ins. Co.

Before CALDWELL and SANBORN, Circuit Judges.

CALDWELL, Circuit Judge. The defendant in error brought suit in the circuit court of the United States for the eastern district of Missouri, against the plaintiff in error, to recover \$11,466.66 upon a quantum meruit for his services and expenses while acting as an insurance agent for the plaintiff in error.

The contract between the parties was evidenced by three written agreements, which the plaintiff below averred the defendant had wrongfully terminated. A general demurrer to the complaint was overruled, and thereupon the defendant answered the merits, and the plaintiff filed a reply. We think the demurrer to the complaint was properly overruled, for the reasons stated in the opinion of the circuit court. *Newcomb v. Insurance Co.*, 51 Fed. 725. Moreover it is the settled doctrine of the supreme court that filing a plea to the merits after the demurrer is overruled is a waiver of the demurrer. *Stanton v. Embrey*, 93 U. S. 548; *Campbell v. Wilcox*, 10 Wall. 421; *Railroad Co. v. Washington*, 4 U. S. App. 121, 1 C. C. A. 286, and 49 Fed. 347; *Jones v. Terry*, 43 Ark. 230.

In the view we take of the case, the contracts between the parties and the facts in the case, so far as they are disclosed by the record, need not be further noticed. The cause being at issue, the court made the following order:

"Now comes the defendant, by attorney, and moves the court for an order of reference of this cause, upon consideration whereof it is ordered that said motion be, and the same is hereby, sustained, and that this cause be referred to a referee to hear and determine all of the issues therein."

¹A motion for rehearing in this case denied September 10, 1894. See 63 Fed. —.

The referee heard the case, and made a report recommending that a judgment be rendered in favor of plaintiff, and against the defendant, for the sum of \$3,585.67; and judgment was rendered accordingly, and both parties have brought error. Exceptions were filed by both parties to the referee's report, which the record shows were disposed of as follows:

"And, thereupon, on the 18th day of April, 1893, the court overruled each and all of said exceptions, and approved said report, and rendered judgment as in said report recommended; whereupon, and on April 21, 1893, plaintiff and defendant each filed his motion for a new trial and to set aside the judgment."

There was no written agreement of the parties to waive a jury or to refer the cause to a referee. It was referred on the motion of the defendant, for some reason not disclosed by the record. The evidence upon which the referee based his finding is not in the record. As there is no allusion in the order of reference to the Missouri statute, and no consent of the parties, in writing, as provided by section 2137, and no finding that the case was one coming under the provisions of section 2138 of that statute, it would seem that the reference should be regarded as a common-law reference, and not as a reference under the statute of the state regulating references. *Investment Co. v. Hughes*, 124 U. S. 157, 8 Sup. Ct. 377; *Dietz v. Lymier* (at the present term of this court) 61 Fed. 792.

The record does not disclose a single exception taken by either party to any ruling made by the court in the progress of the trial; nor was any exception taken to the ruling of the court overruling the exceptions to the referee's report, nor to the rendition of the judgment. These rulings were assigned as grounds for a new trial, but exceptions cannot be saved by stating them for the first time in a motion for a new trial, the overruling of which cannot be assigned for error.

We have looked into the report of the referee, and do not think it subject to any just exception; but, if the fact were otherwise, the result must be the same; for there being no written stipulation of the parties waiving a jury, and the record not containing the evidence, and no specific exception having been taken to the order overruling the exceptions to the referee's report, and no exception taken to the judgment at the time it was entered, the case comes within the rule laid down in the cases heretofore cited. There is no question presented by the record which we can review, and the presumption in favor of the regularity and rightfulness of the proceedings of the circuit court must prevail.

By written stipulation of the parties, this cause was brought into this court by both parties on one and the same bill of exceptions and record, and the costs of said appeals will therefore be equally divided between them.

The judgment of the circuit court is affirmed.

BACON et al. v. HARRIS et al.

(Circuit Court, N. D. Iowa, W. D. June 18, 1894.)

1. COURTS—CONFLICTING STATE AND FEDERAL JURISDICTION.

The appointment by a state court of a receiver of the property of an insolvent bank does not prevent a federal court from entertaining a suit to set aside conveyances to the bank, as void as against the grantor's judgment creditors; nor does the sale by the receiver of the property so conveyed, made after such suit is brought, and the possession by the state court of the proceeds of such sale, defeat the jurisdiction of the federal court over the respective rights of such creditors and the bank, although it may affect the nature and extent of the remedy.

2. FEDERAL COURTS—CREDITOR'S SUIT ON JUDGMENT OF STATE COURT.

A creditor's suit may be maintained in a federal court, of otherwise competent jurisdiction, on a judgment at law of a state court sitting in the same state and return of execution thereon unsatisfied.

3. ESTOPPEL—CONCEALMENT OF CONVEYANCE BY DEBTOR.

A creditor who unites with his debtor in concealing the fact of indebtedness and the existence of a bill of sale or mortgage to secure it, to enable the debtor to obtain on credit money or property from third persons, may be estopped from asserting his lien or claim when necessary to protect innocent third persons from being defrauded of debts due them, created in the belief that no indebtedness to the party sought to be estopped existed; and such estoppel extends to an assignee of such party for benefit of creditors, he not being an innocent purchaser for value, and is not obviated by his securing a new bill of sale, no consideration therefor being satisfactorily shown.

This was a suit by Bacon and others against A. W. Harris and others, to set aside certain bills of sale as being void against creditors. Submitted on pleadings and proofs.

Park & Odell, for complainants.

O. J. Clark and Swan; Lawrence & Swan, for defendants.

SHIRAS, District Judge. The facts in this case, as gathered from the evidence, appear to be as follows: At and previous to the year 1886, A. W. Harris was engaged in the business of buying and shipping grain at Manley, Iowa, and subsequently at Sibley and other points in northwestern Iowa. In 1886 he associated with himself a partner named Kunsdon, and the business was conducted under the firm name of Harris, Kunsdon & Co. until in April, 1889, when Harris bought out the interest of Kunsdon in the firm, and in the same month he admitted as partners J. W. Orde and R. A. Harbord, who were then the cashier and president of the Sibley Exchange Bank, the business being done under the firm name of A. W. Harris & Co. until the spring of 1891, when said Orde and Harbord withdrew from the firm, the business thereafter being conducted by A. W. Harris, under the name of A. W. Harris & Co., until April 6, 1893, when he failed and suspended business, having at the time elevators or warehouses at Sibley, Archer Grove, and Ocheyedan, in Iowa. During this time, the complainants, who were commission merchants, residing at Milwaukee, Wis., had from time to time advanced money to said Harris and his partners to be used by them in the purchase of grain; and on the 6th day of April, 1893, when Harris finally suspended,

there was due to complainants from him the sum of \$2,617.87, for which amount Harris confessed judgment in favor of complainants in the district court of Osceola county, Iowa, under date of May 12, 1893, in accordance with the provisions of the Code of Iowa, and, judgment having been duly entered up, execution thereon was issued to the sheriff of Osceola county, and by him returned unsatisfied. It further appears that the Sibley Exchange Bank was merged into the Northwestern State Bank of Sibley at some time prior to April, 1891, the exact date not appearing in the evidence; and on the 6th day of April, 1893, said bank suspended payment, and made an assignment of its property to H. E. Thayer. On the 11th day of April, 1893, the attorney general of the state of Iowa filed a petition in the name of the state, against said bank, in the district court of Osceola county, asking the appointment of a receiver to take charge of the property of the bank, and wind up its affairs; and on the 18th day of April an order was entered appointing H. E. Thayer a receiver, and authorizing him to take possession of the assets of said bank. It further appears that, about the time J. W. Orde and R. A. Harbord withdrew from the firm of A. W. Harris & Co.,—that is to say, in the month of April, 1891,—A. W. Harris executed and delivered to the Northwestern State Bank of Sibley a bill of sale, in the nature of a mortgage, for the sum of \$25,000, conveying the steam elevator, appurtenances, furniture, coal house, etc., owned by said Harris at Sibley, Iowa; also the grain warehouse and appurtenances at Sibley; also elevator, appurtenances and coal house at Ochevedan; also one-half interest in warehouse at Harris; also warehouse and appurtenances at Archer Grove, Iowa. This mortgage or bill of sale was not filed for record by the bank until the time when the bank suspended payment, in April, 1893, when it was recorded. The property remained in the possession and under the control of A. W. Harris until April 7, 1893. On that day H. E. Thayer procured the execution by A. W. Harris of two bills of sale, covering the elevators, warehouses, fixtures, furniture, and grain owned by said Harris and located at Sibley, Ochevedan, and Archer Grove, it being the intent to cover by said bills all the property of said Harris at these places, the same constituting practically all the assets then owned by him. Thayer testifies that when he procured the execution of these bills of sale, he had no knowledge of the existence of the bill of sale previously executed to the bank, of which he was assignee. After the appointment of Thayer as receiver, he sold the greater portion of the property covered by the bills of sale executed by Harris, and reported the same to the district court of Osceola county, by which court the sales thus made were approved. On the 16th day of May, 1893, the complainants filed the bill in the present case, whereby they seek to set aside the bill of sale executed to Thayer, assignee, by A. W. Harris, on the ground that the Northwestern State Bank is estopped from asserting the existence of any indebtedness to it from Harris, as against complainants; that the said bank actively aided A. W. Harris in obtaining credit with complainants, and the advancement of moneys

from time to time, by concealing the fact of the existence of the indebtedness to the bank, and the giving of a mortgage to secure the same.

The first question presented by the answer of Thayer, receiver, is as to the jurisdiction of the court, it being averred that the state court, having jurisdiction of the receiver and the property in his hands, has exclusive jurisdiction over all questions connected with the settlement of the affairs of the insolvent bank. It will be borne in mind that the real question at issue is between two creditors of A. W. Harris, as to their rights and equities in his assets. The state court has not jurisdiction over his estate, as he has not made an assignment, nor has a receiver of his property been appointed. The ultimate question of issue is whether the bills of sale of the property of A. W. Harris executed to Thayer, as assignee of the Northwestern State Bank, are valid or invalid as against the claim and judgment of the complainants. The appointment of a receiver by the state court of the property of the bank did not confer upon that court jurisdiction over the estate or property of A. W. Harris. When the bill in this case was filed, the property covered by the bills of sale had not been sold or converted into money, and the purpose of the bill was to obtain a decree adjudging these conveyances to be void as against the debt due complainants, and thus enabling complainants to secure a levy of execution upon the property. If the property had not been sold, no reason exists why this court could not have proceeded to determine the question of the validity of the bills of sale executed by Harris, and the fact that the receiver has seen fit to sell the property during the pendency of this suit does not defeat the pre-existing jurisdiction. Even if it be true that the possession of the property, or the money which now represents it, is with the state court, that does not defeat the jurisdiction of this court over the respective equities and rights of the complainants and the bank, although it may affect the nature and extent of the remedy which can be granted.

Objection to the jurisdiction of this court is further made upon the grounds that the courts of the United States, sitting in equity, cannot give aid to the enforcement of judgments at law rendered in a state court. In *Taylor v. Bowker*, 111 U. S. 110, 4 Sup. Ct. 397, a bill was filed in the United States circuit court for the district of Maine, for the purpose of enforcing the collection of a judgment rendered in a court of the state of Maine; and the relief prayed for was granted. In *Tube-Works Co. v. Ballou*, 146 U. S. 517, 13 Sup. Ct. 165, it is said:

"Where it is sought by equitable process to reach equitable interests of a debtor, the bill, unless otherwise provided by statute, must set forth a judgment in the jurisdiction where the suit in equity is brought, the issuing of an execution thereon, and its return unsatisfied, or must make allegations showing that it is impossible to obtain such a judgment in any court within such jurisdiction."

The decision in that case was that a judgment in the state of Connecticut would not support the proceedings in equity in the

state of New York, but, if I correctly interpret the ruling, it is to the effect that a judgment at law in any court, state or federal, in the jurisdiction in which the proceeding in equity is brought in the federal court, will meet the requirements of the rule that a party must exhaust his remedy at law before he can invoke the aid of a court of equity. The main reasons underlying the proposition that in the courts of the United States a bill in equity will not be sustained in favor of one who is only a general creditor, and whose claim is unliquidated, are twofold: First, because the fact of the existence of a just claim in favor of the creditor must be established by a judgment at law, or otherwise the debtor is deprived of his constitutional right to a trial by jury; and, second, because it must appear that the creditor cannot collect his claim at law before he can invoke the aid of a court of equity, which is not primarily a court for the collection of debts. It is the latter reason that requires the obtaining a judgment in the jurisdiction wherein the aid of a court of equity is invoked as a prerequisite thereto. A judgment rendered in any court of competent jurisdiction would be sufficient evidence of the existence and amount of the claim; but the rendition of a judgment in one state, and a return of execution unsatisfied, would only show that the judgment debtor did not have property in that state, and would not be evidence that he might not have property open to levy in other states. For illustration, a judgment rendered in the state of Nebraska, and a return of execution unsatisfied, is evidence showing the judgment at law cannot be collected in that state, but it is not evidence that the debtor has not ample property in the state of Iowa which may be reached by execution. Hence the need for obtaining judgment within the jurisdiction wherein the aid of the court of equity is invoked, and, by return of execution unsatisfied, proving the need of equitable aid. This proof, however, may be furnished as well by means of a judgment in the state court as by a judgment in the federal court, for the process by execution is as effective in the one court as in the other; and therefore, if a party has obtained judgment in a state court, and has issued execution, without being able to enforce payment thereof, he is entitled, upon return of the execution unsatisfied, to invoke the aid of a court of equity, either state or federal, sitting in the same state, or otherwise competent jurisdiction, for the enforcement of his rights; and therefore, if the amount involved is sufficient, and the citizenship of the adversary parties is diverse, he may file a bill in a court of the United States for the purpose of attacking conveyances of property which prevent the levy of an execution in the law action. I therefore hold that this court has jurisdiction in the present proceeding, and the question for determination is whether the complainants are entitled to estop the Northwestern Bank and its receiver from asserting the validity of their claim to the assets of Harris, which were described in the bills of sale executed under date of April 7, 1893.

According to the general principles that sustain the doctrine of estoppel by conduct, it seems clear that a creditor who unites with his debtor in concealing the fact of the indebtedness to him, and of

the existence of a mortgage or bill of sale to secure the same, this being done to give the debtor a credit which he could not have if the truth were known, and to enable the debtor to obtain on credit money or property from third parties, may be estopped from asserting his claim or lien, when such estoppel is necessary to protect innocent third parties from being defrauded out of the collection of the debts due them, and which were created in the belief that no lien or indebtedness existed in favor of the party sought to be estopped.

In *Blennerhassett v. Sherman*, 105 U. S. 100, it was held by the supreme court that:

"Where a mortgagee, knowing that his mortgagor is insolvent, for the purpose of giving him a fictitious credit, actively conceals the mortgage which covers his entire estate and withholds it from the record, and, while so concealing it, represents the mortgagor as having a large estate and unlimited credit, and by these means others are induced to give him credit, and he fails, and is unable to pay the debts thus contracted, the mortgage will be declared fraudulent and void at common law, whether the motive of the mortgagee be gain to himself or advantage to his mortgagor."

In the course of the opinion, the supreme court cited approvingly the following cases, to wit:

Hungerford v. Earle, 2 Vern. 261, wherein it was held that:

"A deed not at first fraudulent may afterwards become so by being concealed or not pursued, by which means creditors are drawn in to lend their money."

Also *Coates v. Gerlash*, 44 Pa. St. 43, wherein it is said:

"There is another aspect of the case, not at all favorable to the wife. It is that she withheld the deed of her husband from record until December 2, 1857. In asking that a deed void at law should be sustained in equity, she is met with the fact that she asserted no right under it, in fact concealed its existence, until after her husband had contracted the debts against which she now seeks to set it up. There appears to have been no abandonment of possession by her husband. Even if the deed was delivered on the day of its date, the supineness of the wife gave to the husband a false credit, and equity will not aid her at the expense of those who have been misled by her laches."

Also *Hilliard v. Cagle*, 46 Miss. 309, wherein the principal circumstance relied on to avoid a deed of trust was the fact that the grantor retained possession of the property, and the deed was withheld from record, and the mortgagor was enabled to contract debts upon the presumption that the property was unincumbered, the court declaring:

"That the natural and logical effect of the agreement and assignment, and the conduct of the parties thereto, was to mislead and deceive the public, and induce credit to be given to the mortgagor which he could not have obtained if the truth had been known; and therefore the whole scheme was fraudulent as to subsequent creditors, as much so as if it had been contrived from that motive and for that object."

Also *Gill v. Griffith*, 2 Md. Ch. 270, wherein it was held that a party cannot be permitted to take a bill of sale or mortgage of chattels from another for his own security, leave the mortgagor in possession and ostensibly the owner, and at his request, and to keep the public from a knowledge of its existence, withhold it from the record an indefinite period, renewing it periodically, and then re-

ceive the benefit of it by placing the last renewal upon record, to the prejudice of others whom the possession of that very property by the mortgagor has induced to confide in him.

Also *Hafner v. Irwin*, 1 Ired. 490, wherein a deed of trust was withheld from record, and was therefore held void as against creditors.

Also *Neslin v. Wells*, 104 U. S. 428, wherein a mortgage was given to secure part of the purchase money, and it was held that the failure to record the same "constituted such negligence and laches as in equity requires that the loss which in consequence thereof must fall on one of the two shall be borne by him through whose fault it was occasioned."

This question has been recently considered by the supreme court of Iowa, in the case of *Goll & Frank Co. v. Miller*, 54 N. W. 443, wherein the facts are very similar to those in the case at bar. It therein appeared that one Miller had at different times executed chattel mortgages upon his stock in trade to J. L. Nicodemus. These mortgages were not recorded. On the 16th day of June, 1890, Miller executed a bill of sale of his stock to Nicodemus, who took possession of the property. Subsequently, other creditors filed a bill in equity, averring that they were entitled to priority over Nicodemus, by reason of the fact that he had withheld the previous mortgages from record, thereby misleading them into giving credit to Miller. After stating the facts, the court said:

"It is charged that the withholding of the mortgages from record was a fraud as to the plaintiffs, and this is the principal question in the case. There can be no doubt that the withholding of the mortgages from record, in pursuance of an agreement between the parties, could have but one object, and that was to maintain the credit of Miller, and lead parties with whom he dealt to give credit to him, in the belief that he was not a chattel-mortgage merchant. In such a case it is well settled that the mortgagee cannot be permitted to insist on the validity of his mortgage, as against those who have given credit to the mortgagor under such circumstances. Such a transaction is fraudulent as to the other creditors. * * * There are several grounds upon which it is claimed by counsel for the defendant that the rule above announced should not be applied to this case. The principal contention turns upon the alleged fact that the taking of the bill of sale on the 16th day of June was an entirely new transaction; that the debt to Nicodemus was an honest obligation; and that, being a bona fide creditor, he had a right to secure his claim, even if it resulted in the bankruptcy of Miller. This is true if the bill of sale was the only act of Nicodemus which prevented the plaintiffs from securing their claims. But the bills of sale could not purge the several mortgages of their fraudulent character. The mischief was done by withholding the mortgages from the record. It is fair to presume that, if the mortgages had been placed on record, the plaintiffs would not have been creditors of Miller."

The conclusion reached was that, upon the facts of the case, it must be held that the bill of sale was void as against creditors who had been misled by the failure to record the pre-existing chattel mortgages.

The principles thus announced by the supreme court of Iowa and the supreme court of the United States are decisive of the case now before the court. The evidence shows that J. W. Orde and R. A. Harbord, who were the president and cashier of the

private bank known as the Exchange Bank of Sibley, became partners in the grain business carried on under the name of A. W. Harris & Co. The Exchange Bank was merged into the Northwestern State Bank, J. W. Orde being president and R. A. Harbord cashier thereof. In April, 1891, a bill of sale, in the nature of a chattel mortgage, was executed and delivered to the Northwestern State Bank, which covered substantially all the partnership property. The mortgage was not recorded until April 6, 1893. The reason why it was so withheld from record could have been no other than the one given by Harris in his statement to the agent of complainants, in which he stated that it was withheld from the record because it would hurt his credit if it was filed, and the bank assented to his request not to record it. Having thus aided Harris in obtaining a false credit from complainants and others, the bank cannot now be permitted to assert that it has a debt and lien superior in equity to the claims of those whom it aided in defrauding. It needs no elaboration of the facts to show that the bank is estopped from asserting any rights as against complainants, under the bill of sale executed in April, 1891. It is, however, claimed that the bills of sale executed to Thayer, assignee, in April, 1893, have no relation to the bill of sale withheld from the record, and the invalidity of the latter cannot affect the former; that when Thayer, as assignee, procured the execution of the bills of sale to himself, he had no knowledge of the existence of the first bill of sale; and that, as assignee, he had the right to take the bills in payment of the indebtedness actually due the bank of which he was assignee. Thayer, as assignee of the bank, was not an innocent purchaser for value. He succeeded to the rights of the assignor, but took its property subject to all rights and equities in favor of third parties. If the complainants had the right to estop the bank from asserting a superior claim to the assets of A. W. Harris, the same right existed as against the assignee of the bank. Therefore the question is just as it would have been had the bank, previous to its assignment, taken the bills of sale now relied on under the circumstances shown in the evidence. The wrong and fraud committed against third parties by withholding knowledge of the existence of the chattel mortgage and the debt secured thereby is not obviated by the mere device of securing a new mortgage or bill of sale, as is well shown in the opinion of the supreme court of Iowa in *Goll & Frank Co. v. Miller*, supra. The inequity chargeable against the bank is that it aided the debtor in concealing his real condition, and in obtaining a false credit, thereby misleading others, and inducing them to extend a credit which would not have been given had the truth not been concealed. The loss resulting from this conduct must fall upon one of the parties, and equity requires that it shall be visited upon the one whose misconduct has caused the loss.

The evidence shows without dispute that A. W. Harris is justly indebted to complainants in the sum of \$2,617.87, and interest, for advances made him in aid of his business. This debt has been reduced to judgment, and complainants are therefore entitled to subject the property of the judgment debtor to levy of process for

the collection of the judgment. The property of the debtor Harris was found in the possession of H. E. Thayer, who claimed the right thereto as the assignee of the Northwestern State Bank, under the bills of sale executed to him as assignee by A. W. Harris. To substantiate the claim that Thayer stands as an innocent purchaser under the bills of sale to him, it would be necessary to prove that he had paid value for the property. There is nothing in the evidence to show that Thayer personally paid anything therefor, and there is nothing to show that Harris was in fact indebted to the bank. The bills of sale to Thayer, as assignee, recite the payment in the one of \$1,500, and the other of \$10,000, as a consideration for their execution; but these recitals are not evidence as against the complainants. *Sillyman v. King*, 36 Iowa, 207; *Boone v. Chiles*, 10 Pet. 177. There is nothing to show, and it is not claimed, that Thayer paid any consideration to Harris when the bills of sale were executed to him, and the only consideration therefor must be found in the existence of an indebtedness from Harris to the bank, and this is not proven by competent evidence. The witnesses assume the existence of the fact, but none testify thereto, and there is really no evidence from which it can be determined that there was an indebtedness for any given sum from Harris to the bank at the date when the bills of sale were executed to Thayer, as assignee of the bank. Under these circumstances, it must be held that the bills of sale executed by A. W. Harris to H. E. Thayer, as assignee of the Northwestern State Bank, under date of April 7, 1893, are invalid as against the complainants, and that the property taken possession of by said assignee, and described in said bills of sale, was liable to be levied on and sold in satisfaction of the judgment in favor of complainants, against A. W. Harris, entered in the district court of Osceola county, Iowa; that, the said property having been sold and converted into money by said Thayer, after the bringing of this suit, the money in his hands stands in equity in place of the property, and so much thereof as is necessary is properly applicable to the payment of said judgment, interest thereon, and the costs of these proceedings, and the complainants are entitled to a decree accordingly. As it has been urged in argument that a decree of this court would be ineffectual, because the money realized from the sale of the property of A. W. Harris has passed into the possession of the state court in the proceedings against the Northwestern State Bank, it may not be out of place to suggest that, if the money in fact has been paid into or placed under the control of that court, then the complainants herein should apply to that court for an order directing that so much of the money realized from the sale of the property of A. W. Harris as is needed to pay off the judgment, interest, and costs in favor of complainants be so applied, the motion being based upon the decree in this case; and thus the rights of the parties will be protected without conflict between the different courts.

GREGOR v. HYDE.

(Circuit Court of Appeals, Eighth Circuit. May 21, 1894.)

No. 338.

DURESS—THREATS OF CRIMINAL PROSECUTION—CANCELLATION OF DEED.

Comp. Laws Dak. §§ 3504, 3505, define "duress of the person" as "unlawful" confinement, or confinement "lawful in form, but fraudulently obtained, or fraudulently made, unjustly harassing or oppressive," and declare a threat of such duress to be "menace," and authorize (section 3589) rescission of a contract by a party whose consent was "obtained through duress or menace." *Held*, that a threat of lawful arrest of a person justly amenable to criminal prosecution is not ground for cancellation of a deed, though it was executed under pressure of such threat; there being no circumstances of oppression or fraud, and no objection made for nearly three years.

Appeal from the Circuit Court of the United States for the District of South Dakota.

This was a suit by John Gregor against S. Y. Hyde for cancellation of a deed. The bill was dismissed. Complainant appealed.

F. L. Soper, for appellant.

C. H. Winsor and A. B. Kittredge, filed brief for appellee.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

THAYER, District Judge, delivered the opinion of the court.

The appellant filed a suit in the circuit court for Lake county, S. D., which was subsequently removed to the United States circuit court for that state, to cancel a deed for a quarter section of land situated in Lake county, S. D., which the appellant, John Gregor, had conveyed to the appellee, S. Y. Hyde, on the 6th day of July, 1889. The suit to cancel the conveyance was begun in the month of March, 1892. In his complaint the appellant charged that he was induced to execute the deed under compulsion of certain threats made by the appellee,—that he would cause the arrest and imprisonment of the complainant's son, Alexander M. Gregor, on the charge of embezzlement, if the deed was not executed. The bill was dismissed by the circuit court on final hearing, and the complainant has brought the case to this court by appeal.

The facts disclosed by the record, as we find them, are these: For some three years prior to 1889, Alexander M. Gregor, the son, had had charge of an elevator belonging to the firm of Hodges & Hyde, at Wells, in the state of Minnesota, and had been engaged at that place in the purchase and sale of grain, live stock, and coal for and in behalf of the firm of Hodges & Hyde, whose chief place of business and residence was at La Crosse, Wis. In the transaction of such business the complainant's son had appropriated to his own use, and had spent, funds of the firm of Hodges & Hyde, to an amount exceeding \$3,000, and had done so under circumstances which undoubtedly rendered him amenable to prosecution for the crime of embezzlement. The son had fled from Wells shortly prior to July 1, 1889, leaving his wife and family there; but he had

returned home before the execution of the deed in controversy, and he appears to have been present when the deed was executed by his father. No warrant for his arrest had then been sued out, and no warrant for his arrest was afterwards obtained, or attempted to be obtained. Hearing of his son's defalcation, the father came from Madison, S. D., to Wells, Minn., on or about the 6th day of July, 1889, and at the latter place had an interview with the appellee, S. Y. Hyde, who was one of the members of the firm of Hodges & Hyde, which resulted in his executing the conveyance for the tract of land aforesaid, to which the present controversy relates. Contemporaneously with the execution and delivery of the deed by the complainant, Hodges & Hyde executed and delivered an acquittance in favor of Alexander M. Gregor, the son, in which they acknowledged to have received from him "the sum of sixteen hundred dollars, in full settlement of all claims and demands of every name and nature whatsoever, without any reservation." The land conveyed to Hyde appears to have been worth at that time about the sum stated in the above-mentioned receipt. The deed thereto was recorded in Lake county, S. D., on the 9th day of July, 1889; and there the matter rested until this suit was begun, nearly three years thereafter, in the month of March, 1892.

The view that we have been compelled to take of the questions discussed by counsel does not require us to decide whether, in point of fact, the appellant was constrained to make the deed by threats that his son would be prosecuted criminally for the crime of embezzlement if the deed was not executed. It is sufficient to say with respect to that issue that, if it was necessary to determine it, there is some evidence in the records which tends strongly to show that he was not so induced to make the deed solely through fear, induced by threats, that if it was not made his son would be arrested and tried upon a criminal charge. The appellant appears to have known Mr. Hyde, of the firm of Hodges & Hyde, long and intimately (for at least 30 years, according to his own statement); and, in a letter written by him to his son's wife some days before any threats of an arrest could have been made, he expressed, in the strongest terms, his intention to do all in his power to make good to Hodges & Hyde, "to the last cent," the amount of his son's defalcation. Under these circumstances, we consider it not improbable that, in executing the deed, he did precisely what he had fully resolved to do before he had met Mr. Hyde, and before any prosecution could have been threatened. Many a father has sacrificed a considerable portion of his own means to pay his son's debts, and save his credit and business reputation, even when the debts so paid were contracted in such manner that they would not furnish the slightest excuse for a criminal prosecution. It does not seem to us improbable that the appellant was actuated by equally honorable motives in endeavoring to cancel his son's liabilities, if we view the transaction in the light of the sentiments which he expressed in the letter written to his daughter-in-law.

But it is unnecessary to pursue this line of thought further. It is more important to inquire and determine whether the threats com-

plained of by the appellant constituted such duress as will serve to invalidate a deed or other contract, under the laws of the state of South Dakota. In that state the legislature has made considerable progress in the direction of codifying the common law. Among other things, it has declared (vide section 3504, Comp. Laws Dak.) that:

"Duress consists in: (1) Unlawful confinement of the person of the party or of husband or wife of such party, or of an ancestor, descendant or adopted child of such party husband or wife; (2) unlawful detention of the property of any such person; or (3) confinement of such person, lawful in form, but fraudulently obtained, or fraudulently made, unjustly harassing or oppressive."

It has also declared (vide section 3505) that:

"Menace consists in a threat (1) of such duress as is specified in the first and third subdivisions of the last section; (2) of unlawful and violent injury to the person or property of any such person as is specified in the last section; or (3) of injury to the character of any such person."

It is further declared, by section 3502, that:

"An apparent consent is not real or free when obtained (1) by duress; (2) by menace; (3) by fraud; (4) by undue influence; or (5) by mistake."

And, by section 3589, it is declared that:

"A party to a contract may rescind the same in the following cases only: (1) If the consent of the party rescinding or of any party jointly contracting with him was given by mistake or obtained through duress and menace, fraud or undue influence, exercised by or with the connivance of the party * * * or of of any other party to the contract jointly interested with such party. * * *"

It is obvious, we think, from these several statutory provisions, that, in the state of South Dakota, a threat to cause the arrest and imprisonment of a person on a criminal charge does not amount to such menace as will serve to invalidate a deed, although it is executed under the pressure of such threat, unless it is a threat to cause the unlawful arrest and confinement of the person, or unless it is a threat to cause his arrest and confinement, which is made for some fraudulent or unlawful purpose, by one who knows that there is no adequate cause for a criminal prosecution. The law with respect to duress, as thus declared by statute in South Dakota, is in conformity with the views which many courts appear to entertain of the true doctrine of the common law. It is held in a number of states that a threat to cause a person's arrest and confinement under process that is to be regularly and lawfully sued out, for adequate cause, is not such duress per minas as will suffice to invalidate a deed or contract that has been executed for a sufficient consideration. It has frequently been ruled that a threat of a lawful arrest is not such duress as will avoid a contract, especially if no warrant has at the time been sued out or obtained. It has been held, however, that a threat of an arrest may amount to such duress as will avoid a contract, if it is made with knowledge that no offense has been committed, and for the wrongful purpose of exciting the fears, and overcoming the free will, of him to whom the threat is addressed. *Alexander v. Pierce*, 10 N. H. 494, 498; *Compton v. Bunker Hill Bank*, 96 Ill. 301; *Hilborn v. Bucknam*, 78

Me. 482, 7 Atl. 272; Higgins v. Brown, 78 Me. 473, 5 Atl. 269; Harmon v. Harmon, 61 Me. 227; Davis v. Luster, 64 Mo. 43; Sanford v. Sornborger (Neb.) 41 N. W. 1102; Landa v. Obert, 45 Tex. 539; Eddy v. Herrin, 17 Me. 338; Richardson v. Duncan, 3 N. H. 508. We are not unmindful of the fact that there is a line of authorities which maintain that a threat made to a wife to obtain the arrest of her husband on a criminal charge, or to a parent to obtain the arrest of his child, does constitute such duress as will serve to vitiate a contract, if the threat in fact overcomes the will, and occasions a forced assent, without reference to the question whether it was or was not a threat of a lawful arrest for adequate cause. This has sometimes been termed a species of moral duress. Eadie v. Slimmon, 26 N. Y. 9; Adams v. Bank, 116 N. Y. 606, 23 N. E. 7; Taylor v. Jaques, 106 Mass. 291; Lomerson v. Johnson (N. J. Ch.) 13 Atl. 8; and cases there cited. But in the case at bar it is unnecessary to attempt to reconcile conflicting views on this subject, which are perhaps irreconcilable. We entertain the opinion that, under the statutes of South Dakota, the menace complained of in the case at bar did not constitute such duress as will invalidate the deed. If the threat was made as stated by the complainant, it was a threat of a lawful arrest, for, beyond all question upon the state of facts disclosed by the present record, the complainant's son was justly amenable to a criminal prosecution; and the "menace," so termed, amounted to no more than a threat to have the criminal laws of the state executed, which the appellee, under the circumstances, had an undoubted right to demand. Moreover, we do not discover in this record any circumstances of oppression or fraud, accompanying the alleged threat, which would justify us in holding that the appellee took an undue advantage of the appellant, or that his conduct towards him was either harsh or oppressive. Furthermore, after the deed was executed, and his son's debt had been canceled, the appellant rested content with the transaction for nearly three years, before discovering that he had been imposed upon. Under these circumstances, and for the foregoing reasons, we conclude that the bill was properly dismissed, and the decree of the circuit court is therefore affirmed.

DONHAM v. SPRINGFIELD HARDWARE CO.

(Circuit Court of Appeals, Eighth Circuit. May 7, 1894.)

No. 371.

JUDGMENT—JURISDICTION—EQUITABLE RELIEF.

A judgment of a circuit court, rendered upon personal service on the defendant of a summons not delivered to the marshal until after Act March 3, 1887, limiting the jurisdiction of the court to matters exceeding \$2,000, went into force, although the complaint was filed before the act, will not be declared void on bill in equity on the ground that the matter in dispute was less than \$2,000. If erroneous, the remedy is by writ of error.

Appeal from the Circuit Court of the United States for the Western District of Missouri.

This was a suit by W. W. Donham against the Springfield Hardware Company to have a judgment against complainant declared void for want of jurisdiction. A demurrer to the bill was sustained. Complainant appealed.

Henry C. Young and M. C. Cantrell, for appellant.

G. M. Seabee, for appellee.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

CALDWELL, Circuit Judge. On the 23d day of February, 1887, A. C. Phillips, a citizen of the state of Arkansas, filed a complaint at law against W. W. Donham, a citizen of Missouri, in the United States circuit court for the central division of the western district of Missouri, to recover the contents of a promissory note for the sum of \$550. A summons was issued the day the complaint was filed, and delivered to the plaintiff's attorney, who placed it in the hands of the marshal on the 23d day of March, 1887. The summons was thereafter duly served, and, the defendant not appearing to the action, judgment by default was rendered against him on the 12th day of March, 1888, for \$755.14, which was afterwards assigned to the appellee. The appellant filed this bill in equity, praying to have the judgment "declared null and void," upon the ground that the court "had no jurisdiction to render judgment for a sum less than \$2,000." The lower court sustained a demurrer to the bill, and the plaintiff appealed.

The contention of the appellant is that the action at law in which the judgment was rendered was not commenced until the summons was delivered to the marshal on the 23d day of March, 1887, and that at that time the act of March 3, 1887 (24 Stat. 552), was in force, which declares that the circuit courts of the United States shall have original cognizance of suits "when the matter in dispute exceeds, exclusive of interest and costs, the sum of \$2,000," and that, as the matter in dispute in the action was less than \$2,000, the court had no jurisdiction of the cause, and its judgment therein is void.

This contention is untenable. The summons in the case was served personally on the defendant. The court, therefore, had jurisdiction of the person of the defendant. Having unquestioned jurisdiction of the person of the defendant, it had jurisdiction to determine the question whether the suit was commenced before or after the passage of the act of 1887, and whether the complaint stated a cause of action within the jurisdiction of the court. The erroneous decision of any or all of these questions would not affect the jurisdiction of the court over the cause. Its erroneous decision of these or other questions could be corrected by the appropriate appellate procedure in a court which by law could review the decision. Until corrected in this manner, the judgment is as valid and binding as if the record disclosed on its face a cause of action clearly within the jurisdiction of the court. It is well settled that the judgments of the United States courts rendered upon personal

service on the defendant are binding until reversed, though no jurisdiction be shown on the record. *Skirving v. Insurance Co.*, 8 C. C. A. 241, 59 Fed. 742; *Foltz v. Railway Co.*, 8 C. C. A. 635, 60 Fed. 316; *Elder v. Mining Co.*, 7 C. C. A. 354, 58 Fed. 536.

Assuming, but not deciding, that the court erred in rendering a judgment on a complaint in which the plaintiff claimed less than \$2,000, the appellant has mistaken his remedy to correct that error. His remedy was by writ of error, and not by a bill in chancery.

The decree of the lower court is affirmed.

EXCHANGE BANK v. HUBBARD et al.

(Circuit Court of Appeals, Second Circuit. May 29, 1894.)

No. 112.

1. CONFLICT OF LAWS—PROMISE TO ACCEPT DRAFT.

Where a promise is made in one state to accept a draft payable in another state, the law of the state where the draft is made determines the validity of the contract; and it is immaterial that, by the statutes of the state where the draft is payable, a promise to accept must be in writing, to be deemed an actual acceptance, and, if not in writing, can be enforced only by the person who draws or negotiates the bill.

2. NEGOTIABLE INSTRUMENTS—ORAL PROMISE TO ACCEPT DRAFT—ACTION FOR BREACH.

An action for breach of a promise to accept drafts, to be made and negotiated to obtain money for a specified purpose, may be maintained by one who has taken such drafts for money furnished by him for said purpose on the faith of the promise.

3. PRINCIPAL AND AGENT—MONEY LOANED ON AGENT'S DRAFTS ON PRINCIPAL.

Defendants requested H. & Co. to purchase for them certain cotton, and to borrow the money to pay therefor on defendants' credit, promising to remit currency or to accept drafts for the amount loaned, at the lender's option. H. & Co. obtained the money from a bank on the faith of this promise, giving their drafts on defendants therefor, and therewith purchased the cotton, which defendants received, but refused to accept the drafts. *Held*, that defendants were liable to the bank as for a loan made to them, and for their benefit, through their agents.

In Error to the Circuit Court of the United States for the Southern District of New York.

This was an action by the Exchange Bank against Samuel T. Hubbard and others, doing business under the firm name of Hubbard, Price & Co., for the amount of certain bills of exchange. A demurrer to the complaint was overruled (58 Fed. 530), but at the trial the judge directed the jury to find a verdict for defendants, and judgment for defendants was entered thereon. Plaintiff brought error.

John R. Abney (William B. McCam, C. E. Spencer, and J. R. Abney, of counsel), for plaintiff in error.

Sullivan & Cromwell (William J. Curtis and Edward B. Hill, of counsel), for defendants in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The plaintiff in the court below brings this writ of error to review a judgment for the defendants

entered upon the verdict of a jury. The principal question presented by the assignments of error is whether the trial judge erred in instructing the jury to render the verdict.

It appeared upon the trial that the plaintiff, a bank doing business at Yorkville, S. C., cashed certain drafts drawn by the firm of Hope & Co., of that place, upon the defendants, the firm of Hubbard, Price & Co., cotton merchants doing business at New York City. The evidence authorized the jury to find that the drafts were cashed under the following circumstances: On the 5th day of October, 1891, Price, one of the defendants, applied at Yorkville, S. C., to Hope, of Hope & Co., to purchase cotton for the defendants. Hope informed Price that a lot of 300 bales was to be sold on the following Wednesday. Price requested Hope to ascertain if the money to pay for the cotton could be raised from the bank at Yorkville, and authorized him to state to the bank that the defendants would remit the currency immediately upon receiving the bills of lading for the cotton, or would honor drafts promptly, whichever the bank preferred, and stated that if the money could be raised in this way he would decide the next day whether to buy the cotton, and would telegraph Hope from Atlanta. Thereupon, Hope consulted with the president of the plaintiff, and told him what Price had said, and the plaintiff promised to furnish the money upon the production of a satisfactory authorization from the defendants. The next day, Hope & Co. received a telegram from Atlanta, from Price, making an offer for the cotton; fixing the price, subject to a variation of one-eighth cent per pound, at the discretion of Hope & Co., and directing the cotton to be shipped by bills of lading to a firm at Norfolk, Va., of which Price was a member. The telegram contained also this sentence: "Drafts on New York, or currency shipment from there, as you prefer." Hope thereupon exhibited this telegram to the president of the plaintiff, purchased the cotton, and shipped it, conformably to the instructions, drew drafts for the amount upon the defendants, payable at New York upon presentment, and procured the plaintiff to cash the drafts. One of the drafts was honored and paid by the defendants. Acceptance of the other drafts was refused.

Upon the evidence it was a question of fact, for the jury, whether Price represented the defendants in the transactions mentioned, or the Norfolk firm, of which he was a member, and also whether Hope & Co., in buying the cotton, acted merely as agents. Hope testified that he told Price that Hope & Co. had no money, and could not buy the cotton, but that he would be glad to represent him (meaning Price's firm), and do what he could to secure the cotton for them. The telegram from Price to Hope, giving the latter discretion as to the price, indicates that Price regarded Hope & Co. as agents, and not as purchasers on their own account.

The trial judge ruled that the cause was controlled by the statutes of New York relating to bills of exchange, and that the plaintiff was not entitled to recover, pursuant to the statutory provisions, either as upon a written acceptance by the defendants of the drafts, or as upon a breach of a promise to accept. These stat-

utes provide that no person within this state shall be charged as an acceptor upon a bill of exchange unless his acceptance shall be in writing, signed by himself or his lawful agent; that an unconditional promise in writing to accept a bill before it is drawn shall be deemed an actual acceptance in favor of every person who, upon the faith thereof, shall have received the bill for a valuable consideration; and that these provisions shall not be construed to impair the right of any person to whom a promise to accept a bill may have been made, and who, on the faith of such promise, shall have drawn or negotiated the bill, to recover damages of the party making such promise on his refusal to accept such bill. 3 Rev. St. N. Y. (7th Ed.) pp. 2242, 2243.

We think the ruling of the trial judge was erroneous. The contract having been made in South Carolina, the statutes of New York do not furnish the rule by which to determine its validity, notwithstanding the drafts were to be accepted and made payable there. Matters bearing upon the execution, interpretation, and validity of a contract are determined by the law of the place where it is made. Those connected with its performance are regulated by the law prevailing at the place of performance. Accordingly, where a promise is made in one state to accept a draft which is to be payable in another state, and by the statutes of the latter the promise would be invalid, the law of the state where the promise is made determines the validity of the contract. This was expressly decided in *Scudder v. Bank*, 91 U. S. 406. Authorities to the like effect are *Tilden v. Blair*, 21 Wall. 241; *Russell v. Wiggin*, 2 Story, 213;¹ and *Brown v. Finance Co.*, 31 Fed. 517. If the contract was valid at common law, there being no statutes in South Carolina affecting it, it was valid everywhere; and it is quite immaterial that by the statutes of New York a collateral promise of acceptance is required to be in writing, or that a promise to accept a bill which is not in writing can only be enforced by the person who draws or who negotiates the bill, as was held in *Bank v. Gibson*, 5 Duer, 574.

Notwithstanding the ruling of the trial judge proceeded upon an erroneous view of the law, the exception taken by the plaintiff is not available if, upon any view of the facts, the plaintiff was not entitled to recover. We are therefore to inquire whether the evidence authorized the jury to find a state of facts giving a good cause of action to the plaintiff.

It is to be observed that the action was not brought to charge the defendants as acceptors of the drafts, nor even to recover for a breach of their promise to accept the drafts, but that the complaint, conformably to the provisions of the Code of Civil Procedure, sets out all the facts attending the advance of money by the plaintiff which were proved upon the trial, and is sufficient to authorize a recovery upon any legal theory warranted by the evidence.

It is well settled that a promise to accept an existing bill, is, in legal effect, an acceptance, and suffices to maintain an action upon

¹ Fed. Cas. No. 12,165.

the bill in favor of any person who takes it upon the faith of the promise, whether the promise be in writing or by parol. This was held in *Scudder v. Bank*, supra, where the suit was brought upon an oral promise to accept a draft, and it is sufficient to refer to the authorities there cited. Such, also, is the rule in the courts of South Carolina. *Strohecker v. Cohen*, 1 Speer, 349. Nevertheless, the defendants did not become liable as acceptors of the drafts, according to the judgments of the federal courts, because the promise was not one to accept any particular bill or bills, but was one to accept generally any drafts which might be drawn on them by Hope & Co. for the purchase of the cotton. *Coolidge v. Payson*, 2 Wheat. 66; *Schimmelpenich v. Bayard*, 1 Pet. 264; *Boyce v. Edwards*, 4 Pet. 111. In *Boyce v. Edwards* the court used the following language:

"The distinction between an action on a bill, as an accepted bill, and one founded on a breach of promise to accept, seems not to have been adverted to, but the evidence necessary to support the one or the other is materially different. To maintain the former, as has been already shown, the promise must be applied to the particular bill alleged in the declaration to have been accepted. In the latter the evidence may be of a more general character, and the authority to draw may be collected from circumstances, and extended to all bills coming fairly within the scope of the promise."

The court observed, however, that as respected the rights and remedies of the immediate parties to the promise to accept, and of all others who might take bills upon the credit of such promise, they were as secure and attainable in an action on the breach of a promise to accept as they could be in an action on the bill itself.

Where the action is brought for the breach of a promise to accept a bill, while there can be no doubt of the right of the person to whom the promise is made to maintain an action, and attain practically the same remedy which he would have against an actual or virtual acceptor, it is not so well settled that an action can be maintained upon such a promise by a third person, who has taken the bill upon the faith of the promise. The objection is a want of privity between him and the promisors. This objection was considered in *Cassel v. Dows*, 1 Blatchf. 335, Fed. Cas. No. 2,502, by Mr. Justice Nelson, and in *Russell v. Wiggin*, supra, by Mr. Justice Story, and in each of these cases was held not to be tenable. In the present case it may be doubtful whether the telegram sent by Price to Hope & Co., standing alone, was a sufficient promise to accept the drafts; but it is to be read in the light of the surrounding circumstances, proof of which was admissible to aid in ascertaining the purpose of the paper, and in applying and interpreting its language. *Barney v. Worthington*, 37 N. Y. 115; *Hutchins v. Hebbard*, 34 N. Y. 24. In view of its language, thus interpreted, and especially in view of what had taken place between Price and Hope on the previous day, the proof of a promise to accept such drafts as might be negotiated in order to obtain the money to purchase the cotton was entirely satisfactory. There seems to be no reason why the plaintiff should not be entitled to recover as for the breach of a promise to accept the drafts.

We are also of the opinion that the facts would have justified

the jury in finding that, throughout the entire transaction of purchasing the cotton and raising the purchase money, Hope & Co. were acting as the agents of the defendants, and within the scope of the general authority in that behalf which the defendants had delegated to them. In this view of the case, as there is no pretense that the plaintiff gave credit to the agents personally, the defendants are liable as principals for a loan made to them, and for their benefit, through their agents. The facts set forth in the complaint and shown upon the trial establish a cause of action for money had and received of the plaintiff to the use of the defendants. Upon a quite similar state of facts, it was said in *Bank v. Ely*, 17 Wend. 512, that the drawees would be liable as drawers of the bills, and that, if no drafts had been given, they would have been liable upon the plainest law applicable to the relation of principal and agent. In order to charge the real principal, it is always competent, in whatever form a parol or written contract is executed by an agent, to ascertain by evidence dehors the instrument who is the principal, whether it purports to be the contract of an agent, or is made in the name of the agent as principal; and the real principal may be held, although the other party knew that the person who executed as principal was in fact the agent of another. *Ford v. Williams*, 21 How. 287; *Coleman v. Bank*, 53 N. Y. 393; *Briggs v. Partridge*, 64 N. Y. 357; *Byington v. Simpson*, 134 Mass. 169; *Steamship Co. v. Harbison*, 21 Blatchf. 336, 16 Fed. 688. It is therefore quite immaterial that the money was advanced upon drafts drawn by Hope & Co.

The case is, in substance, one in which the jury might have found that the defendants requested Hope & Co. to act as agents for them in buying a certain lot of cotton, and borrowing the money, upon their credit, with which to pay for it, upon the assurance that they would remit currency as soon as they received bills of lading for the cotton, or accept sight drafts drawn upon them for the amount loaned, at the option of the lender. Hope & Co. borrowed the money. The defendants received the cotton, repaid some of the money borrowed of the plaintiff by their agents, and have refused to pay the balance. There seems to be no reason why, upon these facts, they should escape liability.

The judgment is reversed, and the cause remanded to the circuit court, with instructions to grant a new trial.

ST. LOUIS & S. F. RY. CO. v. McLELLAND.

(Circuit Court of Appeals, Eighth Circuit. May 31, 1894.)

No. 291.

HEARSAY EVIDENCE—STATEMENTS BY EMPLOYE OF PARTY.

A statement by a railway company's section foreman, by whom a colt was found injured near the railway track, that it had been knocked off the track, made some time afterwards to the owner of the colt, not in the transaction of any business with him, and not in the discharge of any

duty for the company, is inadmissible in an action against the company for damages for the death of the colt from its injuries.

In Error to the United States Court in the Indian Territory.

This was an action by John McLelland against the St. Louis & San Francisco Railway Company for injuries to plaintiff's colt, causing its death. At the trial the jury found a verdict for plaintiff. Judgment for plaintiff was entered thereon. Defendant brought error.

L. F. Parker (Edward D. Kenna and H. S. Abbott, on the brief), for plaintiff in error.

T. P. Winchester and W. T. Hutchings filed a brief for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

THAYER, District Judge, delivered the opinion of the court.

This is a stock-killing case which comes to this court on a writ of error from the United States court in the Indian Territory. The defendant in error sued the plaintiff in error in the lower court for the loss of a colt, which was about five or six months old at the time of its death. He alleged in his complaint that the defendant company negligently ran one of its trains against and upon said colt, and thereby inflicted such injuries that it died. The jury before whom the case was tried assessed the value of the colt at \$500, and awarded the plaintiff damages in that sum. It is not disclosed by the record that any one witnessed the accident by which the colt is said to have been injured. The animal was found by the defendant's section foreman from 50 to 125 yards distant from the defendant's railroad track, with one of its hind legs broken, and with some bruises on its shoulder and hip. It was surrounded at the time by a herd of 15 or 20 cattle, who were running around and over the colt in an excited condition, and there were indications that the colt had been lying at the place where it was found for some time before it was discovered by the defendant's section foreman. In the course of the trial the plaintiff was permitted to testify, in his own favor, that the section foreman told him that "the colt had been knocked off the track." The interview at which this statement was made appears to have taken place some time after the colt was discovered by the section foreman, and there is nothing in the record which shows that the statement was made by the foreman in connection with the transaction of any business with the plaintiff, or in the discharge of any duty which he had been deputed to perform for and in behalf of the defendant company. Moreover, the record clearly shows that the foreman had no knowledge whether the colt had or had not been knocked off the track by a passing train, except such knowledge as he may have acquired by inference, from the nature of the injuries which the colt had sustained, and its proximity to the railroad track when it was discovered. This testimony was duly objected to by the defendant company on the ground that it was hearsay, and its admission has been properly

assigned for error. We think it obvious that the testimony was improperly admitted. It is a fundamental rule that statements made by an agent are not admissible against his principal, unless they are made in the course of some business transaction in which the agent is authorized to represent his principal, or unless the statements made are so coincident with the act or event out of which the suit originates as to form a part of the *res gestae*. The statement said to have been made by the section foreman to the plaintiff was not admissible against the defendant company, within either branch of the rule last stated. So far as the record shows, he had not been deputed to conduct any negotiation with the plaintiff which rendered any statement by him, with reference to the manner in which the colt had been injured, either relevant or pertinent. The statement in question was also made at a period of time so remote from the occurrence of the injury that it was not a part of the *res gestae*, but was merely a narrative of a past transaction. There are very many cases in which testimony of the same character has been held inadmissible, but we will only refer to a few which bear a very strong analogy to the case at bar. *Smith v. Railway Co.*, 91 Mo. 58, 61, 3 S. W. 836; *Packet Co. v. Clough*, 20 Wall. 528, and citations; *Railroad Co. v. O'Brien*, 119 U. S. 99, 7 Sup. Ct. 118; *Worden v. Railroad Co. (Iowa)* 33 N. W. 629; *Railway Co. v. Reeves (Ky.)* 11 S. W. 464.

An exception was also taken to the action of the trial court in refusing to direct a verdict for the defendant, but, as the case must be reversed for the reason above indicated, it is unnecessary to consider the last mentioned exception. The evidence on a second hearing of the case may be altogether different from that reported in the present record.

The judgment is reversed, and the cause remanded, with directions to award a new trial.

ST. LOUIS & S. F. RY. CO. v. McLELLAND.

(Circuit Court of Appeals, Eighth Circuit. May 21, 1894.)

No. 292.

SECOND WRIT OF ERROR UNNECESSARILY SUED OUT—DISMISSAL.

After reversal of a judgment on writ of error, for errors committed at the trial, a second writ, sued out to correct alleged errors in taxation of costs after rendition of judgment, which might have been incorporated in the same record, will be dismissed at the cost of plaintiff in error.

In Error to the United States Court in the Indian Territory.

This was an action by John McLelland against the St. Louis & San Francisco Railway Company, in which plaintiff recovered judgment, and defendant brought error. 62 Fed. 116. Defendant also sued out a second writ of error to review alleged errors after rendition of judgment.

L. F. Parker (Edward D. Kenna and H. S. Abbott, on the brief), for plaintiff in error.

T. P. Winchester and W. T. Hutchings filed a brief for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

THAYER, District Judge. This is a second writ of error which was sued out in this case, after a first writ of error had been granted to obtain a reversal of the judgment for errors committed at the trial. The present writ was sued out to correct alleged errors of the trial court in the taxation of costs after the rendition of judgment. As we have already reversed the judgment in this case, on which the liability to pay the disputed costs depends (62 Fed. 116), and as there was no apparent necessity for suing out the second writ, inasmuch as all of the assigned errors might have been incorporated in one and the same record, the second writ of error should be dismissed at the cost of the plaintiff in error, and it is so ordered.

KILMER MANUF'G CO. v. GRISWOLD et al.

(Circuit Court, N. D. New York. June 16, 1894.)

1. PATENTS—LIMITATION OF CLAIM—BALE TIES.

In the Kilmer patent, No. 282,991, for improvement in bale ties, claim 2, for a clasp of wire larger than the band wire, and having a pinching angle to hold tightly the band when forced into it by expansion of the bale, must be confined to the precise mechanism described, in view of the prior state of the art, as shown by the Smith patent, which has the same features except that the clasp is "of wrought iron, malleable iron, or other suitable material," and other patents using a clasp of round wire larger than the band.

2. SAME—INVENTION.

The Kilmer patent, No. 372,375, for an improvement upon No. 282,991, relating to bale ties, in adding to the wedging action of the clasp of that patent a gripping action giving additional power, involves invention, the fundamental idea being new as applied to bale ties, notwithstanding devices performing similar functions were known in analogous arts, as shown in the Foote patent, No. 139,899, and other patents.

3. SAME—INFRINGEMENT.

The Kilmer patent, No. 372,375, for an improvement in bale ties, having first introduced the jamming or wedging action of the sides of the clasp upon the band wire, is entitled to a construction liberal enough to protect that invention, and hence is infringed by ties made under the Griswold patent, No. 466,563, having a clasp differing in form from the Kilmer clasp, but like it in principle, possessing all its features, and operating in substantially the same manner.

This was a suit by the Kilmer Manufacturing Company against J. Wool Griswold and others for infringement of patents.

S. A. Duncan and W. H. Van Steenbergh, for complainant.
E. H. Brown, for defendants.

COXE, District Judge. The complainant, as the owner of two letters patent granted to Irving A. Kilmer for improvements in adjustable bale-ties, brings this bill against the defendant for infringement. The first of these patents, No. 282,991, is dated August 14, 1883, the second, No. 372,375, is dated November 1, 1887.

No. 282,991.

In the specification the patentee says:

"The object of the invention is to produce a device in which the loose end of the band-wire, when put in place, shall be clasped or gripped so as to preclude unintentional separation, and in which the parts in contact will not be cut or broken."

The clasp is made of wire of a size considerably larger than the band-wire. The wire of the clasp is bent at the middle, forming a sharp V-shaped recess. The two ends of the wire so bent are returned upon themselves and bent over the looped end of the band-wire, which is thus permanently attached to the clasp. In use the band-wire is placed around the bale, the free end is slipped into the V-shaped recess and is then bent back and twisted about itself. As the bale is released from the press it expands and this pressure on the band tends to force the wire down into the angle, which, being smaller than the wire, pinches the wire tightly and prevents it from slipping or pulling out. The clasp being of round wire has no sharp cutting edge and the band-wire is in no danger of being abraded or broken. The claim relied on is the second. It is as follows:

"In a bale-tie, a clasp, B, made of wire larger than that of the band and having the pinching angle b, as set forth."

The defenses are lack of novelty and invention and noninfringement.

The complainant's brief contains the following concise proposition:

"In order to anticipate the invention covered by the first Kilmer patent it is necessary to find in the prior art a bale-tie having the following characteristics: 1. A band made of wire. 2. A clasp made of wire and of larger gauge than that of the band. 3. A pinching angle formed in the wire clasp. By 'pinching angle' in this connection is meant an angle formed by bending the wire composing the clasp into the form of a V having an apex smaller than the diameter of the band-wire, so that the wire will be pinched by the mere forcing of the wire down into such angle, irrespective of any inward movement of the sides of the clasp."

Turning to the patent granted to Isaac T. Smith, February 2, 1875, for an improvement in bale-ties, it will be found that all of these features are present, except that the clasp is not, apparently, made of wire. The band is made of wire, the clasp is made "of wrought-iron, malleable iron, or other suitable material having its ends bent over on top, forming a double hook," etc. Material having the properties described may very properly, upon the testimony in this cause, be called wire. The complainant's brief, in discussing the question of infringement, says, on this subject:

"Contrary to defendants' contention, the saddle of the Griswold tie is made from a strip of metal which is properly designated as 'wire.' Two reasons seem to have influenced defendants' experts in declaring that this saddle-piece is not made from 'wire;' first, that it is not cylindrical, and, second, that it does not appear to have been made by the process of 'drawing.' (1) The first of these reasons is disposed of by the definition of the term 'wire' and the several illustrations of the different forms of wire taken from Knight's Mechanical Dictionary. Knight says: 'Wire is usually cylindrical, but it is also made of various other forms, as oval, half-round, square and triangular, and of more complicated shapes for small pinions,' etc. Among the illustrations given by Knight are various forms where the wire is saddle-shaped in cross section, very much like the saddle of defendants' tie. A reference to the Pendleton and Proctor patents on cotton-gin saws shows that the term 'wire' is frequently used to designate the strips of flat metal out of which cotton-gin saws are made. Mr. Lenox, one of the defendants' witnesses, and who is connected with the bale-tie business of the Washburn & Moen Mfg. Co., says that the term 'wire' is applied to flat goods as well as cylindrical. He says: 'We receive orders for flat wire of all dimensions up to an inch or thereabouts in width.' (2) Equally erroneous is the statement of defendants' expert Mr. Brevoort, that the saddle of defendants' tie is not 'wire,' because it has not been made by 'drawing.'"

It is apparent, therefore, that a clasp made of wire would be within the Smith patent. The Smith clasp is made of material that may be "bent over" and it is of larger gauge than the band-wire. There is also a pinching angle formed in the clasp. Indeed, the description of the Smith device applies equally well to the Kilmer clasp. The specification of the Smith patent says:

"When the bale is pressed and the wire passed around the same, the ends of the wire are bent and passed through the central top opening, a, into the V-shaped recesses, b, b. When the pressure is removed from the bale the bale at once expands, drawing the wires into the V-shaped recesses and pinching them tightly therein, so that they cannot slip out from the same."

Assuming that this patent does not anticipate, the remaining question is whether it required invention to substitute a clasp made of round wire for the clasp "of wrought-iron, malleable iron or other suitable material," of the Smith patent. It is, perhaps, an improvement to present rounded pinching edges to the band-wire, but it required only mechanical skill to do this. No new function is performed. There is no proof regularly before the court that the Smith clasp will break or cut the wire of the band. Assume that it would. A workman of ordinary capacity, on discovering the defect, would know enough to round off the sharp edges which injure the wire. Again, Kilmer was not the first to use a clasp of round wire larger in diameter than that of the band. Such a clasp is shown in the Lowber patent of 1868, the Trowbridge patent of 1869, the Knipscheer patent of 1878 and the Griswold patent of March, 1883. Indeed, wire was the most natural material to use. I cannot avoid the conclusion that the fundamental principle underlying the Kilmer patent of 1883 is disclosed by the Smith patent—the idea is all there. Smith describes a bale-tie, having a wire band, a clasp of larger gauge than the band and a V-shaped recess in the clasp into which the band-wire is pressed by the expansion of the bale. Grant that Kilmer has embodied this idea in a more practical and perfect device, did it require in-

vention to do this? The defects which, it is suggested, are found in the Smith clasp would develop immediately upon the proper test being applied, and the remedy would at once occur to the skilled workman, especially when the prior art abounds with clasps made of large round wire. The Smith patent was not discovered until after the final hearing, but counsel have had full opportunity to examine and discuss it. The other references offered by the defendants when aggregated show all that the Smith patent shows, but in the opinion of the court no other reference shows so many of the features of the Kilmer patent in combination. The court is constrained to hold, therefore, in view of what the prior art discloses, that, if sustained at all, the second claim of No. 282,991 must be confined strictly to the precise mechanism shown. *Sargent v. Covert*, 67 O. G. 403, 14 Sup. Ct. 676; *Belding Manuf'g Co. v. Challenge Corn-Planter Co.*, 67 O. G. 141, 14 Sup. Ct. 492; *Giles v. Heysinger*, 150 U. S. 627, 14 Sup. Ct. 211; *Saunders v. Allen*, 60 Fed. 610; *Manufacturing Co. v. Walbridge*, Id. 91; *Manufacturing Co. v. Weeks* (C. C. A.) 61 Fed. 405.

No. 372,375.

This patent is for an improvement upon No. 282,991. To the clasp of the former is added a closing action which gives additional power to the holding feature of the clasp. Instead of being returned upon themselves the ends of the improved clasp are separated some distance apart, giving the clasp a V-shaped appearance. The clasp is secured to a loop in the band-wire. In use, the free end of the band is inserted in the pinching angle as in the former patent. When the bale is released the strain not only pulls the band down into the angle, but also pulls the ends of the clasp together, making the vertex of the angle more acute, thus nipping the band-wire between the sides of the clasp. The merit of this action is that it holds the band-wire tightly the moment the strain is applied. The claim relied on is as follows:

"2. The band A, having the clasp B, with the angle b^a, and its ends b apart, as set forth."

The defenses are the same as those urged to the previous patent. The question, therefore, is whether it required invention to add the gripping action of this clasp to the wedging action of the clasp of the prior patent? The court is of the opinion that it did. Kilmer was the first to employ a clasp having this feature in a bale-tie. Devices performing somewhat similar functions were known in analogous arts, but its first appearance in a bale-tie having a wire band was in this patent. The fundamental idea of the former patent was old as applied to bale-ties; the fundamental idea of this patent was new as applied to bale-ties. It originated with Kilmer. This proposition cannot be successfully disputed.

The device of the Foote patent (No. 139,899) does not anticipate or negative patentability for the following reasons:

First: It is designed for use by hand in tying up bundles of grain having little or no resiliency or expansive power.

Second: The band is made of cord and not of wire. The cord is of about the same diameter as the wire of the "holder."

Third: The cord, after being carried around the bundle and drawn tight, slides down between the converging sides of the holder and is pinched between them, but the pinching sides are substantially parallel. They do not form a V-shaped recess. In the Foote holder, also, the free end of the cord is apparently left in the direction of the pull, thus giving a long diagonal bearing on the side of the "holder." As shown in the drawing it is not turned back and tucked under the "standing" part of the band as in the Kilmer tie.

Fourth: The Foote tie would be wholly impracticable as a bale-tie of the class to which the Kilmer tie belongs. If the "holder" were made of much larger wire, and wire were substituted for the binding cord, it is possible that it might answer as a bale-tie. But it would be clumsy and ineffectual. The defendants, and all others, are at liberty to use such a tie, but it is thought that no one having the slightest knowledge of the art would substitute such a device for the Kilmer tie. The difference between them is all the difference between a botch and a success.

Fifth: The Foote specification speaks of the converging sides of the "holder" being drawn together by the strain of the bundle, but this convergence, if it exists, does not produce the gripping action of the Kilmer clasp. When the strain is applied the first effect is to open the holder, afterwards the sides are slightly drawn together by a longitudinal pull. They are not jammed together, to any appreciable extent, by a lateral pull also. It is this pronounced action of the sides of the Kilmer clasp, holding the band-wire as in a vise, that distinguishes it from all prior structures.

Sixth: The action of the Foote holder under strain would be most unsatisfactory in a bale-tie. In short, the general conclusion arrived at by the expert witness for the complainant is, I think, substantially correct. He says:

"The Foote holder is designed to be used, as before explained, with a cord, in which the sides, B, B', of the holder can readily imbed themselves upon the application of a small amount of strain, which is in the vicinity of about five pounds; while the Kilmer clasp is designed to be used with metal, which, if compressed at all, is compressed only by the application of great force; and, therefore, the two holders have to act upon different principles or modes of operation in order that they may serve the function each was designed to serve. That is, the Foote holder cannot be used as described in the Kilmer patents in suit—with a cord, as a bale-tie, for baling hay and similar substances; nor can the Kilmer clasp be used as described in the Foote patent—in a band or tie for binding grain and similar substances. In other words, the Foote holder cannot be substituted for the Kilmer clasps, nor can the Kilmer clasps be substituted for the Foote holder. Each must be used in its own place to do its own peculiar work."

The other references add little to the Foote patent. It is true that some patents for garment supporters show the drawing-in action referred to, but these devices are so different in structure, purpose and function, that they deserve only a passing mention. The Kilmer clasp has become popular and has largely taken possession of the market. It is cheap, durable, reliable and efficient.

Without dwelling longer upon this branch of the case it may be asserted with confidence that every argument which was used to sustain the barbed wire patent applies with much greater cogency to the patent at bar. Barbed-Wire Case, 143 U. S. 275, 12 Sup. Ct. 443, 450. The facts in that case were quite analogous to the facts here except that the prior art approximated more closely to the patent in that case and the field of invention was, therefore, much narrower. If the Kelly patent were insufficient to defeat the Glidden patent it seems very clear that the Foote patent is insufficient to defeat the Kilmer patent. See, also, *Krementz v. Cottle Co.*, 148 U. S. 556, 13 Sup. Ct. 719; *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. 825; *Gandy v. Belting Co.*, 143 U. S. 587, 12 Sup. Ct. 598; *Richardson v. Shepard*, 67 O. G. 144, 60 Fed. 273.

Infringement.

The defendants' ties are made under letters patent No. 466,563, granted to the defendant J. Wool Griswold, January 5, 1892. Their clasp though differing in form is, in principle, like the clasp of the patent, possessing all its features and operating in substantially the same manner. In the defendants' tie the band is made of wire. The clasp, reinforced as it is by a metal saddle, is of larger dimension than the band-wire. It has the V-shaped pinching angle, and when the strain is applied the sides of the clasp close in and the end of the band wire is "jammed or wedged therein" precisely as in the complainant's device. Not only does the Griswold patent expressly declare over and over again that this jamming action exists, but the proof of actual tests demonstrates its existence. As Kilmer was the first to introduce this principle into bale-ties, he is entitled to a construction liberal enough to protect his invention. He should have what he has invented, nothing more, nothing less.

The complainant is entitled to a decree upon the second claim of No. 372,375 for an injunction and an accounting, but without costs.

GOLDSTEIN v. WHELAN et al.

(Circuit Court, N. D. New York. June 14, 1894.)

No. 6,226.

1. TRADE-MARKS—INFRINGEMENT—FEDERAL QUESTION.

On motion for a preliminary injunction in a suit between citizens of the same state for infringement of a registered trade-mark, the affidavits showed that the trade-mark was invalid because anticipated. *Held*, that an injunction should not be granted, although the affidavits disclosed a case of unfair competition, the jurisdiction to retain the case as to that matter being doubtful.

2. AFFIDAVITS NOT ENTITLED IN CAUSE.

Affidavits not entitled in the cause cannot be considered in opposition to a motion for preliminary injunction.

This was a suit by Julius M. Goldstein against Charles A. Whelan and others to enjoin alleged infringement of a registered trade-mark. Complainant moved for a preliminary injunction.

Charles H. Duell, for complainant.

Howard P. Denison, for defendants.

COXE, District Judge. This action is brought to restrain the defendants from infringing the complainant's registered trade-mark "Napoleon." Both parties are citizens of this state. In his statement, filed February 23, 1894, the complainant says:

"My trade-mark consists of the word symbol 'Napoleon.' * * * The word may be printed in connection with an ornamental label having, among other figures or forms, a picture of Napoleon I., without materially altering the character of the trade-mark, the essential feature of which is the word 'Napoleon.'"

The trade-mark is used to designate a certain brand of cigars.

Affidavits, not entitled in the cause, are presented by the defendants showing that long prior to the complainant's use, the name "Napoleon" had been used, with a portrait of the first emperor, to designate a brand of cigars precisely as the complainant uses it at the present time. It also appears that this use was practically continuous from 1876. If the facts stated in these affidavits are true, the complainant's registered trade-mark, no matter what construction is placed upon it, is anticipated in every particular. *Stachelberg v. Ponce*, 128 U. S. 686, 9 Sup. Ct. 200. This proposition must be conceded, but it is argued that the affidavits disclose a case of unfair competition in trade, and that this court, having once acquired jurisdiction, may retain it even as to matters not alleged in the bill and cognizable only by the state courts.

It is thought that the cases cited by the complainant hardly go to the necessary extent. It is probably true that where a federal question is involved, the court is justified in adjudicating upon all questions growing out of the transaction involved. But is this true where it appears that there is no federal question? In other words, can the court retain jurisdiction to pass upon a cause of action solely cognizable by the state courts after it is demonstrated that no federal question is involved, simply because the bill alleges facts, which if true, would give the federal court jurisdiction?

In the case relied upon by the complainant (*Omaha Horse Ry. Co. v. Cable Tramway Co.*, 32 Fed. 727) the court says:

"No mere assertion that a federal question exists, or that a right is claimed under the federal constitution, is, of itself, sufficient to give jurisdiction; it must appear that there is some real, substantial federal question involved."

See, also, 1 Fost. Fed. Pr. p. 534, § 293.

Surely there is force in the suggestion that the bill must be dismissed the moment the court determines that the complainant's registered trade-mark is invalid. It is not the purpose of the court at this time to pass definitively upon this proposition. It is, to say the least, doubtful, and a preliminary injunction should never issue in a doubtful case.

The court has treated the motion thus far as if the defendants' affidavits were regularly before it, thinking it for the interest of both parties that this should be done. These affidavits cannot, however, properly be considered under the decision of *Buerk v. Imhaeuser*, 10 O. G. 907, Fed. Cas. 2,107a, for the reason that, with one exception, they are not entitled in the cause. The circuit court of this circuit there said regarding similar papers:

"Perjury could not be assigned on these affidavits by reason of the want of the title. They appear to be mere extrajudicial oaths, and are not receivable in this court."

See, also, *Hawley v. Donnelly*, 8 Paige, 415.

If the complainant is convinced that the defect is the result of an oversight and is one which can be readily remedied, it is possible that some agreement looking to a waiver of the objection can be reached.

It follows that the restraining order heretofore granted must stand, without prejudice to the defendants, upon properly entitled affidavits, to move to vacate the same.

In re SAITO.

(Circuit Court, D. Massachusetts. June 27, 1894.)

ALIENS—NATURALIZATION OF JAPANESE.

A native of Japan, of the Mongolian race, is not entitled to naturalization, not being included within the term "white persons" in Rev. St. § 2169.

Application by Shebata Saito for naturalization.

J. Henry Taylor, for applicant.

COLT, Circuit Judge. This is an application by a native of Japan for naturalization.

The act relating to naturalization declares that "the provisions of this title shall apply to aliens being free white persons, and to aliens of African nativity and to persons of African descent." Rev. St. § 2169. The Japanese, like the Chinese, belong to the Mongolian race, and the question presented is whether they are included within the term "white persons."

These words were incorporated in the naturalization laws as early as 1802. 2 Stat. 154. At that time the country was inhabited by three races, the Caucasian or white race, the Negro or black race, and the American or red race. It is reasonable, therefore, to infer that when congress, in designating the class of persons who could be naturalized, inserted the qualifying word "white," it intended to exclude from the privilege of citizenship all alien races except the Caucasian.

But we are not without more direct evidence of legislative intent. In 1870, after the adoption of the thirteenth amendment to the constitution, prohibiting slavery, and the fourteenth amendment, de-

claring who shall be citizens, the question of extending the privilege of citizenship to all races of aliens came before congress for consideration. At that time, Charles Sumner proposed to strike out the word "white" from the statute; and in the long debate which followed the argument on the part of the opposition was that this change would permit the Chinese (and therefore the Japanese) to become naturalized citizens, and the reply of those who favored the change was that this was the very purpose of the proposed amendment. Cong. Globe, 1869-70, pt. 6, p. 5121. The amendment was finally rejected, and the present provision substituted, extending the naturalization laws to the African race.

Again, in the first revision of the statutes, in 1873, the words "being free white persons" were omitted, probably through inadvertence. Under the act of February 18, 1875, to correct errors and supply omissions in the first revision, this section of the statute was amended by inserting or restoring these words. In moving to adopt this amendment in the house, it was stated that this omission operated to extend naturalization to all classes of aliens, and especially to the Asiatics; and reference was made to the fact that, a few years before, the proposition of Mr. Sumner, in the senate, to strike out the word "white," had been defeated, and that the committee only proposed, by restoring these words, to place the law where it stood at the time of the revision. The debate which followed proceeded on the assumption that by restoring the word "white" the Asiatics would be excluded from naturalization, and the amendment was adopted with this understanding of its effect. 3 Cong. Rec. pt. 2, p. 1081.

The history of legislation on this subject shows that congress refused to eliminate "white" from the statute for the reason that it would extend the privilege of naturalization to the Mongolian race, and that when, through inadvertence, this word was left out of the statute, it was again restored for the very purpose of such exclusion.

The words of a statute are to be taken in their ordinary sense, unless it can be shown that they are used in a technical sense.

From a common, popular standpoint, both in ancient and modern times, the races of mankind have been distinguished by difference in color, and they have been classified as the white, black, yellow, and brown races.

And this is true from a scientific point of view. Writers on ethnology and anthropology base their division of mankind upon differences in physical rather than in intellectual or moral character, so that difference in color, conformation of skull, structure and arrangement of hair, and the general contour of the face are the marks which distinguish the various types. But, of all these marks, the color of the skin is considered the most important criterion for the distinction of race, and it lies at the foundation of the classification which scientists have adopted. Blumenbach, in 1781, divided mankind into five principal types,—the Caucasian or white, Mongolian or yellow, Ethiopian or black, American or red, and Malay

or brown. Cuvier simplified this classification into Caucasian, Mongol, and Negro, or white, yellow, and black races. Other writers make a still larger number of distinct races. It is said that Prof. Huxley's division of mankind is the most satisfactory. He distinguishes four principal types, and he points out the marked physical characteristics of each. These types are the Australioid (chocolate brown), Negroid (brown black), Mongoloid (yellow), and Xanthochroic (fair whites). To these he adds a fifth variety, the Melanochroic (dark whites). The "fair whites" are the type of the prevalent inhabitants of northern Europe; and the "dark whites," of southern Europe. All these physical differences do not exist in the case of each individual, and "innumerable varieties of mankind run into one another by insensible degrees;" but, taking the race or type as a whole, their peculiarities are sufficiently distinct to form the basis of well-recognized classification. Enc. Brit. tit. "Anthropology."

Before the act of May 6, 1882 (22 Stat. 58, 61), which prohibited the naturalization of Chinese, or when the Chinese and Japanese stood on the same footing under the law, the question of the right to naturalize a Chinaman came before Judge Sawyer in the case *In re Ah Yup*, 5 Sawy. 155, Fed. Cas. No. 104, and, in a well-considered opinion, the court denied the application. See, also, *In re Camille*, 6 Sawy. 541, 6 Fed. 256; *Elk v. Wilkins*, 112 U. S. 94, 5 Sup. Ct. 41; *Fong Yue Ting v. U. S.*, 149 U. S. 698, 716, 13 Sup. Ct. 1016.

Whether this question is viewed in the light of congressional intent, or of the popular or scientific meaning of "white persons," or of the authority of adjudicated cases, the only conclusion I am able to reach, after careful consideration, is that the present application must be denied.

Application denied.

CAIRO, V. & C. RY. CO. v. BREVOORT.

(Circuit Court, D. Indiana. June 9, 1894.)

No. 8,993.

1. FEDERAL COURTS—FOLLOWING STATE DECISIONS—RIPARIAN RIGHTS.

The right of an owner of land on one side of a navigable river, which forms the boundary between two states, to make a new bank for the river, or, by artificial structures, to turn the waters upon land on the opposite side of the river, is not a local question, but one depending for determination on the general principles of the law, on which decisions of the state courts are not binding on the federal courts.

2. SURFACE WATER—RIGHTS OF LANDOWNER.

The superabundant waters of a river, at times of ordinary floods, spreading beyond its banks, but forming one body and flowing within their accustomed boundaries in such floods, are not surface waters which a riparian owner may turn off as he will.

3. EMINENT DOMAIN—RIGHTS OF LANDOWNER.

A riparian proprietor who has conveyed to a railway company all the right, title, and estate in a strip of his land which could have been acquired by condemnation thereof for a right of way, has no right to construct along the river bank, over such right of way, a levee which will raise the water flowing in the stream at times of ordinary floods so as to endanger the bridge and other structures of the railway, and will also throw such water upon lands on the opposite side of the river, thereby subjecting the railway company to suits for damages.

This was a suit by the Cairo, Vincennes & Chicago Railway Company against Brevoort, to restrain the construction of a levee along the bank of the Wabash river across complainant's right of way. Defendant demurred to the bill.

C. S. Conger and Elliott & Elliott, for complainant.
Reily & Emison, for defendant.

BAKER, District Judge. The questions for decision arise upon a demurrer to the bill of complaint. The grounds of demurrer are that the bill of complaint does not state facts entitling the complainant to any equitable relief. The facts stated are that the complainant has constructed, owns, and operates a line of railway along the bank of the Wabash river, in the state of Illinois, opposite to a tract of land owned and occupied by the defendant, which is situated in Knox county, in the state of Indiana; that the complainant is a corporation organized under the laws of the state of Illinois, and is a citizen of that state; that it owns and operates a branch or short line of railroad which crosses the Wabash river from the Illinois side, and extends thence over lands in Knox county, Ind., to the city of Vincennes, in said county; that the branch line of railway is constructed upon and across the lands of defendant, where the railway crosses the Wabash river into Knox county, Ind.; that on the Indiana side, where said railway is constructed from the Indiana bank of the river for a short distance, the branch railway is built upon trestlework, in such manner that the water overflowing the Indiana side of the river, in times of floods, passes through the trestlework; that the defendant has built a levee on his lands upon and along the banks of the river, on the Indiana

side, near to said trestlework, and intends and threatens to continue said levee upon and across the complainant's right of way, and to join the same to the embankment and end of said trestle, where the same unites with an embankment or filling of solid earthwork, upon which the railway is constructed. It is further averred that the complainant has constructed its railway across the river upon a bridge with a sufficient opening on both sides of the river to suffer and permit the water accumulating in times of floods to pass, without material obstruction, through and under said bridge and trestlework; that a part of the plan, in constructing the bridge, was to leave open trestlework on the Indiana side of the river for the passage of flood water; and that, if the defendant shall complete his proposed levee, it will hold the flood water, when the river is high, within so narrow a channel that it will thereby become higher than it otherwise would, and would endanger the bridge, trestlework, and embankments of the railway, as well as the tracks and superstructure erected thereon, and would cause the right of way and other large bodies of land on the Illinois side of the river to be overflowed, subjecting the complainant to many suits by the owners of such lands for damages. The bill further avers that the complainant has been in the undisturbed possession and use of its right of way, as it now exists, and did exist at and before the time when the defendant began to construct his levee, for over 20 years; that it obtained the same by deed from the owner of the land, from whom the defendant long afterwards acquired his title. It is further averred that the complainant owns a right of way, 200 feet in width, over and across the defendant's land, held by a deed conveying all the right and privileges incident thereto, it being the purpose of the grantors in said deed to grant to said company such exclusive interest and estate in said strip of land (and no other interest or estate) as said company would acquire therein, were the same condemned to the use of said railroad by regular proceedings under the statutes of the state in that behalf made and provided.

In support of the demurrer, counsel for the defendant contend that the riparian proprietor may lawfully protect his property from floods by erecting a dike or levee on the bank of a stream, though its necessary effect may be to turn its superabundant waters on the land of his neighbor; that the waters of a stream, when swollen beyond its banks by ordinary and habitually recurring floods, are in the nature of surface water; and that such waters are a common enemy, which such proprietor may fight off as he will. And it is further contended that the complainant, by its deed of conveyance, has acquired only an easement of way, and that the defendant retains the paramount title, and may lawfully erect his levee thereon, doing no unnecessary injury to the complainant. Cases are cited from the supreme court of this state, which, it is claimed, support these contentions. These cases, if of the character claimed, would be authoritative expositions of the law for the control and guidance of the courts of the state in regard to what constitutes surface water; but they would not be binding on the federal courts, unless the question is one of local law. The right of an

adjoining landowner to make a new bank for a navigable river which forms the boundary between two states, or, by artificial structures, to turn the waters onto lands on the opposite side of the river, is not a local question, but one depending for its determination upon the general principles of the law. The Wabash river, as the court judicially knows, and as the bill avers, is a navigable stream and public highway, upon which interstate commerce is carried; and, this being so, it must follow that questions relating to the channel and banks of the river are in no just sense local in their nature. It is firmly settled that the decisions of the state courts are not controlling, and ought not to be followed, upon questions of general law, where such decisions are found to be at variance with the general principles of the law. *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, and cases there cited. The Indiana cases cited and relied on, in my judgment, have settled the law for this state that the superabundant water of a stream which, at times of ordinary floods, spreads out, and overflows its banks and channel, is to be deemed surface water, and, as such, that each proprietor may fight it off as he will, without liability to any one for damages occasioned thereby. *Taylor v. Fickas*, 64 Ind. 167, was an action by an upper riparian proprietor against a lower one to recover damages for obstructing and throwing back the waters of the Ohio river, which, having been swollen by rains, had overflowed its banks. It was alleged that:

"During times of high water and overflow, the water from the said river runs over the said tracts of land with a strong and rapid current,—the general current of the same running from east to west, first over the land of the plaintiff, and then over that of the defendant; the water in said current over said land varying in depth from two to ten feet,—and that the water (which is in fact a portion of the said river) has run in that manner, during seasons of high water, and during times of overflow, from time immemorial."

It was held that these waters were in the nature of surface water, and that the lower proprietor might lawfully fight them off as he saw fit, without regard to the damages caused thereby to the upper proprietor. The court say:

"In the complaint before us, there is no averment of any water course, except, indeed, by way of parenthesis, that the place, during floods, is a part of the Ohio river. But the facts averred clearly show that it is not upon the bed of the river, nor within its channel, nor between its banks; in short, that it is no part of a water course, but that the flow is over the entire surface of the land, is occasioned by temporary causes, and is not usually there. The rights of the appellee, therefore, are such as a proprietor may have in surface water, which, as we have seen, is a part of his land; and the injuries or inconveniences which the appellant is alleged to have suffered are such as arise from the changes, accidents, and vicissitudes of natural causes."

In the case of *Railroad Co. v. Stevens*, 73 Ind. 278, the question arose upon a complaint charging that the defendant "negligently and unskillfully built and constructed an embankment, and failed, negligently and carelessly, in the construction of the embankment, to make any culvert," and that "by reason thereof the water coming upon the land of the plaintiff, and flowing thereon from the river and from the surrounding lands, has been stopped and hindered by said embankment from flowing under said embankment."

In deciding the case, the court, upon the authority of *Taylor v. Fickas*, supra, assumed that the water which injured the plaintiff was surface water, but did not enter into a consideration of the question whether the water of a swollen stream would be regarded surface water. The court say:

"With reasonably near approximation to accuracy, it may be laid down as a general rule that, upon the boundaries of his own land,—not interfering with any natural or prescriptive water course,—the owner may erect such barriers as he may deem necessary to keep off surface water or overflowing water, from or across adjacent lands; and for any consequent repulsion, turning aside, or heaping up of these waters, to the injury of other lands, he will not be responsible."

In the case of *Turnpike Co. v. Green*, 99 Ind. 205, it is held that a riparian proprietor may, by levees on his own land, protect it from overflow by floods,—not, however, obstructing the channel of the stream; and for this purpose he may build a levee over the graveled way of a turnpike company having an easement upon his land,—not materially injuring the use of the way,—even though his levee causes a greater overflow of water upon the land of others, and upon the turnpike.

In the case of *Jean v. Pennsylvania Co.* (Ind. App.) 36 N. E. 159, it is held that the overflow caused by a river spreading beyond its banks in time of high water must be regarded, and may be treated, as surface water. The same principle has been recognized in the following cases: *Weis v. City of Madison*, 75 Ind. 241; *Benthall v. Seifert*, 77 Ind. 302; *Railroad Co. v. Houry*, Id. 364; *Hill v. Railroad Co.*, 109 Ind. 511, 10 N. E. 410; *Weddell v. Hapner*, 124 Ind. 315, 24 N. E. 368; *Barnard v. Shirley* (Ind. Sup.) 34 N. E. 600.

It is insisted—and, I think, with justice—that the opinion in *Taylor v. Fickas*, supra, upon which all subsequent Indiana cases rest, is based on an unfounded assumption. The court assumed—what is not true, in law or physics—that the water of the Ohio river, in times of ordinary floods, is surface water. The cases cited lend no just support to the assumption on which the opinion rests. It is settled law here, as well as elsewhere,—settled beyond serious debate,—that a railroad company, in bridging a stream, must provide a water way for the passage of the water which flows into and down the stream in times of ordinary floods, but it is not bound to provide outlets for surface water. If the water of the Wabash river, in times of ordinary floods, is surface water, a railway company would be under no obligation to provide an outlet for its superabundant water at such times; and the ultimate result would be that all the company need do is to provide outlets sufficient to pass the water which flows in the channel, and within its banks. Such, however, is not the measure of its duty. Either the cases which hold that a railroad company, in bridging a stream, must provide a sufficient water way for the passage of the superabundant water which flows into and down the stream in times of ordinary floods, are unsound, or else the doctrine of *Taylor v. Fickas*, supra, and of the cases which follow it, cannot be upheld.

In the decision of the case before me, it is not necessary to repudiate the doctrine of *Taylor v. Fickas*, supra, and of the other

cases which follow it, because there is an essential difference between the facts in the present case and the facts in the cases hereinbefore cited and criticised. In those cases the embankments or obstructions complained of did not run upon and along the bank of the stream, but they were placed at right angles thereto, while here the levee runs upon the bank, and parallel with the river. In this case the riparian owner proposes to change the bank by erecting an artificial upon the natural bank. There is also a plain difference between the backing up of flood waters on one side of the stream, and a change of the bank so made as necessarily to cast the water which flows in the stream at times of ordinary floods upon the proprietors of lands on the opposite side of the river. No Indiana case has been cited, and none is believed to exist, holding that a riparian proprietor has the right to erect a new bank along the margin of a stream, the necessary effect of which is to cast its superabundant waters, in times of ordinary floods, upon the lands of the opposite riparian proprietor, without responsibility for the proximate damages occasioned by such new bank. The flow of a river, when swollen beyond the low-water mark of the dry seasons by the ordinary rains which fall in wet seasons, or by the melting of snows, does not constitute surface water. The waters of a natural stream are not surface water, in any just sense, and the waters of a stream are those which are cast into it by rainfalls and melting snows. Ordinary rainfalls are such as are not unprecedented and extraordinary; and hence floods and freshets which habitually recur, though at irregular and infrequent intervals, are not extraordinary or unprecedented. It has been well said that "freshets are regarded as ordinary which are well known to occur in the stream occasionally through a period of years, though at no regular intervals." Gould, Waters, § 211c. The waters cast into a stream by ordinary floods must have a channel in which they are accustomed to flow, and, if they have, that channel is a natural water course, with which no riparian proprietor can lawfully interfere to the injury of another. If there is a natural water way or course, and its existence is necessary to carry off the water cast into the stream by ordinary floods, that way is the flood channel of the stream; and, if it is the flood channel of the stream, the water which flows there cannot be regarded as surface water. Surface water is that which is diffused over the ground from falling rains or melting snows, and continues to be such until it reaches some bed or channel in which water is accustomed to flow. Surface water ceases to be such when it enters a water course in which it is accustomed to flow; for, having entered the stream, it becomes a part of it, and loses its original character. "A stream," says Gould, "does not cease to be a water course, and become mere surface water, because, at a certain point, it spreads over a level meadow, and flows for a distance without defined banks, before flowing again in a definite channel." Gould, Waters, § 264. It must necessarily follow from this general principle that where water naturally flows, though the volume may change with the varying seasons, there is a natural water course,

even though at times the place where the water flows in ordinary floods may become entirely dry. It can make no difference that the boundaries within which the water flows change with varying seasons, for the way which nature has provided for its flow is the stream, and water flowing in that water way is not surface water. As is well said in *Crawford v. Rambo*, 44 Ohio St. 279, 7 N. E. 429:

"It is difficult to see upon what principle the flood waters of a river can be likened to surface water. When it is said that a river is out of its banks, no more is implied than that its volume then exceeds what it ordinarily is. Whether high or low, the entire volume at any one time constitutes the water of the river at such time, and the land over which it flows must be regarded as its channel. So that, when, swollen by rains and melting snows, it extends and flows over the bottoms along its course, that is its flood channel; and when, by drought, it is reduced to its minimum, that is its low-water channel."

Lord Tenterden, with whom originated the expression that "surface water is a common enemy," held, in *Rex v. Trafford*, 1 Barn. & Adol. 874, that the water of a stream was not surface water, and declared that the doctrine announced in *Rex v. Commissioners of Sewers*, 8 Barn. & C. 355 (the case in which he used the above expression), had no application to the waters of a natural stream. In the course of his opinion, he observes:

"It has long been established that the ordinary course of water cannot be lawfully changed or obstructed for the benefit of one class of persons to the injury of another. Unless, therefore, a sound distinction can be made in the ordinary course of water flowing in a bounded channel at all seasons of the year, and the extraordinary cause which its superabundant quantity has been accustomed to take at particular seasons, the creation and continuance of these feeders cannot be justified. No case has been cited or has been found that will support such a distinction."

In the case of *O'Connell v. Railroad Co.*, 13 S. E. 489, the supreme court of Georgia states the question before it thus:

"The precise question in this case is whether the owner of land on the bank of a river can, without liability, erect on his own land an embankment which increases the overflow, in times of flood, upon the lands of the opposite proprietor, to the injury thereof."

After a full and careful consideration of the question it was held that there was no such right. In the course of the opinion the court observed:

"The surplus waters do not cease to be a part of the river when they spread over the adjacent low grounds, without well-defined banks or channels, so long as they form with it one body of water, eventually to be discharged through the proper channel."

In *Menzies v. Breadalbane*, 3 Bligh (N. S.) 414, the court say:

"It is clear, beyond the possibility of doubt, that, by the law of England, such an operation cannot be carried on. The old course of the flood stream being along certain lands, it is not competent for the proprietors of those lands to obstruct that course by a sort of new water way, to the prejudice of the proprietor on the other side."

In *Burwell v. Hobson*, 12 Grat. 322, it is holden that the water of a stream, when swollen by ordinary floods, is not surface water. Speaking of the concession of counsel that the general rule is that the flow of a stream cannot be lawfully obstructed, and the denial of its application to the case before it, the court said:

"But he contended that it is confined in its application to the ordinary course of the stream, and that a riparian proprietor may lawfully protect his property from floods by erecting a dike or other obstruction, though its necessary effect may be to turn the superabundant water on the land of his neighbor. Such a distinction between the ordinary and extraordinary flow of a stream is not laid down or recognized by any elementary writer, or in any adjudged case, so far as I have seen. The utmost extent to which the authorities go in that direction is that a riparian proprietor may erect any work in order to prevent his land being overflowed by any change in the natural flow of the stream, and to prevent its old course from being altered. Ang. Water Courses, § 333. But he has no right to build anything which, in times of ordinary flood, will throw the waters on the grounds of another proprietor, so as to overflow and injure them. If, in the case of such an obstruction, it appears that the injury arose from causes which might have been foreseen, such as ordinary freshets, he is liable for the damage. Id. § 349. That the supposed distinction does not exist was expressly decided in *Rex v. Trafford*, 1 Barn. & Adol. 874."

The same principle is recognized or expressly decided in the following cases: *Jones v. Hannover*, 55 Mo. 462; *Wharton v. Stevens*, 84 Iowa, 107, 50 N. W. 562; *Gerrish v. Clough*, 48 N. H. 9; *Hartshorn v. Chaddock*, 135 N. Y. 116, 31 N. E. 997; *Byrne v. Railway Co.*, 38 Minn. 212, 36 N. W. 339; *Wallace v. Drew*, 59 Barb. 413; *Ordway v. Village of Canisteo*, 66 Hun, 569, 21 N. Y. Supp. 835; *Carriger v. Railroad Co.*, 7 Lea, 388; *West v. Taylor*, 16 Or. 165, 13 Pac. 665.

With reasonably near approximation to accuracy, it may be laid down as a general rule that all the waters of a river, which form one body, when flowing within the boundaries within which they have been immemorially accustomed to flow, in times of ordinary floods, constitute waters of the river, and are not surface waters.

The complainant owns a right of way over and across the lands of the defendant, 200 feet in width. Its title thereto was acquired by a deed of conveyance from the same party from whom the defendant subsequently acquired his title. The deed conveyed to the complainant all the right, title, and estate which could have been acquired under condemnation proceedings under the statute of the state in that case made and provided. The complainant acquired an easement in the land, whose nature and extent are such as is necessary for the purpose of maintaining and operating its railway. The estate of the complainant is the dominant, and that of the defendant the servient. *Davidson v. Nicholson*, 59 Ind. 411; *Robinson v. Thrailkill*, 110 Ind. 117, 10 N. E. 647. The grant of an easement conveys all such incidental rights as are necessary to the enjoyment of the thing granted. The use to which an easement is devoted, or for which it is created, determines its character; and, to the extent that the use is necessary to carry out the purpose of the grant, the rights of the owner of the easement are paramount. An easement granted to a railway is essentially different from any other. The nature of railway service requires exclusive occupancy. A railroad company is held to the highest degree of care, and the exercise of this care necessarily requires that it should have complete dominion over its right of way. It is bound to prevent obstructions from being placed on its tracks, and is required to keep them fenced in, and free from rubbish or

other combustible materials. The duties of a railway company are due to the public as well as to individuals, and these duties it must perform at its peril. The rules which apply to the use of streets or highways fail, when applied to railroads, because the necessities of their use are different. The railroad must have the exclusive possession and control of the land within the lines of its location, and the right to remove everything placed or growing thereon, which it may deem necessary to remove to insure the safe management of its road. *Hayden v. Skillings* (Me.) 6 Atl. 830; *Brainard v. Clapp*, 10 Cush. 10; *Hazen v. Railroad Co.*, 2 Gray, 577; *Locks & Canals v. Nashua & L. R. Co.*, 104 Mass. 11; *Jackson v. Railroad Co.*, 25 Vt. 150; *Railroad Co. v. Holton*, 32 Vt. 43; *Atlantic & P. Tel. Co. v. Chicago, R. I. & P. R. Co.*, 6 Biss. 158, Fed. Cas. No. 632. The construction of the levee as proposed would be a plain invasion of the complainant's exclusive rights. It follows from the foregoing considerations that the demurrer must be overruled, and it is so ordered.

WATTS v. WESTON et al.

(Circuit Court of Appeals, Second Circuit. May 29, 1894.)

No. 111.

1. DAMAGES—BREACH OF CONTRACT SUBJECT TO FURTHER AGREEMENT.

A contract for the sale of the entire output of a colliery for more than 20 years provided that the price should be agreed upon from month to month by the parties. *Held* that, on a refusal to deliver such output, in the absence of any further agreement as to price or of any means of determining what price the contract required, the damages from such refusal could not be ascertained, and nominal damages only were recoverable.

2. APPEAL—DISCRETION OF TRIAL COURT—AMENDMENT.

In an action on a guaranty of performance of a contract, a refusal to allow an amendment of the complaint, setting up a modification of the contract originally declared upon, is within the discretion of the trial court, and will not be reviewed.

In Error to the Circuit Court of the United States for the Southern District of New York.

This was an action by James R. Watts against Walter Weston and Alfred J. Weston on a guaranty. The circuit court directed a verdict for plaintiff for six cents damages. Plaintiff brought error.

Treadwell Cleveland, for plaintiff in error.

Martin J. Keogh, for defendants in error.

Before LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The complaint alleges that by certain agreements and conveyances therein set forth one Caleb B. Knevals had in 1871 become the trustee of the Primrose colliery, in Schuylkill county, Pa., with full control of its business, and the mining, transporting, and selling of its coal, until June 14, 1901. That on or about June 25, 1880, Knevals, as such trustee, entered into a written agreement with the firm of Caldwell, Weston & Co.,

doing business in the city of New York, engaging to consign and deliver to said firm, their successor, successors, or assigns, the entire output of the Primrose colliery until June 1, 1901. The agreement provided, as the complaint alleges, that "they, the said Caldwell, Weston & Co., their successor or successors or assigns, should be the exclusive agents, and have full control of the entire production of coal that should at any time be mined by the said Knevals, trustee, or the said Primrose colliery, during the said period, and that such coal should be sold to the said Caldwell, Weston & Co., their successor or successors or assigns, at a price to be agreed upon from month to month, on or about the first of each month, by said Caleb Knevals, trustee, or the Primrose colliery, and the said Caldwell, Weston & Co., their successor or successors or assigns." Advances were to be made upon coal so mined, as soon as notice of shipment from the colliery should be received, to an amount not exceeding the purchase price per ton agreed upon. The firm aforesaid continued in business until December 31, 1882, when it was succeeded by the firm of Caldwell, Weston Bros. & Watts, which last-named firm was itself succeeded December 31, 1882, by the firm of Weston Bros. & Watts, composed of the defendants and the plaintiff. During all this time it is averred that the contract was carried out, and the entire product consigned to the New York firm. The complaint then avers that the firm of Weston Bros. & Watts continued in the coal business until on or about January 10, 1885, and during the whole period of its existence continued in the performance of the said contract with Knevals and the colliery. That on or about January 10, 1885, it was duly dissolved, and was succeeded by the firm of James R. Watts & Co., composed of the plaintiff and one Adler, to which firm the said contract and all rights and causes of action thereunder were duly assigned. That the firm of James R. Watts & Co. continued in business until September 2, 1885, when it was dissolved, and all its property transferred to plaintiff; and that said firm of James R. Watts & Co. continued in the due performance of the said contract until about the month of March, 1885, when Knevals, as trustee, and the Primrose colliery, ceased and refused, and have ever since so refused, to consign and deliver to the said firm any of the output thereof, by reason of which refusal and failure to perform the contract the firm of James R. Watts & Co. and the plaintiff suffered great loss and damage. It is further averred in the complaint that on or about January 12, 1885 (the date of the dissolution of the firm of Weston Bros. & Watts), the defendants "jointly and severally, duly and for a valuable consideration, guaranteed and agreed in writing to indemnify and save harmless the plaintiff, his legal representatives or assigns, against all loss or damage which might arise from or by reason of any default or breach by the said Caleb B. Knevals, trustee, or the said Primrose colliery, from any cause whatever, to fully carry out the said agreement dated June 25, 1880, to the end of the term." Upon this contract of guaranty, plaintiff demanded judgment against defendants for his damages from the breach of the agreement of

June 25, 1880. The action was tried before a jury, and at the close of plaintiff's case the court, although satisfied that the averments of the complaint as to the transactions above set forth had been fully proved, directed a verdict in favor of the plaintiff for six cents only. To such disposition of the case exception was duly taken, and the direction of such a verdict is assigned as error.

In our opinion, the plaintiff was not entitled to recover any but nominal damages. The agreement of June 25, 1880, bound Knevals and the colliery only to sell the New York firm coal at a price to be agreed upon between the parties from month to month. The profits of the firm would manifestly be the difference between the price thus fixed, plus such expenses as they might be put to, and the price they might be able to obtain for the coal in the New York market. As the price to be paid the colliery was left wholly unsettled by the contract, and could be made certain only by further agreement of the parties from time to time, there is nothing, in the absence of such further agreement, with which to compare the market price at which coal, if shipped, could have been sold by the firm, and thus determine the profits which might have been lost by a refusal to sell at all. Not only is the contract uncertain as to the price to be paid by the firm, but it is not by its terms capable of being made certain either by reference to some umpire in case of a disagreement, or by providing that in the absence of an agreement it should be taken at the market price. Nor is there sufficient in the evidence to warrant a finding that the parties had practically so interpreted it as to dispense with the successive agreements as to price for which it provides. No doubt, in figuring for a coming month, both sides naturally enough took the market price of coal in the preceding months as a basis; both also took into consideration the tendency of the market for the future; but the important fact as to practical interpretation is that they did in fact from time to time agree upon the price. Neither seems ever to have acted upon the assumption that such price was to be fixed otherwise than with the concurrence of both. Moreover, it is difficult to see how, under the contract, there could be, as the plaintiff contends, any "market price" for Primrose coal "at the colliery." A market implies competition, and, if the entire output was to be turned over for 30 years exclusively to a single customer, it is quite apparent that unless some control over the price was reserved to the colliery it would be entirely at the mercy of the customer, who might fix the market at the mines by the price it was willing to pay. Nor is it to be supposed that the price to be paid was the market price of coal of this kind in New York, less expenses of transportation and sale. In the absence of a selling commission,—and the contract provides for none,—this would leave no profit to the consignees. We find nothing in the case from which a jury could determine what price the contract required plaintiff's firm to pay during any month not covered by an agreement as to price, and without that element the damages resulting from a failure to sell them coal are not susceptible of adjustment.

A further assignment of error is to the refusal of the circuit court to allow plaintiff to amend his complaint. The amendment asked for was as follows:

"That on or about November 12, 1884, the said last-mentioned contract [that of June 25, 1880] was, at the request of Caleb B. Knevals, trustee, and with the consent of Weston Bros. and Watts, to whom the said contract had been duly assigned by mesne assignments from Caldwell, Weston & Co., modified by providing that the said Weston Bros. & Watts should take the entire output of the Primrose colliery and sell the same at a certain commission upon each ton, namely, at 15 cents a ton for pea and lump coal, and 20 cents for all other sizes; and that under said contract, as modified, the said Caleb B. Knevals, trustee, and the said Weston Bros. & Watts continued to conduct the business aforesaid."

There was in evidence a letter from Knevals proposing,—in fact, insisting upon,—such a modification, and some proof tending to show that about the time of its dissolution the firm of Weston Bros. & Watts had rendered one or more statements of account on some such basis. Manifestly, if the agreement between the colliery and the New York house secured the latter a fixed sum on each ton of coal sold, the difficulty as to proof of damages in the case of its breach would be largely removed.

Motions to amend the pleadings upon the trial are within the discretion of the trial judge, who is more fully informed as to all the attendant circumstances, and can best determine whether amendment at that stage of the case would be consistent with the meting out of equal justice to both sides. Such discretion is not as a rule the subject of review, but counsel for appellant correctly states the exception to the rule, namely, that when the record plainly shows that the exercise of discretion was "wholly unreasonable" it will be reviewed on appeal or writ of error. But in the case at bar the refusal was very far from being "wholly unreasonable." To have allowed the amendment would have been to substitute an entirely new cause of action in the place of the one sued upon. And this, too, in an action against guarantors, whose written contract of guaranty refers solely to the agreement originally declared upon, incorporating it into the contract of guaranty with no modification in its terms, and who were brought into court to answer for default only as to the particular form of agreement to which their contract referred.

The judgment of the circuit court is affirmed.

MITCHELL v. MARKER.

(Circuit Court of Appeals, Sixth Circuit. May 8, 1894.)

No. 144.

1. APPEAL—OBJECTIONS TO EVIDENCE.

An objection to evidence, to be available on writ of error, must be specific, and distinctly indicate the grounds upon which the objection is made.

2. OPERATION OF PASSENGER ELEVATORS—DEGREE OF CARE REQUIRED.

A carrier by elevator is not an insurer of the safety of his passengers, but is required to exercise the highest degree of care, as in the case of

a carrier by railway or stagecoach; and therefore *held* not error to charge in the light of the particular case, and in connection with the context, that reasonable care to prevent injury to passengers upon an elevator was "the highest degree of care consistent with the possibility of injury." 54 Fed. 637, affirmed.

8. SAME.

The rule that a carrier of passengers must exercise the highest degree of care, whether carried in an elevator or a railway, includes the control and management of the means of transportation, and is not restricted to the vehicle and machinery.

4. SAME.

It is the duty of one operating an elevator to give passengers reasonable opportunity to obtain a balance upon entering the car, before a rapid and sudden upward movement is begun, having a tendency to disturb the equilibrium of one yet in motion; and therefore *held* not error to charge, in such case, that "It is the duty of the elevator man to see that all his passengers are on, and to give them sufficient time to adjust themselves."

5. SAME.

Error alleged as to the charge of a court will not be considered by the circuit court of appeals for the sixth circuit (rule 11), where the assignment of errors does not set out the part referred to in totidem verbis.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

This was an action by Elijah M. Marker against Robert Mitchell to recover damages for personal injuries. There was a verdict for plaintiff in the circuit court, and afterwards a motion for a new trial was denied. 54 Fed. 637. Defendant sued out this writ of error.

C. D. Robertson and Charles T. Greve, for plaintiff in error.

W. H. Jackson and Theo. Hallam, for defendant in error.

Before LURTON, Circuit Judge, and RICKS, District Judge.

LURTON, Circuit Judge. This was an action for personal injuries sustained by appellee while being carried in a passenger elevator in an office building in the city of Cincinnati, Ohio, owned by the appellant. There was a jury, and a verdict for the appellee. The bill of exceptions is very meager, and was prepared chiefly with a view of presenting certain questions of law arising upon the charge of the court. There is, however, one error assigned upon the ruling as to the admission of evidence. To understand that assignment, and its bearing upon the other assignments which relate to the charge, we set out so much of the bill of exceptions as relates to the evidence submitted. It is as follows:

"The plaintiff, to maintain the issue on his part, offered testimony tending to prove the allegations of the petition, to wit, to prove that the servant of the defendant, while in the line of his employment, for hire, operating a passenger elevator in the Mitchell building, in Cincinnati, belonging to said defendant, was negligent in such a degree and manner as to injure the plaintiff, who was lawfully entering said elevator; and, in the course of said testimony for plaintiff, counsel for plaintiff asked the following question, which was objected to by counsel for defendant, but said objection was overruled by the court, to which exception was then and there taken by counsel for defendant, and the question was answered as herein set forth, to wit: 'Q. You say that you frequently spoke to this man about the rate of speed at which he was running the elevator? A. Yes, sir; time and again' (the

man referred to being the man whose alleged negligence in operating said elevator at the time of the accident is the cause of complaint herein). That thereupon plaintiff rested, and thereupon defendant offered testimony tending to contradict the evidence of plaintiff, and to prove the allegations of the answer, to wit, that there was no negligence on the part of the defendant, causing said accident, and thereupon defendant rested; and thereupon plaintiff offered evidence tending to rebut the evidence of the defendant; and this was all the evidence offered by either party to the cause."

The first error assigned is as follows:

"(1) The court erred in allowing the asking of the following question of plaintiff: 'You say that you frequently spoke to this man about the rate of speed at which he was running the elevator?' (the man referred to being the elevator man, whose alleged negligence in operating the elevator is the cause of complaint herein),—and in allowing said question to be answered, as follows, to wit: 'Yes, sir; time and again.' The counsel for the defendant then and there excepting."

This assignment is bad. The ground of objection was not stated in the court below. The exception was a general one. The ground now assigned is that "the question was an improper one, as it tended to establish a habit of negligence on the part of defendant's agent, while the point at issue in this case was not the negligence of defendant in employing a careless servant, but the negligence of that servant at the time of the accident." What was said about the speed of the elevator man is not shown. We are left to speculate and conjecture as to whether it was a warning that his speed was dangerous, or a commendation as to his regulation of the speed, or a complaint that his speed was too slow. The cases are numerous which hold that, to avail on writ of error, an objection to evidence must be specific, and distinctly indicate the grounds upon which the objection is made. *Noonan v. Mining Co.*, 121 U. S. 400, 7 Sup. Ct. 911; *Patrick v. Graham*, 132 U. S. 627, 10 Sup. Ct. 194. Aside from this, it is impossible for this court to assume that the court was in error in excluding the testimony now complained of; for its character is not sufficiently evident, and its bearing upon the issues by no means plain, in view of the meagerness of the bill of exceptions.

The second error is that the court erred in charging the jury as follows:

"It follows that reasonable care, under those circumstances, is a high degree of care,—the highest degree of care consistent with the possibility of injury."

This sentence is the last of a paragraph concerning the degree of care required in the operation of an elevator. That paragraph is as follows:

"Mr. Marker seeks to recover damages from Mr. Mitchell, on the ground that he suffered an injury because of Mitchell's negligence. Mitchell is the owner of a building on Fourth street, in which there is an elevator. The elevator is put in there for the purpose of accommodating those who wish to go to offices of Mitchell's tenants; and Mitchell owes a duty, therefore, to those who take that elevator for that lawful purpose, to see that he uses every reasonable means that carriage on the elevator shall not injure those who use it. Now, every reasonable means are those means which a man of ordinary, careful prudence would use under the circumstances. When a man steps upon an elevator of this character, he places himself under the

control of another; and it follows that reasonable care, under those circumstances, is a high degree of care,—the highest degree of care consistent with the possibility of injury."

Particular objection is made to the expression, "consistent with the possibility of injury." Appellant's counsel argue that the jury were thereby given to understand that the owner of an elevator was "practically an insurer;" that "consistent with the possibility of injury" "means just allowing for such a possibility." This is a strained and unnatural interpretation. The sentence must be read with its context, and in the light of the particular action being tried. The expression, "consistent with the possibility of injury," is not the happiest which might have been chosen. It is plain, however, that the court was not misunderstood, when we consider the subject-matter of the suit, the dangers incident to vertical carriage, the helplessness of a passenger so carried, and the serious consequences to ensue from even slight negligence. The obvious meaning of the court, when the objectionable sentence is read in the light of the particular case on trial, and in connection with the context, was, that reasonable care, under such circumstances, would be a high degree of care, the highest degree of care being only such as would be commensurate with, or proportionate to, the possibility of injury to one so entirely dependent upon the caution and skill of another, and the soundness of the machinery used for his transportation. To say to a jury that the law requires that the degree of care to be exercised must be such as is "consistent with the possibility of injury" is only to say that the care must be commensurate with, or in proportion to, the possibility of injury presented by the particular situation. There was nothing in the paragraph excepted to which would justify an inference that a carrier by elevator was an insurer of the safety of his passengers. Assuming that the charge meant what we understand it to mean, and that the jury would not be justified in putting any other meaning upon it, we think the principle of law stated was both wholesome and sound.

We see no distinction in principle between the degree of care required from a carrier of passengers horizontally, by means of railway cars or stagecoaches, and one who carries them vertically, by means of a passenger elevator. The degree of care required from carriers by railway or stagecoach is the highest degree. Neither is an insurer, but, in regard to each, care short of the highest degree becomes, not ordinary care, but absolute negligence. Speaking of the degree of care required from a railroad company, the supreme court, in *Pennsylvania Co. v. Roy*, 102 U. S. 458, said:

"He is responsible for injuries received by passengers in the course of their transportation which might have been avoided or guarded against by the exercise upon his part of extraordinary vigilance, aided by the highest skill, and this caution and vigilance must necessarily be extended to all the agencies or means employed by the carrier in the transportation of the passenger."

See, also, *Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653; *Gleeson v. Railroad Co.*, 140 U. S. 435, 11 Sup. Ct. 859.

In *Stokes v. Saltonstall*, 13 Pet. 181, the same measure of care was required from the owner of a stagecoach.

The suggestion that this rule applies only to the vehicle or machinery is not sound. There is no distinction between the duty in regard to vehicle and machinery and track and that required in the control and management of the means of transportation. In the last case cited the supreme court approved a charge in which the degree of care required from a driver of a stagecoach was laid down as the "utmost prudence and caution." The rule in regard to carriers of passengers has been well stated by Judge Cooley in his very able work on Torts. He says:

"Such carrier only undertakes that he will carry them without negligence or fault. But as there are committed to his charge, for the time, the lives or safety of persons of all ages, and of all degrees of ability for self-protection, and as the slightest failure in watchfulness may be destructive of life and limb, it is reasonable to require of him the most perfect care of prudent and cautious men; and his undertaking as to his passengers goes to this extent: that, as far as human foresight and care can reasonably go, he will transport them safely. He is not liable if injuries happen from sheer accident or misfortune, where there is no negligence or fault, or where no want of caution, foresight, or judgment would prevent the injury. But he is liable for the smallest negligence in himself or his servants." Cooley, Torts (2d Ed.) 768, 769.

The case of *Treadwell v. Whittier*, reported in 80 Cal. 574, and 22 Pac. 266, is directly in point. The question there presented was the degree of care required from one operating a passenger elevator. After considering and stating the rule required from carriers by railway and coach, the California court said:

"The same responsibility must attach to one controlling and running an elevator. Persons who are lifted by elevators are subjected to great risk to life and limb. They are hoisted vertically, and are unable, in case of the breaking of machinery, to help themselves. The person running such elevator must be held to undertake to raise such persons safely, as far as human care and foresight will go. The law holds him to the utmost care and diligence of every cautious person, and responsible for the slightest neglect. Such responsibility attaches to all persons engaged in employments where human beings submit their bodies to their control by which their lives or limbs are put at hazard, or where such employment is attended with danger to life or limb. The utmost care and diligence must be used by persons engaged in such employments to avoid injury to those they carry. The care and diligence required is proportioned to the danger to the persons carried. In proportion to the degree of danger to others must be the care and diligence to be exercised. Where the danger is great, the utmost care and diligence must be employed. In such cases the law requires extraordinary care and diligence. We know of no employment where the law should demand a higher degree of care and diligence than in the case of the persons using and running elevators for lifting human beings from one level to another. The danger of those being raised is great. When persons are injured by the giving way of the machinery, the hurt is always serious,—frequently fatal; and the law should, and does, bind persons so engaged to the highest degree of care practicable under the circumstances. It would be injustice and cruelty to the public, in courts, to abate in any degree from this high degree of care. The aged, the helpless, and the infirm are daily using these elevators. The owners make profit by these elevators, or use them for the profit they bring to them. The cruelty from a careless use of such contrivances is likely to fall on the weakest of the community. All, including the strongest, are without the means of self-protection upon the breaking down of the machinery. The law therefore throws around such persons its protection, by requiring the highest care and diligence."

The case of *Goodsell v. Taylor*, 41 Minn. 207, 42 N. W. 873, is a like case, and the rule applicable to carriers by railway is there applied to carriers by passenger elevators.

The third assignment of error is as to so much of the charge as held it to be "the duty of the elevator man to see that all his passengers are on, and to give them sufficient time to adjust themselves." The petition charged that as the plaintiff—

"Was entering the car of the elevator in said building, to be carried to the fifth floor thereof, while he was in the act of entering said car, and before he was allowed the proper time to safely balance or adjust himself therein, the agent or servant having charge of the running of said elevator negligently and carelessly caused the same to be suddenly started, with great, unusual, and dangerous speed and violence, and negligently failed to guard the door or entrance to the car of said elevator, * * * by reason of which negligent acts and omission of defendant's agent or servant, and also by reason of the unsafe construction of said elevator, the plaintiff was thrown violently from his feet, and was caught between the cage of said elevator and a projection of the floor above, and sustained serious and permanent injuries," etc.

Upon this allegation the court said:

"Now, it is charged in this petition that Bartholomew failed in three respects: First, that he started the elevator too quickly; and by that I don't refer to the starting of the elevator by jerks, but I mean that he didn't wait long enough, until Marker should have time to adjust himself to the quick, upward motion. Of course, it is the duty of the elevator man to see that all his passengers are on, and to give them sufficient time to adjust themselves. Whether that was done in this case, it is for you to say. If he did not do that, and if, by reason of starting too quick, the accident occurred, Mr. Mitchell is liable."

We think there was no error in this, as applied to the issue to which it related. It was clearly the duty of the engineer operating the elevator to give passengers reasonable opportunity to obtain a balance upon entering the car, before a rapid and sudden upward movement is begun, having a tendency to disturb the equilibrium of one yet in motion.

The fourth and last error assigned is in these words: "The court erred in charging the jury with reference to the duty of the elevator man in extending his arm." The language of the assignment is precisely the language in which the exception was taken. Looking to the petition, we find that it alleged that the door or entrance to the car was unguarded, and that plaintiff fell out this door, and was jammed between the elevator and the shaft. Looking to the charge, we find that the court commented upon the issue thus presented, and the testimony relating to the issue, and submitted to the jury the question as to whether, under the circumstances, reasonable prudence would have required the elevator man to have extended his arm in such way as to prevent one losing his balance from falling out the door. The facts relating to this issue are not included in the bill of exceptions; and we cannot say whether there was or was not evidence justifying the submission of this question to the jury. Certainly, we cannot, on this record, say that it was error in the trial court to have so instructed the jury. But a fatal objection to this assignment is that it does not set out the part of the charge referred to. Rule

11 requires that, "when the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to totidem verbis, whether it be in instructions given or in instructions refused."

Counsel, in brief, have complained of other parts of the charge. But as no exception was taken on the trial, and no error has been assigned as required by the rule cited above, we cannot consider them.

The judgment must be affirmed.

SHIPMAN v. SALTSBURG COAL CO.

(Circuit Court of Appeals, Third Circuit. June 15, 1894.)

SALE—APPORTIONMENT OF DELIVERIES.

A contract for the sale of the entire output of certain coal mines, at prices payable in monthly installments, for the coal at the mines, the buyer agreeing to ship and pay for at least a certain quantity per annum, provided so much is furnished him, cannot be construed, because of circumstances existing when it was made, to require him to take the coal monthly, in such quantities as to keep the seller's works and workmen reasonably employed, as they had customarily been and were at the time of the contract, thus imposing on him a distinct and unexpressed obligation.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

This was an action by O. W. Shipman against the Saltsburg Coal Company, for damages for breach of contract. On the trial in the circuit court the jury found for defendant, and judgment for defendant was entered on the verdict. Plaintiff brought error.

R. L. Ashhurst and S. S. Hollingsworth, for plaintiff in error.

Wm. M. Stewart, Jr., and George L. Crawford, for defendant in error.

Before ACHESON, Circuit Judge, and WALES and GREEN, District Judges.

ACHESON, Circuit Judge. This was an action brought by O. W. Shipman against the Saltsburg Coal Company for the breach of a written agreement between these parties, dated September 30, 1889, the material provisions of which are these:

"That the said the Saltsburg Coal Company agrees to sell, and the said O. W. Shipman agrees to purchase, the entire output of the Foster and Fairbank coal mines, except as hereinafter provided, for a period of five years, beginning from the first day of January, A. D. 1890, at the following prices, payable in monthly installments, on or before the twelfth day of each and every month during the term."

After specifying the prices, the paper provides:

"The above prices to be paid for the coal free on board at the mines, and all freights on shipments to be paid by the said O. W. Shipman."

Here follows a clause excepting coal to supply local demand, and a provision for an advance in the specified prices in the event of an increase in the cost of mining. The paper then proceeds as follows:

"And the said O. W. Shipman covenants and agrees to ship and pay for at least two hundred thousand tons of coal per annum, provided that so much is furnished him, and the shipment of the same is not prevented by storms, strikes, or railroad complications over which he has no control. In case default be made by either party in any of the covenants of this contract for a period of thirty days, the other party shall have the option, upon giving a ten-days written notice thereof, to cancel this agreement, and hold the other party liable for all damages caused by reason of such failure to comply with the covenants herein contained."

Shipment of coal began January 1, 1890, and ceased August 13, 1891, the defendant company having given notice on the latter date that it canceled the agreement because of the alleged default of the plaintiff. During the year 1890 the shipments of coal under the contract amounted to 220,731 tons, in unequal monthly quantities; the highest monthly shipment being 21,725 tons, and the lowest 14,830 tons. In the year 1891 the shipments in the month of January were 17,942 tons; in February, 11,919 tons; in March, 19,431 tons; in April, 10,775 tons; and in May, 10,744 tons. In June the shipments fell to 8,319 tons, and in July to 8,010 tons. In August the plaintiff shipped 5,270 tons. To these shipments in the year, 1891, however, is to be added the item of 11,310 tons of "tipple coal," so that the total amount taken by the plaintiff in 1891, up to the termination of the contract by the act of the defendant, was 103,720 tons. The unvarying course of dealings between the parties, under the contract, was for the plaintiff to give the defendant orders for coal, and the coal was mined by the defendant when and as these orders were received. It does not appear that the defendant, in any instance, mined coal, and tendered it to the plaintiff, or notified him to ship it. After the 1st day of April, 1891, the defendant complained of the falling off in the plaintiff's shipments, and repeatedly asked him to increase his orders. On August 13, 1891, the defendant served upon the plaintiff a written notice, addressed to him, and signed by the president of the coal company, of which the following is a copy:

"You are hereby notified by the Saltsburg Coal Company that, under the terms of your written agreement with said company, you have failed to comply with the same by shipping and paying for at least two hundred thousand tons of coal per annum, together with other matters connected with said agreement. You are also notified that more than thirty days have expired since you have failed and refused to comply with said contract; and, in accordance with its terms, the said company hereby further notifies you that at the expiration of ten days from this date, that said company, under its option, cancels the agreement between you and said company, and that said company will hold you responsible for all damages caused by reason of said failure."

The defendant declined to furnish any coal under the contract subsequently. The alleged reason (and it would seem, from the evidence, the true reason) for the falling off in the plaintiff's shipments was an excessive increase in the freight rate on this coal (an additional charge of 40 cents a ton), which the Pennsylvania Railroad

Company imposed in the spring of 1891. That company operated the only railway connecting with these mines, and this advance in freight charges seriously interfered with the plaintiff's established trade. There was uncontradicted evidence to show that the defendant company, with its then facilities, could mine over 300,000 tons of coal a year. In the court below the defendant took the position that the plaintiff was bound to take 200,000 tons of coal per annum, in equal monthly quantities. But the court declined—and, we think, rightly—so to construe the contract. The court here said:

"The demand for coal on the plaintiff, who was selling, might be greater during one month, or one season, than another; and in the absence of any language requiring him to take an equal amount each month it would be unreasonable to suppose that he was intended to do so."

The court, however, added that it—

"Would be equally, if not more, unreasonable to conclude that he was intended to take, if he saw fit, only a nominal amount for one month, or for several months, in compliance with the mere letter of the contract, and thus leave the defendant without employment for its men or its works during this period, and force it to the serious disadvantage of furnishing the balance of the usual output of 200,000 tons during the limited period of the year left."

The court said that the paper was to be read in the light of the circumstances surrounding the parties at the time it was executed, which circumstances, it was stated, were—

"That the plaintiff was purchasing the coal to sell again, as he could obtain purchasers; that the defendant, the coal company, was operating mines which produced, as then and previously worked, about 200,000 tons per annum, and that there was no provision on the premises for storing coal; that the practice was at the time of the contract, and had been, to take it from the mines, and load it on cars as mined, which cars the railroad company would not permit to remain standing upon its tracks longer than was necessary to make up trains and get them away after being loaded; and that the plaintiff, or his agent who negotiated the contract, was familiar with the mines, understood their situation, and the extent of their output."

The learned judge gave the jury the following instructions, which are assigned for error:

"I therefore charge you that it was the plaintiff's duty to take the coal monthly, in such quantities as was sufficient to keep the defendant's works and workmen reasonably employed, as they had customarily been, and were at the time of the contract, and as would have enabled the defendant to furnish, and the plaintiff to take and pay for, the 200,000 tons during the year. * * * Now, the question of fact for your determination is whether or not the plaintiff did, during the months of June, July, and August, take as much coal as I have already said it was his duty to accept. Did he take as much as was necessary to keep the defendant's works and workmen reasonably employed, according to its usual custom, and as was necessary to enable the defendant, without unreasonable crowding or increased expenditure, to furnish, and the plaintiff to accept, the balance necessary to make up 200,000 tons within the year? You have heard the evidence about the closing of one of the mines, and the idleness and discharge of men, or their withdrawal, from the other mine. If this is true, and if such closing of one of the mines, and idleness, discharge, or withdrawal of men from the other, resulted, alone and directly, from the plaintiff's failure to take more coal than he did during the period referred to, and if this contracting of the work was an unusual occurrence in the prosecution of the defendant's business, it would seem to follow, necessarily, that the plaintiff failed in his duty, and that the defendant was justified in annulling the contract."

We are unable to concur in the views expressed in these instructions. The written agreement contains no provision requiring Shipman to take the coal in such monthly quantities as may be sufficient to keep the coal company's works and workmen reasonably employed, as they had customarily been, and were at the time the contract was made, and we find no warrant for importing into the contract such an undertaking. If the parties had intended this to be the measure of Shipman's duty, nothing was easier than to say so. The absence from the paper of such a provision is a conclusive reason against the interpolation thereof by judicial interpretation. It will be perceived that the coal company was under no correlative obligation. It did not covenant to keep its mines or workmen employed as they were at the date of the agreement, or as they had customarily been employed. Nor, indeed, did it covenant to keep them employed at all. Had the company seen fit to suspend mining, it would not have violated its engagement with the plaintiff. What the plaintiff expressly stipulated to do was "to ship and pay for at least two hundred thousand tons of coal per annum," provided so much was furnished him. To hold that he also bound himself to take the coal in reasonably apportioned monthly quantities, so as to keep the defendant's mines in constant operation, as they were at the date of the contract, and had been previously, is to impose upon him a distinct and unexpressed obligation. Nor is there any covenant on his part from which any such implication can properly arise. In *Maryland v. Railroad Co.*, 22 Wall. 105, 113, the supreme court of the United States declared:

"Ordinarily, a reference to what are called 'surrounding circumstances' is allowed, for the purpose of ascertaining the subject-matter of a contract, or for an explanation of the terms used,—not for the purpose of adding a new and distinct undertaking."

And in *Brawley v. U. S.*, 96 U. S. 168, 173, we find the rule thus laid down:

"Previous and contemporary transactions and facts may be very properly taken into consideration to ascertain the subject-matter of a contract, and the sense in which the parties may have used particular terms, but not to alter or modify the plain language which they have used."

In the former of these cited cases, Mr. Justice Strong, speaking for the court, quotes with approval, as based on "sound reason," the remarks of Lord Denman, who, delivering the judgment of the queen's bench in *Aspdin v. Austin*, 5 Adol. & El. (N. S.) 671, said:

"Where parties have entered into written engagements, with express stipulations, it is manifestly not desirable to extend them by any implications. The presumption is that, having expressed some, they expressed all the conditions by which they intended to be bound under that instrument. It is possible that each party to the present instrument may have contracted on the supposition that the business would in fact be carried on, and the service in fact continued, during the three years, and yet neither party might have been willing to bind themselves to that effect; and it is one thing for the court to effectuate the intention of the parties to the extent to which they may have, even imperfectly, expressed themselves, and another to add to the instrument all such covenants as, upon a full consideration, the court may deem fitting for completing the intention of the parties, but which they, either purposely or unintentionally, have omitted. The former is but the application of a rule of construction to that which is written. The latter adds

to the obligation by which the parties have bound themselves, and is, of course, quite unauthorized, as well as liable to great practical injustice in the application."

These observations, here so pertinent, commend themselves to our judgment. Applying, then, to this case, the principles sanctioned by the foregoing authorities, we are constrained to hold that the above-quoted instructions, of which complaint is here made, were unwarranted and erroneous.

To the suggestion that during the first year the contract was in force the defendant's mines were kept running without any serious interruption, it is enough to say that no determining effect is to be given to that fact, the language of the plaintiff's stipulation being clear. The judgment of the circuit court is reversed, and the case is remanded for a new trial.

HERRMAN v. UNITED STATES.

(Circuit Court, S. D. New York. June 29, 1894.)

CUSTOMS DUTIES—PLATE GLASS SILVERED AND BEVELED.

Certain cast polished plate glass, silvered and beveled, from which looking glasses are made, *held* dutiable at 6 cents a square foot, and also to an additional duty of 10 per cent. ad valorem, under paragraphs 116 and 118 of the tariff act of October 1, 1890, and not dutiable under paragraph 116 only, as "looking glass plates."

Appeal by Importer from Decision of Board of United States General Appraisers. Decision affirmed.

The collector of customs assessed duty upon this merchandise, imported by H. Herrman in March, 1891, under the following paragraphs of the act of October 1, 1890:

"Par. 116. Cast polished plate glass, silvered, and looking glass plates not exceeding sixteen by twenty-four inches square, six cents per square foot; above that, and not exceeding twenty-four by thirty inches square, ten cents per square foot; above that, and not exceeding twenty-four by sixty inches square, thirty-five cents per square foot; all above that, sixty cents per square foot."

"Par. 118. Cast polished plate glass, silvered or unsilvered, and cylinder, crown, or common window glass, when ground, obscured, frosted, sanded, enameled, beveled, etched, embossed, engraved, stained, colored or otherwise ornamented or decorated, shall be subject to a duty of ten per cent. ad valorem in addition to the rates otherwise chargeable thereon."

The claim of the importer was that it was dutiable only under paragraph 116; that it was shaped and used for making looking glasses, and was specifically covered by the term "looking glass plates" in paragraph 116. The board of United States general appraisers affirmed the decision of the collector.

Curie, Smith & Mackie, for importer.
Henry C. Platt, U. S. Atty.

TOWNSEND, District Judge. Certain plate glass was classified for duty under paragraph 116 of the tariff act of 1890. To this classification no objection is made. But it was also classified, under paragraph 118 of said act, as "cast polished plate glass silvered and beveled." The importer protests against this classification, on the

ground that, while paragraph 116 in terms covers looking-glass plates, paragraph 118 does not refer to them. The evidence shows that the glasses in question are used for making looking glasses. It is not denied that they are "cast polished plate glass," and there is no evidence that such glasses are commercially known as "looking glass plates." As congress has recognized "looking glass plates" as distinct from "cast polished plate glass silvered," and as the articles in question are clearly embraced within the latter class, the decision of the board of general appraisers is affirmed.

In re IRWIN et al.

(Circuit Court, S. D. New York. June 22, 1894.)

1. CUSTOMS DUTIES—BAUXITE—ALUMINA.

The white powder known to the trade as "refined bauxite," which is manufactured from bauxite by removing from the crude ore the impurities of iron, silica, and titanitic acid, is not bauxite, within the meaning of paragraph 501 of the free list of the tariff of October 1, 1890.

2. SAME.

The white powder known to the trade as "refined bauxite" or "hydrate of alumina" is made by heating in a furnace a mixture of crude bauxite, ground fine, and soda ash, until the carbonic acid of the latter is expelled. The mixture is then cooled and treated with water, which dissolves the resulting aluminate of soda, leaving behind the silica, iron, and titanitic acid of the bauxite; and the solution is treated with gaseous carbonic acid, which converts the soda into a carbonate, and allows the precipitation of the alumina. From this precipitate, when washed and dried, results the powder in question. *Held*, that this is alumina, within the meaning of paragraph 9 of the tariff act of October 1, 1890, and is dutiable as such at six-tenths of a cent a pound.

This was a protest by Thomas Irwin & Sons, before the United States board of general appraisers, against the decision of the collector as to the rate of duty to be paid on certain imported merchandise. The board sustained the contention of the importer, and the collector appeals.

James T. Van Rensselaer, Asst. U. S. Atty., for collector.
Stephen G. Clarke and Henry A. Wyman, for importers.

COXE, District Judge. The collector classified the merchandise in question under paragraph 9 of the act of October 1, 1890, which is as follows:

"Alumina, alum, alum cake, patent alum, sulphate of alumina, and aluminous cake, and alum in crystals or ground, six-tenths of one cent per pound."

The importers protested, insisting that it should have been admitted free under paragraph 501 of the free list as "Bauxite, or beauxite." The board found the following facts:

"First. The merchandise under consideration is a white mineral powder, resembling pulverized alum in appearance. Second. It is, chemically considered, hydrate of alumina, or alumina and water combined. Third. It is known and dealt with in trade under the name of 'refined bauxite,' and differs from crude bauxite only in the fact that it has gone through a process of manufacture by which the impurities of iron and silica have been mechanically removed from the crude article. Fourth. It is used for the same pur-

pose as the crude bauxite, namely, for the manufacture of alum or aluminous product, such as the sulphate of alumina or alum cake. Fifth. We further find that the article is refined bauxite, which is nothing more than crude bauxite, with the impurities of iron and silica removed, without affecting the chemical composition of the article or its chief utility. There are samples of this mineral found in nature which are about as free from impurities as the refined article, and a trihydrate may be reduced through the application to a dihydrate by an expulsion of an equivalent of water."

The protests were sustained and the decision of the collector was reversed. Subsequently the collector took additional testimony in this court. The question then is, is the imported merchandise bauxite?

The testimony seems very clear that the word bauxite means, and prior to October 1, 1890, meant, when used commercially, the crude mineral, and the weight of testimony is to the effect that it meant only that. The word bauxite alone would not describe the imported merchandise. That word alone, when used in trade, indicated the crude ore, which, when taken from the mine, resembles lumps of coarse earth or clay, and contains iron, silica, titanitic acid, besides other substances. When business men spoke of bauxite they meant this substance, and not the manufactured white powder free from iron, sand and titanitic acid. No business man would have thought of filling an order for bauxite with the imported article.

Again, taking into consideration the testimony in this court, it is thought that the proposition that the article in question is not bauxite when considered from a chemical point of view is also sustained by a preponderance of testimony. The article imported is known as "hydrate of alumina" or pure alumina. Its analysis is as follows:

Aluminium oxide, Al_2O_3 ,	65.05	per cent.
Silica, SiO_2 ,	1.80	" "
Carbonate of soda,	3.60	" "
Water, balance,	29.55	" "

The processes, called the "wet" and "dry," by which it is manufactured are very complicated, requiring chemical knowledge and skill. When the latter process is used the crude ore is ground very fine, and, generally, it is bolted. It is then mixed with, at least, a small quantity in weight of soda ash, and the mixture is put in a furnace and heated to a bright red heat until all the carbonic acid of the soda ash is expelled. When this stage is reached it is withdrawn from the furnace and left to cool. After cooling it is put in a leaching apparatus and treated with water, which will dissolve the alumina in it as an aluminate of soda, and leave behind the greater part of the silica, all of the iron and all of the titanitic acid. The mixture, then in liquid form, is placed in large cylinders with paddles in them to keep it in motion. The gaseous carbonic acid is introduced into this liquid through a pipe, and when the soda is converted into a carbonate of soda, all of the alumina will fall out as a powder in a wet state. The carbonate of soda is withdrawn, the powder is washed several times and dried, and the result is the hydrate of alumina in question. The original water of combination is entirely expelled by the roasting process and a new water of com-

bination added. The product is a new chemical combination from which the silica of the crude bauxite has been nearly expelled, the ferrous oxides and titanitic acid entirely expelled and 3.60 per cent. of carbonate of soda added. The product of this elaborate process is worth eight or nine times as much as the crude bauxite. To refer to the manufactured article as being either chemically or commercially the same as the coarse clay from which it is made is an inaccurate use of language. As well might one allude to flour or bread as being the same thing as wheat because they are made of wheat. Bauxite is the name used to designate the ore as it comes from the mine. This is conceded on all hands. That it means anything else is doubtful; that it includes such a product as the hydrate of alumina in question is disproved by a preponderance of evidence. It must be assumed that congress used the word in its commercial sense as it was known in the market, as it was understood in trade by importers and large dealers, at the date of the tariff act. When this meaning is ascertained it must control without regard to the scientific designation of the article, the material of which it is made or the use to which it may be put. *Twine Co. v. Worthington*, 141 U. S. 468, 12 Sup. Ct. 55; *Arthur's Ex'rs v. Butterfield*, 125 U. S. 70, 75, 8 Sup. Ct. 714; *Robertson v. Salomon*, 130 U. S. 412, 9 Sup. Ct. 559. It is not important to consider how it was known in the laboratory, but even if its chemical nomenclature should be considered it would not, as before stated, aid the importers.

The court is of the opinion that the new evidence establishes the following propositions with sufficient clearness: First. The merchandise in question has never been known as bauxite commercially, chemically or in common parlance. It is not bauxite. Second. It is a manufactured article, the product of an elaborate and difficult process which radically changes its nature so that it has lost all but one of the ingredients found in the original ore and has added an ingredient never found there. In short, it is changed into a new and different article having a distinctive name, character and use. *Hartranft v. Weigmann*, 121 U. S. 609, 7 Sup. Ct. 1240; *U. S. v. Semmer*, 41 Fed. 324; *Erhardt v. Hahn*, 5 C. C. A. 99, 55 Fed. 273. If additional argument were needed to sustain this view of the legislative intent, it will be found by a comparison of the imported merchandise with the articles mentioned in paragraph 9. These articles may all be produced from the mineral bauxite. Many of them are much nearer to crude bauxite than the imported hydrate of alumina. Can it be that congress intended to levy a duty on "aluminous cake" and permit the merchandise here involved to enter duty free? Aluminous cake is the crude mineral simply treated with acid. It contains all the undesirable ingredients of bauxite, namely, iron, silica and titanitic acid. Aluminous cake pays duty, but this much more finished product, under the importers' construction of the statute, escapes by hiding behind the name of bauxite. It is thought not only that congress did not intend to admit it free, but did intend to levy duty upon it under the name of alumina. It follows that the decision of the board should be reversed and that of the collector affirmed.

MARINE, Collector, v. LYON et al
(Circuit Court of Appeals, Fourth Circuit. May 22, 1894)

No. 70.

1. APPEALS—TIME OF TAKING—CUSTOMS DUTIES CASES.

The provision of the act of June 10, 1890, requiring appeals in customs cases to be filed within 30 days from the date of the decision, applies only to appeals from the board of appraisers and to the rulings of the circuit court thereon. It does not apply to a decree of the circuit court upon a question of costs and interest made after a reversal of a former decree in the circuit court of appeals and a remand of the cause. An appeal from such a decree is governed by the general rule.

2. COSTS—WHEN RECOVERABLE AGAINST THE UNITED STATES.

Costs do not go, as a matter of common right, with a judgment against the government; and a party suing the United States cannot recover costs unless he shows by the act under which he sues that the United States has consented to pay costs.

3. SAME—CUSTOMS DUTIES CASES.

In cases appealed from the board of general appraisers, under the act of June 10, 1890, neither the costs of the circuit court, nor the costs of a subsequent appeal to the circuit court of appeals, are recoverable against the United States.

4. INTEREST IN CUSTOMS DUTIES CASES.

In cases appealed from the board of general appraisers, under the act of June 10, 1890, interest is not allowable in favor of the importer, for the suit is practically one against the United States. *U. S. v. Sherman*, 98 U. S. 567, followed.

Appeal from the Circuit Court of the United States for the District of Maryland.

This is an appeal from a decree of the circuit court of the United States for the district of Maryland dismissing the petition of the United States that the judgment in the principal cause be reformed so as to exclude interest and costs. Lyon, Hall & Co., importers, having been dissatisfied with the rulings of the collector of the port of Baltimore, appealed from him to the board of general appraisers, under the provisions of the act to simplify the laws in relation to the collection of taxes, approved 10th June, 1890 (26 Stat. 131). The board reversed the ruling of the collector, and thereupon, under the fifteenth section of the act, application was made to the circuit court of the United States for the district of Maryland for a review of the questions of law and fact involved in their decision. The court affirmed the ruling of the board of general appraisers, but, on appeal to this court, the decree of the circuit court was reversed. 5 C. C. A. 359, 55 Fed. 964. No provision was made in the body of the mandate of this court as to the costs of appeal. This was explained by a footnote of the clerk, stating: "No costs. See section 4, rule 31." 1 C. C. A. xxiii., 47 Fed. xiv. This rule provides that no costs shall be allowed in this court for or against the United States; and it also provides that, when costs are allowed in this court, it is the duty of the clerk to insert the amount thereof in the body of the mandate or other proper process sent to the court below, and annex to the same the bill of items taxed in detail. When the mandate reached the court below, that court, on 28th June, 1893, entered an order following the mandate, in so far as it reversed the former decision, and then proceeded as follows: "And it is further ordered, adjudged, and decreed that the appellants, Lyon, Hall & Co., have judgment against the appellee, William M. Marine, collector of the port of Baltimore, in the sum of three hundred and sixty-six dollars and twenty-four cents, paid in excess of proper legal duties upon said importation, together with their costs expended in this behalf, to be taxed by the clerk, and interest thereon from October 26, 1891, until paid. The judgment entry is for \$366.24, interest from October 26, 1891. The costs are taxed as follows:

Plaintiffs' costs in circuit court paid by them.....	\$ 67 '46
Plaintiffs' costs in U. S. circuit court of appeals paid by them...	104 95

\$172 41"

It was stated in argument that the costs taxed as of this court were obtained by a memorandum of the plaintiff showing the costs he had paid. There was no taxation by the clerk of this court. Thereupon the petition on the part of the United States was filed, praying the reformation of the judgment in the items of interest and costs. This petition was refused.

John T. Ensor, U. S. Atty. for Maryland, and John S. Ensor, for appellant.

John F. Preston, for appellees.

Before GOFF and SIMONTON, Circuit Judges, and JACKSON, District Judge.

SIMONTON, Circuit Judge (after stating the facts). In their brief the appellees contended that this appeal will not lie. The decree appealed from was filed October 5, 1893. The petition for appeal and the assignments of error were filed 27th December, 1893. The appellees insist that, under the fifteenth section of the act of 1890, the appeal on behalf of the United States must be filed within 30 days from the rendition of the decision by the circuit court. No notice was given of a motion to dismiss the appeal. It would seem from the language of subdivision 3, rule 21, of this court (1 C. C. A. xix., 47 Fed. x.) that some such notice was necessary. Without, however, deciding this point, the appellee can take nothing by this motion. The limitation of time to the United States provided in section 15 of the act applies only to appeals from the action of the board of general appraisers and of the rulings of the circuit court thereon. This case comes before us on the dismissal of a petition of the United States in the matter of interest and costs on a judgment, and is governed by the general law of appeals.

The question is, is the United States liable for interest and costs in cases arising under the fifteenth section of the act of 1890, entitled "An act to simplify the laws in relation to the collection of the revenues?" It would seem that, so far as the costs of this court are concerned, in this case, the United States is not liable for costs. The rule forbids it; and the mandate does not allow costs. But we will not rest the case on this ground. The rule is that the United States is not liable for costs, and a judgment against it for costs will be reversed. *U. S. v. Boyd*, 5 How. 29; *U. S. v. McLemore*, 4 How. 286; *The Antelope*, 12 Wheat. 546. As the United States is not suable of common right, the party who institutes a suit against it must bring his case within some act of congress authorizing the suit or the court cannot exercise jurisdiction. *U. S. v. Clarke*, 8 Pet. 436. So, when a party brings suit against the United States, he must not only show permission to sue, but his suit must be brought subject to such conditions as the act imposes. As costs are not a matter of right, and are not recoverable as an incident to the judgment, but depend on statutory provisions, if he desires costs in case of success he must show by the act under which he sues that the United States has consented to pay costs if defeated. There is no room for inference, and, if the terms of the statute are not ambiguous, there can be no reasoning from analogy. The sovereign may, in certain cases and under certain circumstances, allow suit to be

brought, and at the same time may submit to costs; but, as the privilege of bringing suit against the sovereign is a special privilege,—the waiver of a right,—so the right to recover costs is a special provision, confined to the special case. The act is the law of the case, and in that act we must find as well the right to recover costs in the suit as the right to sue, else such right does not exist.

The action in the main case was brought under the act of 1890. That act is the only authority for such a suit. Nowhere does the act make any provision for the payment of costs by the United States. The silence of the act on this subject is significant. Its manifest purpose is to bring together in one act all acts relating to the collection of revenue. Its title embraces all laws in relation to revenue, and declares an intent to simplify them. It repeals 31 sections of the Revised Statutes and 2 acts of congress on this subject, and all acts and parts of acts inconsistent with its provisions. Among the sections of the Revised Statutes is section 3011. That section, as originally prepared, provided a mode of relief from payment of excessive dues. It made no provision as to interest and costs in case of recovery by the importer. It was amended by an act approved 1st February, 1888 (25 Stat. 6), wherein provision was made for payment of costs of suit, and interest at the rate of 3 per cent. per annum, on all judgments obtained for overpayment of duties. The act of 1890, legislating on this same subject, and providing a substitute for the proceeding allowed in that section, and for a suit and appeal thereon, repeals the section, but says nothing whatever as to interest and costs. It is impossible to escape the conclusion that congress either did not intend that the United States should pay costs in the cases provided for, or that it omitted to insert such intention, and that this omission defeats the claim for costs. One sentence in the fifteenth section of the act of 1890 has been pressed on our attention, as indicating an intent that costs shall be paid "on such original application, and, on any such appeal, security for damages and costs shall be given as in case of other appeals in cases in which the United States is a party." The reference here is to sections 1000 and 1001 of the Revised Statutes. These provide that in all cases in which the United States is appellee, the other party must give bond and security for costs, but that in no case shall such bond and security be required from the United States; and only in cases in which "such costs are taxable by law against the United States" is any provision made for the payment of them out of the contingent fund of the department. As we have seen, there is no provision by this act of 1890 for costs taxable against the United States. It is contended, however, that this is an action against William M. Marine, collector, and that the incident of costs follows the judgment. Originally this was the case. *Elliott v. Swartwout*, 10 Pet. 137; but, congress having required the collector to pay all moneys received by him into the treasury of the United States, this defeated the common-law right of action against the collector (*Cary v. Curtis*, 3 How. 236); and, although the legislation of congress has been somewhat contradictory on this subject, none of it restored the common-law right of

action against the collector. The legislation created a statutory right of action, governed exclusively by the provisions of the statutes of the United States. *Arnson v. Murphy*, 109 U. S. 238, 3 Sup. Ct. 184. In other words, notwithstanding that the name of the collector was used, the real purpose of the proceeding was to get money out of the treasury of the United States, and the United States was the real and only party in interest, the suit being governed wholly by the provisions of the statutes of the United States. This brings us precisely to the conclusion we have reached.

With regard to interest, we think that this case is controlled by the case of *U. S. v. Sherman*, 98 U. S. 567, quoted and affirmed in the case of *U. S. v. North Carolina*, 136 U. S. 217, 10 Sup. Ct. 920. The court say:

"When the certificate is given, the claim of the plaintiff in the suit is practically converted into a claim against the government, but not until then. Before that time the government is under no obligations, and the secretary of the treasury is not at liberty to pay. When the obligation arises, it is an obligation to pay the amount recovered; that is, the amount for which judgment has been given. The act of congress says not a word about interest. Judgments, it is true, are by the law of South Carolina, as well as by federal legislation, declared to bear interest. Such legislation, however, has no application to the government, and the interest is no part of the amount recovered. It accrues only after recovery has been had. Moreover, whenever interest is allowed either by statute or at common law, except in cases in which there is a contract to pay interest, it is allowed for the delay or default of the debtor. But delay or default cannot be attributed to the government. It is presumed to be always ready to pay what it owes."

The decree of the circuit court is reversed, without cost to either party. Let the case be remanded to the circuit court, with instruction to enter judgment for the appellee in the sum of \$366.24, without interest or costs.

JOHNSON CO. v. PENNSYLVANIA STEEL CO.

(Circuit Court, E. D. Pennsylvania. January 23, 1894.)

No. 59.

1. PATENTS—INVENTION—CABLE-RAILWAY CROSSINGS.

In a cable-railway crossing, where girder guard rails are to cross slot rails, and be secured thereto, there was no invention in cutting a notch in the top of the slot rails, and thus depressing the girder guard rail sufficiently, without cutting away its floor, so as to weaken the guard.

2. SAME.

The *Entwistle* patent No. 367,746, for a "girder slot rail crossing," is void, as to the second claim, for want of invention.

This was a suit in equity by the Johnson Company against the Pennsylvania Steel Company for infringement of a patent.

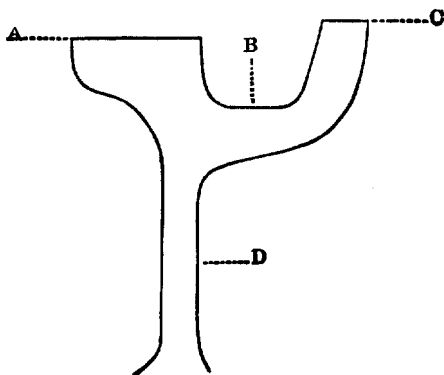
George Harding and George J. Harding, for complainant.
Joshua Pusey and Philip T. Dodge, for respondent.

DALLAS, Circuit Judge. This is a suit upon letters patent No. 367,746, dated August 2, 1887, granted to Edward B. Entwistle, for "girder slot rail crossing." It contains two claims, and the bill involves both of them; but upon the hearing the complainant,

without making any general admission with respect to the first claim, stated that this case would be pressed only as to the second claim, which is as follows:

(2.) A slot rail and girder rail crossing, consisting of main girder guard rails and slot rails, secured together at the proper angle, and with the guard rails overlapping the heads of the slot rails, the latter rails being partially cut away, so as to preserve the floor of the guard rails intact, substantially as and for the purposes set forth.

"Slot rails" are those which form the sides of the slot or orifice through which passes the shank of the grip used in the operation of a cable. A "main girder guard rail" is a car bearing rail of the form shown, with sufficient accuracy for the present purpose, in the accompanying sketch of an end view thereof. A is the part upon which the wheels of the cars rest or move, and is called the "head;" B is the floor; C is the guard; and D is the web.



Slot rails and girder guard rails were old. To secure them together at the proper angle, and with the main rails overlapping the heads of the slot rails, nothing was required but the common knowledge and skill of a mechanic. In fact, in what is known in the case as the "Chicago Crossing," such securing together and overlapping had been actually resorted to in constructing a crossing of slot rails with the rails of a steam railroad. In that instance, all except the head of the main rail was cut away, so as to conform it to the side of the slot rail, and admit of the head only of the former overlapping the top of the latter, and such overlapping was in fact made; and the two rails, though not directly connected, were indirectly secured together by means of their separate bearings upon the same I beams. It is true the main rail of the Chicago crossing was a T rail, not a guard rail, and the head of the T rail was wholly exposed above the slot rail, whereas the patentee in this case was dealing with a guard rail, and had it in mind, as he stated in his specification, that it is desirable that the head and guard be not exposed too much above the slot rail crossed. Accordingly, the particular matter to which his attention seems to have been directed was the making of the crossing in such manner that the undesirable exposure

of the head and guard would be avoided. An obvious way to accomplish this would have been to cut away the floor of the car-bearing rail, so as to lower its head and guard to the desired point; but, as is also set forth in the specification, "it is advisable not to cut the floor entirely away, as the guard would then be rendered weak, and not well sustained." Consequently a partial cutting away of the slot rails was resorted to, instead of cutting the floor of the guard rail objectionably, and thus a notch was formed in the top of the slot rails, in which the guard rail was placed, and by this means its head and guard were sufficiently depressed, without rendering its guard weak and not well sustained. Did this involve invention? This, I think, is the substantial question in the case. It is undoubtedly true that "it is not always safe to consider that there has been no invention because it appears obvious and simple;" but, on the other hand, as said by Mr. Justice Bradley in *Atlantic Works v. Brady*, 107 U. S. 200, 2 Sup. Ct. 225, "it was never the object of those laws [the patent laws] to grant a monopoly for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures." Hence the difficulty, whenever the question of sufficiency of invention arises, is to determine whether the subject-matter of the particular patent should be considered an invention, however obvious and simple it may appear, or be held to be a "trifling device, * * * which would naturally and spontaneously occur to any skilled mechanic or operator." In the present case, after very careful consideration of the evidence and examination of the exhibits, I have reached the conclusion that the device claimed is of the latter class. There was nothing new, or in which invention was involved, in securing crossing rails together at the proper angle, and with car-bearing rails overlapping slot rails; and I am unable to perceive that anything beyond mechanical skill was exercised in cutting away a part of the slot rails, so as to make the desired joint with a girder guard without exposing its head and guard too much above the slot rail, and without so cutting the floor of the guard rail as to weaken the guard.

A decree will be entered dismissing the bill with costs.

H. TIBBE & SON MANUF'G CO. v. MISSOURI COB-PIPE CO. et al.

(Circuit Court, E. D. Missouri, E. D. April 30, 1894.)

No. 3,685.

1. PATENTS—CORNCOB PIPES.

"A smoking pipe made of corncob, in which the interstices are filled with a plastic, self-hardening mass or cement," for the purpose of preventing a draft though the interstices of the pipe bowl, and to enable it to be worked to a smooth finish, is infringed by a pipe made from a cob, into whose interstices is pressed fine meal made from parched corn, and the whole then covered with liquid shellac, which permeates the meal, and closes the pores of the cob.

2. SAME.

Letters patent No. 205,816, for improvement in pipes, *held* infringed.

Bill by the H. Tibbe & Sons Manufacturing Company against the Missouri Cob-Pipe Company and others for infringement of letters patent No. 205,816, of July 9, 1878, for improvement in pipes. The patent in suit is for a corncob pipe, having its interstices or outer cellular parts filled with a plastic mass; the purpose being to prevent a draft through the interstices in the pipe bowl, and to enable the pipe bowl to be worked to a smooth finish, so as to present a neat and merchantable appearance. The defense made was that there was no infringement. The defendants filled the interstices or outer cellular parts of their corncob pipe bowls with fine corn-meal dust, made from corn which had been previously parched, pressed this dust into the interstices by mechanical means, then applied a coating of liquid shellac to the outer surface of the corncob pipe bowls thus filled, then allowed this coat of shellac or varnish to dry, then sandpapered the corncob pipe bowl, and afterwards applied a finishing coat of shellac. The claim of the Tibbe patent is for a new article of manufacture, and is as follows:

"As a new article of manufacture a smoking pipe made of corncob, in which the interstices are filled with a plastic, self-hardening mass or cement, substantially as and for the purposes set forth."

Paul Bakewell, for complainant.

W. E. Fisse, for defendants.

THAYER, District Judge. The patent and its construction: This patent is for a new article of manufacture, and, although it did not involve a high order of invention, yet it led to the production of a new article,—namely, a corncob pipe having its exterior interstices filled with a plastic, self-hardening mass, which rendered the pipe more durable and efficient. *Manufacturing Co. v. Heineken*, 43 Fed. 75; *Manufacturing Co. v. Lamparter*, 51 Fed. 763. Pipes thus made immediately came into great demand, and the result of the invention has been the establishment of a new industry, not on a large scale, but sufficient to give employment to a considerable number of persons. Tibbe was the first person who conceived the idea of filling the exterior interstices of the cob so as to render the pipe more durable. He was the first manufacturer of a pipe of that character. He is accordingly entitled to a liberal interpretation of his claim,—such an interpretation as will protect him, during the life of his patent, in the manufacture of what he has invented, and such an interpretation as will prevent others from appropriating the substance of his invention by a colorable departure from the process of manufacture which he describes. The fact that several attempts have been made by persons engaged in the manufacture of corncob pipes to appropriate the idea which was first suggested by Tibbe, and yet to evade the claim of his patent by one means or another, inclines the court to scrutinize closely, and to view with suspicion, all processes of making corncob pipes, in which the exterior interstices are filled with a gummy or mucilaginous substance, of whatsoever nature. In view of the liberal construction which the patent is entitled to receive, the court holds that finely-pulverized corn meal, made of parched corn,

and mixed to a considerable extent with liquid shellac, must be regarded as a plastic, self-hardening cement, within the meaning of the Tibbe patent, if such a mixture is used to fill the exterior cavities of the cob. Such a mixture undoubtedly sets or hardens, although the elements do not unite chemically; and by so hardening, and adhering to the cavities, the pores of the cob are closed, and the fundamental feature of Tibbe's invention is appropriated. In the case of Manufacturing Co. v. Lamparter, *supra*, this court held that a mixture of cob dust and corn starch, when treated with alcohol, and used as a filler, was an infringement of the Tibbe patent, and that it made no difference whether the mixture was made before it was applied to the cob, or whether it was made in the act of applying it. The same ruling was repeated on the application for a preliminary injunction in this case.

The facts: After a careful perusal of the evidence produced on the final hearing of the case, the court has become satisfied that when liquid shellac is applied to the exterior surface of the cob, according to the process now in use by the defendants, it penetrates, to some extent, into the finely-pulverized corn meal with which the interstices have previously been filled, and thereby forms a mixture which hardens, and adheres to the cavities, and effectually closes the pores of the cob. I have no doubt that it is true that there are many cavities that are of such depth that the liquid shellac does not penetrate to the bottom of the same, at their deepest point. On the other hand, it is evident that many of the cavities are so shallow that the liquid does penetrate, practically, to the bottom of the cavity, and that it serves to fill the entire space with a homogeneous mass, which is self-hardening. It must also be borne in mind that the cavities of the cob, at their point of greatest depth, are quite shallow, and that the sides thereof slope; so that, in any event, it seems most probable that by the application of liquid shellac a considerable portion of the corn meal in each cavity is saturated, and formed into a cement. Enough is so saturated to effectually hold the filling in place, and bind it to the cob. I can conceive of no sufficient reason for filling the cavities with corn meal, and then applying liquid shellac, unless it is intended to penetrate the filler, to some extent, and make it adhesive and self-hardening. The court does not consider it necessary, to establish the charge of infringement, that the proofs should show that the liquid shellac penetrates to the bottom of all the cavities, and forms throughout each cavity a homogeneous mass. It is sufficient, the court thinks, that enough of the mass is permeated by the liquid to change its original character in part, bind it to the cavity, and effectually close the pores of the cob. Upon the whole, therefore, the court has concluded that the charge of infringement is established, and that a decree should be rendered in favor of the complainant. It is so ordered.

SOUTHERN PAC. R. CO. v. TOWNSEND et al.

(Circuit Court, S. D. California. May 28, 1894.)

REMOVAL OF CAUSES—FEDERAL QUESTION—CODEFENDANT NOT JOINING IN APPLICATION.

A suit to enforce a contract for sale of land, brought by the vendor, claiming title under a grant by act of congress, against the purchaser and another to whom he had conveyed, who contests complainant's claim under such act, presents a case arising under the laws of the United States, which is removable on petition of such defendant alone, although the purchaser, not joining in the petition, is not a merely nominal party, and complainant is entitled to proceed to judgment against him.

This was a suit by the Southern Pacific Railroad Company against James R. Townsend and Big Rock Creek Irrigation District, a corporation, to enforce a contract for the sale of land by complainant to defendant Townsend. The suit was brought in a court of the state of California, and, after the filing of a demurrer by defendant Townsend, was removed, on petition of defendant Big Rock Creek Irrigation District, to the circuit court of the United States. Complainant moved to remand the cause to the state court.

Joseph D. Redding, for complainant.

Joseph H. Call and Anderson & Anderson, for defendants.

ROSS, District Judge. This suit was brought in the superior court of Los Angeles county. To the bill, James R. Townsend and a corporation styled Big Rock Creek Irrigation District are made defendants, and in it is alleged that at a certain stated date the complainant was the owner and seised in fee of certain lands designated according to subdivisions of the public surveys of the United States, situated in Los Angeles county, Cal., and aggregating 1,435.68 acres, which the complainant then agreed in writing to sell, and defendant Townsend to buy, for the sum of \$3,589.20 in United States gold coin, of which sum Townsend, at the time, paid \$717.84. The remainder of the purchase money was, by the terms of the contract, to be paid at certain designated dates, with interest thereon, as provided for. The contract provided that the vendee should have the immediate possession and enjoyment of the property, in consideration of which he should pay all taxes and assessments imposed thereon, and, upon the full performance on the part of Townsend, his legal representatives or assigns, of his part of the contract, the complainant should execute to him, his heirs or assigns, "upon request and the surrender of this contract, a deed of grant, bargain, and sale for the conveyance of said premises, reserving all claim of the United States to the same as mineral land." The bill alleges that the defendant Townsend failed to make any of the deferred payments at maturity, or at all, and failed to pay any interest thereon, and that the whole of such payments, together with the interest thereon, remain unpaid. It alleges that on October 19, 1892, complainant demanded of him payment of the several sums due under the contract, and, at the time of demanding such payment, tendered to him a good and sufficient grant, bargain, and sale deed conveying the lands

from the complainant to him in conformity with the terms of the contract, upon the return and surrender of the duplicate original contract then in his hands, the return of which complainant, at the time, requested. The bill further alleges that defendant Townsend entered into possession of the property under the contract, and still continues in such possession; that complainant is, and always has been, willing and ready and able to perform all of its part of the agreement, and, upon the full performance by the said defendant of his part thereof, to execute to him its grant, bargain, and sale deed for the property, and offers to execute, and bring into court to be delivered to the defendants, or either of them entitled thereto, such deed, on the full performance on the part of the vendee of all of the conditions of the contract. The bill further alleges, on information and belief, that the defendant Big Rock Creek Irrigation District claims to have some interest in the contract, "and in fact is now the assignee of the said defendant James R. Townsend; that whether this be so or not the plaintiff is not fully informed at the present time, and therefore demands of said defendant the Big Rock Creek Irrigation District to make answer to this complaint, setting forth what interest it or they have in said contract and land mentioned therein, and furthermore, if they are the assignees of the said defendant James R. Townsend, that the allegations of this complaint may apply to it or them likewise, and that they may be called upon to perform the said contract in all of its terms; and the plaintiff herewith offers to the said Big Rock Creek Irrigation District a grant, bargain, and sale deed for said land, duly executed, which shall be delivered to said defendant upon the performance of all the terms of said contract and the surrender of same." The prayer of the bill is for judgment that there is due to (from) defendant Townsend to plaintiff, upon the contract, \$3,876.31, being the amount of the deferred payments, with interest; that he be required to make the payment thereof within 30 days from the entry of the decree, and otherwise perform the conditions of the contract; and that, in the event of his failure so to do within that period, defendant Townsend, and all persons holding the premises under him, be forever barred and foreclosed of all right, interest, and claim in and to the property under and by virtue of the contract, and be barred and foreclosed of all right to a conveyance thereafter; and that complainant be let into possession of the property; and that the contract be annulled; and for such other and further relief as the court may deem just and equitable. Within due time the defendant Townsend filed a demurrer to the bill, and the defendant Big Rock Creek Irrigation Company filed a petition for the removal of the suit, pursuant to the act of congress approved March 3, 1887, to this court, upon which petition an order of removal was made. A motion to remand the case to the superior court is now made by the complainant.

The petition for removal set up that the defendant Big Rock Creek Irrigation Company was, at the time of the commencement of the suit,—November 1, 1892,—and still is, a corporation organized and existing under an act of the legislature of the state of California.

approved March 7, 1887, entitled "An act to provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other property and for the distribution of water thereby for irrigation purposes;" that the plaintiff executed to the defendant Townsend the contract set up in the bill; and "that prior to the commencement of this suit, and after the execution of said contract, said Townsend, for a valuable consideration, did sell and convey unto your petitioner, by a good and sufficient deed, all his right, title, and interest in and to said lands." The petition alleges that the complainant claims to own the lands in question in fee simple, under and by virtue of the act of congress approved March 3, 1871, entitled "An act to incorporate the Texas & Pacific Railroad Company, and to aid in the construction of its road, and for other purposes" (16 Stat. 573), but denies that complainant owns the said lands, or acquired any interest therein, under that act of congress or any other act, for the reason, among other reasons, that the lands in question were not, at the time that act took effect, public lands of the United States, but were reserved lands, to which other parties had acquired rights. It avers that the suit not only involves the construction of the act of congress of March 3, 1871, but also the act of congress approved March 3, 1891, entitled "An act to repeal timber culture laws, and for other purposes" (26 Stat. 1095), with the provisions of which act petitioner alleges it has complied, and under and in accordance with sections 18 to 21 of which "it is in the actual possession and occupancy of the said lands described in the complaint herein, and holds the same for right of way for ditches and canals and for reservoir purposes." The petition further alleges that the defendant Big Rock Creek Irrigation Company has located its ditches, canals, and reservoirs upon the lands in question, and holds the whole thereof for those purposes; that, at the time they were so appropriated by defendant company, they were public lands of the United States, but that that fact is denied by the complainant. The petition further alleges that the defendant Townsend is a nominal party to the suit, and that the petitioner is the real party in interest therein, and that the value of the property in controversy exceeds in amount that necessary to give this court jurisdiction of the case.

The purpose of the suit is the enforcement of the contract into which complainant and the defendant Townsend entered, to compel him to make the payments he stipulated to make, and to obtain a decree fixing a time within which he or his assignee shall make such payments, and receive the conveyance the complainant contracted to make, and, in the event that the defendants fail to make such payments, that all rights acquired by them under the contract be barred and foreclosed, and the complainant be restored to the possession of the property that was conferred by the contract. Townsend demurred to the bill, but did not join in the petition for removal. It is said on behalf of the defendant corporation, on whose petition the case was removed, that he is a mere nominal party, and must be so regarded, because of the allegation of the petition that after the execution of the contract, and before

the commencement of the suit, "Townsend, for a valuable consideration, did sell and convey unto your petitioner, by a good and sufficient deed, all his right, title, and interest in and to said lands." There is no admission by Townsend of such conveyance, as there was of the tenancy of Smale in the case of *Mitchell v. Smale*, 140 U. S. 409, 11 Sup. Ct. 819, 840, relied on by counsel. As the case stands, Townsend not only has the right to be heard respecting the contract upon which the bill is based, but the complainant seeks thereby to compel him to pay the money he is alleged to have agreed to pay, and is entitled to insist on prosecuting its action against him, as well as against the corporation defendant, in order that, if it should be successful, there may be no failure of a complete recovery of the relief sought. It is clear, therefore, that Townsend cannot be regarded as a nominal party. It is only by reason of its claim through him that the defendant corporation was made a party defendant. Its rights under the alleged conveyance from Townsend are subordinate to the contract under which he held, and the taking and holding under that contract constituted it complainant's licensee, and estopped it, during the existence of that relation, from asserting adverse rights under the act of congress approved March 3, 1891, entitled "An act to repeal timber culture laws, and for other purposes." *Lewis v. Hawkins*, 23 Wall. 119; *Burnett v. Caldwell*, 9 Wall. 293. It is a mistake to say, as does counsel for the defendant corporation, that the petition shows that the deed from Townsend to the corporation was a quitclaim deed, and that the defendant corporation, while claiming under the act of congress of March 3, 1891, simply bought in that outstanding claim of title. That is by no means the case presented by the petition. On the contrary, it sets up the contract between the complainant and Townsend; alleges that, after the making of that contract, and before the commencement of the suit, Townsend, for a valuable consideration, sold and conveyed to the defendant corporation, by a good and sufficient deed, all of his right, title, and interest in and to the lands; and then says that the complainant never had any title or interest in the lands to convey, because its claim to them is under the act of congress of March 3, 1871, granting certain lands to complainant to aid in constructing its road, within which grant the lands in controversy did not fall because they were at the time reserved lands, to which other parties had acquired rights; and further sets up that defendant corporation itself has acquired rights to, and interest in, the lands in controversy under and by virtue of the subsequent act of congress of March 3, 1891, entitled "An act to repeal timber culture laws, and for other purposes."

A deed by which a party sells and conveys all of his right, title, and interest in land is not necessarily a quitclaim deed; nor is it to be inferred, in support of the asserted jurisdiction of the circuit court, that the claims of the defendant corporation under the act of March 3, 1891, antedated the alleged conveyance from Townsend to it. The motion to remand the case would, therefore, be granted, but for the allegations of the petition respecting the act of congress of March 3, 1871, under and by virtue of which it is alleged the com-

plainant claims title to the lands in question, its right to which is a legitimate subject of inquiry in the suit brought by it to enforce the contract for its sale. The petition shows that the controversy respecting that matter necessarily involves the consideration of the act of congress of March 3, 1871, exhibiting, as it does, a claim under that act on the part of the complainant, which is contested by the removing defendant. It therefore presents a case arising under the laws of the United States, and so removable to this court, unless the fact that there is another defendant who did not join in the petition defeats the removal. But that a single defendant may in such a case bring it to the federal court seems to have been decided by the supreme court in the case of *Mitchell v. Smale*, 140 U. S. 406, 11 Sup. Ct. 819, 840. That was an action of ejectment brought by a citizen of Illinois in the circuit court of Cook county of that state against three defendants,—J. G. Smale, and John I. and Frank I. Bennett. After service of process on the defendants, one Jordan appeared specially, and moved that he be substituted as sole defendant. The motion was made upon an affidavit of Jordan that the Bennetts had no interest, having conveyed the property to him before the suit was commenced, and that Smale was a mere tenant under him (Jordan), and had no other interest. The court denied the motion, and thereupon Jordan, on his own motion, was admitted to defend the cause as landlord and as codefendant. Afterwards, and in due time, Jordan filed a petition under the act of 1875 for the removal of the cause into the circuit court of the United States, alleging, as a ground of removal, that the plaintiff was a citizen of Illinois, and that he (Jordan) was a citizen of New York, and sole owner of the property, and that the sole controversy in the case was between him (Jordan) and the plaintiff, stating the facts previously affirmed in his affidavit as to the want of interest in the Bennetts and the tenancy of Smale. Objections to the removal being made by the plaintiff, Jordan asked and obtained leave to amend his petition, and filed an amended petition setting out, in addition to the facts stated in his original petition, the following matter, to wit:

"Your petitioner states that said suit is one arising under the laws of the United States, in this, to wit: That plaintiff seeks, in and by said suit, to recover lands embraced in a survey of public lands made by the government of the United States in 1874, embracing a part of said section twenty (20), tp. 37 N., R. 15 E., 3d P. M., in Illinois, and patents issued under said survey, under which your petitioner deraigned title in fee simple before the commencement of said suit, and in him then vested by conveyance from the patentee; that the plaintiff claims that he is seised of the fractional tract described in the declaration as the grantee of one Horatio D. De Witt; that the said survey, patents, and deeds of petitioner are not made in pursuance of the acts of congress and laws of the United States relating to the surveying and disposition of the public lands of the United States, and that said act of congress and laws have been misconstrued by the said land department and disregarded, and that said survey, patents, deeds, and the proceedings of the land department are illegal and void, and in violation of the contract rights of said Mitchell under the laws of the United States; that, by virtue of the alleged ownership of said fractional tract described in the declaration, he (the plaintiff), under and in pursuance of said act of congress and laws of the United States, is also the owner of said lands so owned by your petitioner by virtue of said survey of 1874, and patents and deeds thereunder. This

petitioner claims title in fee to said lands other than said fractional tract by virtue of said survey of 1874, said patents, and deeds issued thereunder in pursuance of the act of congress aforesaid and laws of the United States, and therefore states that said suit is one arising under the laws of the United States entitling this petitioner to a removal of the suit under the act of congress" of March 3, 1875, for that cause alone.

The court said:

"Whether the facts stated in the original petition for removal were sufficient for that purpose may perhaps admit of some question. The plaintiff was alleged to be a citizen of Illinois, and the defendant Jordan a citizen of New York. The citizenship of the other defendants was not mentioned, though it is understood they were residents of Illinois. It is clear, therefore, that the case was not removable unless the interest of Jordan was so separate and distinct from that of the other defendants that it could be fully determined, as between him and the plaintiff, without the presence of the others as parties in the case. As he alone, according to his statement, had the title, and as Smale was merely his tenant, if this relation was admitted by Smale (as it was), there would seem to be no good reason why the contest respecting the title might not have been carried on between him and the plaintiff alone, so far as Smale was concerned. * * * As to the other defendants,—the Bennetts,—there may have been greater difficulty in sustaining a removal. They were made defendants, apparently in good faith, and were not acknowledged to be tenants of Jordan; and the plaintiff might well insist on prosecuting his action against them, as well as against Jordan, in order that, if he should be successful, there might be no failure of a complete recovery of the land claimed by him."

The manifest view of the court was that the Bennetts were proper parties, as to whom the plaintiff had the right to proceed to judgment. They did not join in the petition for removal, yet the court held that the additional ground of removal stated in the amended petition was sufficient to authorize the removal to be made.

"It states [said the court] very clearly that the controversy between the parties involved the authority of the land department of the United States to grant the patent or patents under which the defendant claimed the right to hold the land in dispute after and in view of the patent under which the plaintiff claimed the same land. This, if true, certainly exhibited a claim by one party, under the authority of the government of the United States, which was contested by the other party on the ground of a want of such authority. In the settlement of this controversy, it is true the laws of the state of Illinois might be invoked by one party or both, but it would still be no less true that the authority of the United States to make the grant relied on would necessarily be called in question. We are therefore of opinion that the ground of removal now referred to presented a case arising under the laws of the United States, and so within the purview of the act of 1875."

The decision of the supreme court in the case of *Mitchell v. Smale* is applicable to the removal in question, and, upon the authority of that case, the motion to remand is denied.

**BONDHOLDERS AND PURCHASERS OF THE IRON RAILROAD v.
TOLEDO, D. & B. R. CO. et al.**

(Circuit Court of Appeals, Seventh Circuit. January 20, 1894.)

No. 106.

APPEALABLE JUDGMENTS AND ORDERS—DENIAL OF REHEARING.

After a decree finally disallowing a claim to a fund in court, a rehearing was asked, on grounds involving the correctness and regularity, not the

validity, of the decree. *Held*, that the petition therefor could not be regarded as a petition to vacate the decree as void, and an order dismissing the petition was not appealable.

Appeal from the Circuit Court of the United States for the District of Indiana.

This was a petition by the Bondholders and Purchasers of the Iron Railroad for a rehearing of a claim against proceeds of sale on foreclosure of mortgages on that and other railroads, constituting the Toledo, Cincinnati & St. Louis Railroad. The Toledo, Delphos & Burlington Railroad Company and the Toledo, Cincinnati & St. Louis Railroad Company demurred to the petition. The demurrer was sustained, and thereupon the petition was dismissed. The petitioners appealed.

This appeal is from an order refusing an application for a rehearing. The Iron Railroad, situated entirely in the southern district of Ohio, was a constituent part of the Toledo, Cincinnati & St. Louis Railroad, which in August, 1883, was put into the hands of a receiver by orders of the United States circuit courts for the southern district of Illinois, for Indiana, and for the western division of the northern district of Ohio, and was operated by the receiver as a part of the system until the 20th of October, 1883, when, by order of the court in Ohio, the order for the appointment of the receiver was in respect to the lines in Ohio set aside; and, upon bills filed by the trustees of the mortgages upon the several lines in that state, new orders were made appointing a receiver for each of those lines separately, but naming the same person as receiver in all of the cases. In order that there might be a continued unity of management and operation, the courts of the seventh circuit appointed the same person receiver of the lines in that circuit in place of the receiver first appointed, and accordingly the lines in both circuits were operated as a unit until, by the decree of the court in the southern district of Ohio foreclosing the mortgage on the Iron Railroad, that road was sold to a committee of its bondholders.

Early in the proceedings, and while that line was in the possession of the receiver, it was claimed by and in behalf of the bondholders that the earnings of the Iron Railroad exceeded its expenditures, and that the excess, which was being or had been expended in the operation of the system, should be made good by the other lines. On the 5th of April, 1884, Jacob D. Cox was appointed a special master, and directed to inquire and state, among other things, "what may be due from the one interest or estate to the other, and what proportion each should bear in respect of any charges and liabilities in the premises." The special master, having made his investigation, filed a preliminary report in the court at Cincinnati, and also (in case No. 7,706) at Indianapolis, where, on the 3d of October, 1884, it was stipulated that the same should be deemed and taken to be of force in the consolidated suits (Nos. 7,814 and 7,815) there pending, as if filed therein, and as if the order of reference to the special master had been made in those suits. That report showed a balance of income of the Iron Railroad over expenses, between November 1st and April 1st, of \$33,716.37. A later report was made on the 26th day of July, 1884, showing, among other things, what proportions of the receiver's indebtedness should be borne by the several mortgaged divisions of the system; "the sum of \$33,716.37, before reported to be due the Iron Railroad from the other divisions," being reported as "included in their deficits and a part of the undisputed indebtedness of the receiver, subject, however, to be reduced by the proportion of car rentals, etc., charged that road, if the same shall be approved by the court, as reported in the former report of the master."

On the 8th day of February, 1886, the bondholders, who are appellants here, filed in the court at Indianapolis a petition alleging that \$41,133.91 of the earnings of the Iron Railroad had been diverted by the receivers, and applied to the use of the other divisions, including those embraced in the causes pending in the district of Indiana (Nos. 7,706 and 7,814), and that, by the ratio

adopted by the special master for apportioning the general expenses of operation, the division embraced in No. 7,706 should bear 30.05 per cent., and the division embraced in No. 7,814 should bear 29.85 per cent., of the whole; making the sum due from one division \$12,360.73, and from the other \$12,278.46, for the payment of which sums, respectively, the petitioners asked decrees. This petition, it is alleged in the application for a rehearing, was never passed upon by the court.

Afterwards, on January 7, 1887, the special master made a third and final report, showing that the net earnings of the Iron Railroad, for the entire time it was in the possession of the receiver, had been \$41,748.39; that the whole earnings of the system had been used for operating expenses; and that, as matter of law, "the excess of earnings over expenses in the case of the Iron Railroad, so used by the receivers for operating the other divisions of the system, ought to be a charge against the fund arising from the sale of such other divisions," etc.; and on February 19th, ensuing, exceptions filed in the court at Cincinnati were there overruled, and the report confirmed. That report was filed in the court at Indianapolis on the 12th of January, 1887. On the 1st of October, 1886, it was ordered at Cincinnati (the circuit judges of both circuits being present) that the indebtedness of the first receivership of the system and of the various divisions thereof, in the several actions brought in both circuits, be recognized as debts of the court, the same as the debts of the second receiver, and A. J. Ricks and W. P. Fishback were appointed to take evidence and report the indebtedness. Their report was filed at Cincinnati and Toledo March 11, 1887, and at Indianapolis the day before, among other things approving the claim of the Iron Railroad, as reported by Special Master Cox, subject to such legal objection as might be made; and it is alleged that no exception to that report was ever taken or filed in any of the courts.

On the 6th of April, 1887, the circuit judges of the two circuits and the district judge for the northern district of Ohio met at the city of Cleveland, for the purpose of determining various pending questions, and there agreed upon a decree, since known as the "Cleveland Decree," which was entered in the various courts having jurisdiction,—at Cincinnati April 12, and at Indianapolis April 16, 1887. By the eighth clause of that decree it is ordered "that the claim of the Iron Railroad for forty-one thousand seven hundred and forty-eight and 39-100 (\$41,748.39) dollars, reported and allowed by Governor Cox, as special master, be, and the same is hereby, rejected and disallowed. The exceptions now allowed to be filed to the master's report, allowing said claim, are hereby sustained; and it is finally ordered, adjudged, and decreed that the said Iron Railroad and the purchasers thereof at foreclosure sale take nothing by said claim and proceedings thereunder;"—from which decree an appeal to the supreme court was prayed and granted, upon the giving of a bond in a sum named, "to the approval of the circuit court of the United States for the southern district of Ohio, western division." The appeal was not prosecuted, but on the 28th of April a petition for a rehearing was filed in the court at Cincinnati, and on the 1st of August ensuing was granted; the court ordering that the decree be vacated and annulled in respect to the claim of the Iron Railroad, and that the claim stand for rehearing and further order, in the causes pending in the sixth circuit. Upon the rehearing it was adjudged by the court at Cincinnati that the former decree disallowing the claim be annulled, and that "said claim of the Iron Railroad for net earnings is hereby re-established in all respects as fully as if the decree of April, 1887, had never been made: provided, however, that this decree does not warrant any enforcement or collection of said claim save in cases Nos. 3,554, 3,556, 3,577, 3,578, and 3,579 [all pending in Ohio], without the concurrence herein of the circuit courts of the United States for the district of Indiana and the district of Illinois." Counsel representing all divisions of the system were present at that hearing, and in view of a previous order made by Judge Baxter, surrendering primary jurisdiction over the Toledo division to the circuit courts of the seventh circuit, the decree re-establishing the claim was not entered at Toledo.

The petition for a rehearing was not filed or presented at Indianapolis until November 8, 1889, where, after a recital of the appearance of the parties by counsel, argument, and submission, it was ordered "that the petition be al-

lowed, and, by agreement of counsel in open court, it is further ordered that the petition be, and the same is hereby, set down for further hearing before this court on the 13th day of January, A. D. 1890." On the 27th of February ensuing, upon a showing by affidavit that there had been net earnings by the Toledo division which should be taken into the accounting between divisions, W. P. Fishback, master, was directed to investigate and report the facts; and on the 13th of February, 1891, he reported that the evidence failed to show earnings above expenses by the Toledo division. Nothing further seems to have been done until February 29, 1892, when the amended petition for a rehearing was filed, setting forth the facts stated, with details and circumstances which it is not thought necessary or profitable to recite here. To this petition there was opposed a motion to strike out, and also a demurrer, which last the court, on the 28th day of January, 1893, sustained, and ordered and decreed that the petition and amended petition for rehearing be dismissed; and from that decree or order this appeal is prosecuted.

The prayer of the amended petition is divided into seven clauses, all directly or indirectly to the effect that in the seventh circuit, as had already been done in the sixth circuit, there should be granted a rehearing of the Cleveland decree touching the claim of the Iron Railroad, and that the claim be re-established and apportioned over the several divisions of the system for payment out of the proceeds of sale,—the fifth clause being: "That so much of said Cleveland decree as purports to disallow said Iron Railroad claim may be vacated, annulled, and held for naught, and as no bar to the enforcement of a just proportion of said Iron Railroad claim against said St. Louis and Toledo divisions, including said Toledo terminals, so far as the causes in the district of Indiana are concerned."

The terms of the circuit court of the United States held at Indianapolis during the time of these transactions commenced on the first Tuesdays of May and November of each year.

John C. Coombs, Gustavus H. Wald, and Chas. H. Hanson, for appellants.

Robt. G. Ingersoll and Brown & Geddes, for appellees.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

WOODS, Circuit Judge (after stating the facts). It is well settled that there can be no appeal from an order granting or refusing an application for a rehearing. *Steines v. Franklin Co.*, 14 Wall. 15; *Railway Co. v. Heck*, 102 U. S. 120; *Kennon v. Gilmer*, 131 U. S. 22, 9 Sup. Ct. 696; *Roemer v. Bernheim*, 132 U. S. 103, 10 Sup. Ct. 12; *Boesch v. Graff*, 133 U. S. 697, 10 Sup. Ct. 378; *Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 207, 10 Sup. Ct. 736.

The appellants contend, however, that the decree of which a rehearing was asked was neither final nor valid; that their petition for rehearing was such only in form; that "in substance and reality it was purely and simply a petition to vacate the alleged decree of April 16, 1887, on the ground that it was absolutely null and void, and was not a decree touching matters pending in the seventh circuit at all." This position is not tenable. Both by its averments and by its prayer, it is clear that the petition was intended to be and is just what it purports to be—a petition for a rehearing. It was not filed in time under equity rule 88, it is true, but equally for any other purpose than a rehearing it has no standing or support. If, as contended, the decree was not final, there is for that reason no appeal from it; and if it was not valid, or was absolutely null and void, or did not touch matters pending in the seventh circuit, then

it is no obstacle to any procedure pending, or that might be instituted, for the establishment and enforcement of the claim of the appellants, and the appeal is unnecessary. But the grounds on which a rehearing was asked involve the correctness and regularity, and not the validity, of the decree. If, for instance, no exception had been filed to the several master's reports in support of the claim of the Iron Railroad and for that reason there should have been a decree in accordance with the findings and recommendations of the special master, the objection is not jurisdictional, and the decree, at most, could only be said to be erroneous. For the correction of the error there was a choice of procedure by appeal or by petition for a rehearing. But the appeal, if one is taken, must be always from the original decree, and not from the ruling on a petition for rehearing, if a rehearing has been asked.

The "Cleveland Decree," so called, as entered on the 16th of April, 1887, in the court for the district of Indiana, it is clear, was not invalid; and it was effective to dispose of the claim of the appellants, whether considered as having been brought under the jurisdiction of the court by the reports of the special masters or by the bondholders' petition of February 8, 1886. The general claim, as embodied in those reports, and as more particularly stated and presented by the petition for apportionment among the divisions of the road which extended into the seventh circuit, was properly before the court for adjudication; and, whatever error there may have been in the decision, the validity of the decree is beyond attack. Though presented in two forms,—by the masters' reports, and by the petition of bondholders,—the claim was essentially one, and was pending when the decree agreed upon by the judges at Cleveland was entered, rejecting the claim as an entirety; and, to the extent of the jurisdiction of the court in Indiana over the subject and the parties, that decree, when entered there, was a final disposition of the claim in both forms. The decree had its force, not from anything done or agreed upon at Cleveland or elsewhere in the sixth circuit, but by virtue of the power and jurisdiction of the court which pronounced it; and the subsequent granting of a rehearing by the court at Cincinnati could have had no effect upon the decree in Indiana, even if the proviso to the contrary had been omitted from the Cincinnati decree.

The petition for a rehearing, to be available, should have been presented at the term when the decree was entered; and if when so presented it had been denied, the appeal should have been from the original decree.

This appeal should be dismissed, at the costs of the appellants; and it is so ordered.

CRAVEN v. CANADIAN PAC. R. CO.

(Circuit Court, D. Massachusetts. June 21, 1894.)

No. 3,680.

JUDGMENT—OPENING AFTER TERM—UNAUTHORIZED AGREEMENT OF ATTORNEYS.

A judgment regularly entered pursuant to an agreement of the attorneys for the parties, filed in the case, cannot be opened, after final ad-

journment of the term, on the ground that the agreement was unauthorized.

This was an action by Michael Craven against the Canadian Pacific Railroad Company, in which judgment was entered for plaintiff on an agreement signed by the attorneys for the parties, and filed in the case.

John W. Corcoran, for plaintiff.

William H. Coolidge, for defendant.

PUTNAM, Circuit Judge. At the May term, 1893, the following agreement was filed in the case to which this petition relates:

"In this case it is agreed that entry shall be made: Judgment for the plaintiff for seventeen hundred and fifty dollars, without costs, and judgment satisfied."

William H. Brooks, Attorney for Plaintiff.

"Strout & Coolidge, Attorneys for Defendant."

Judgment was entered at that term pursuant to that agreement.

While the court might not enforce such an agreement before judgment is entered, if unauthorized as between attorney and client (*Holker v. Parker*, 7 Cranch, 496), and may, and perhaps should, on equitable principles reopen a judgment at the same term, entered on such an agreement, if so unauthorized (*Dalton v. Railway Co.*, 159 Mass. 221, 34 N. E. 261), yet the court is not required of its own motion to look behind the signatures of the attorneys. To hold otherwise would be to reverse the rules governing the relations between the court and bar. Consequently this judgment was regularly entered, and the error, if any, was not that of the court or its clerk. Therefore, after the term at which the judgment was entered was finally adjourned, the court had no further control over the judgment. The rule is well stated in *Hickman v. Ft. Scott*, 141 U. S. 415, 12 Sup. Ct. 9.

Petition denied, with costs; petitioner's exceptions to be filed within 10 days.

BUNTON et al. v. UNITED STATES.

(Circuit Court, W. D. Pennsylvania. April 17, 1894.)

1. INTEREST—JUDGMENT OF COURT OF CLAIMS.

Interest *held* not recoverable upon a judgment in the court of claims, where the judgment was founded upon a tort, and the case had been referred to the court under a special act (25 Stat. 1334), which did not contain any provision in relation to interest.

2. SAME—JURISDICTION OF CIRCUIT COURT.

Interest cannot be recovered in the United States circuit court upon a judgment rendered in the court of claims; the question being incidental to the original suit, and the court of claims being the proper forum for its determination.

George A. King, for plaintiffs.

Harry Alvan Hall, U. S. Dist. Atty.

Before ACHESON, Circuit Judge, and BUFFINGTON, District Judge.

BUFFINGTON, District Judge. On January 2, 1884, the steamer I. N. Bunton was sunk in the Ohio river by collision with the pier of the Davis Island dam, a structure erected by the United States government. By special act of congress of March 2, 1889 (25 Stat. 1334), the claim of the owners for this loss was "referred to the court of claims to hear and determine the same to judgment with the right of appeal as in other cases." On March 16, 1889, suit was brought in said court on said claim, and on April 22, 1889, judgment rendered that the "claimants do have and recover of and from the United States the sum of thirty-one thousand six hundred and ten dollars (\$31,610)." No appropriation for the payment thereof was made until September 30, 1890. Thereafter, the said sum was paid. Interest is claimed from April 22, 1889, to September 30, 1890, on the judgment; and to enforce this claim, amounting to \$1,840.51, the present proceeding is brought, and to it a demurrer has been filed. The case involves two questions: First, is interest recoverable upon the judgment? and secondly, if so, has this court jurisdiction to enforce such claim?

It is well settled that interest is not allowed on claims against the government, whether they arise on contract or tort; the only exceptions being where the government stipulates to pay it, or it is given by express legislation. *U. S. v. Bayard*, 127 U. S. 260, 8 Sup. Ct. 1156. The petitioners claim it on this judgment by virtue of section 10 of the act of March 3, 1887, which provides, "From the date of such final judgment or decree interest shall be computed thereon at the rate of four per cent. per annum, until the time when an appropriation is made for the payment of the judgment or decree." Whether this section refers to judgments of the court of claims, or is not restricted to those of the circuit and district courts, as contended by counsel for government, we do not, at present, feel called on to decide; for, in our opinion, this case does not arise under that act, nor is it thereby affected. It will be noted the original cause of action, being a tort, was excepted from the jurisdiction of the circuit, district, and court of claims by said statute. To enable the plaintiffs to sue, the special act of March 2, 1889, was passed, which provides "the claim" shall be referred to, and the court of claims shall "hear and determine the same to judgment." This act is the warrant for that court's jurisdiction, and measures the relief to be granted. In pursuance thereto, that court has fixed the amount, but has not decreed the payment of interest thereon. There is no provision in the act allowing interest on the claim, or on the judgment; nor is there any general statute allowing it, which includes this special case, of an excepted cause of action, specially referred to this particular court. When the court had fixed the amount, the time of payment was the subject of legislative will thereafter. So far as interest was concerned, the status of the case was as though congress had originally passed a private act fixing the amount, and ordering it paid, but made no appropriation for such payment. Under such facts, it could not well be contended that interest ran until appropriation

be made. We are therefore of opinion no interest upon the judgment is recoverable.

But conceding, for present purposes, it is, the question still remains, can such right be enforced by the present proceeding? The judgment was recovered in a court of competent jurisdiction, and interest, if recoverable at all, is recoverable as an incident to that judgment. Manifestly, it is the province of that court to enter a judgment or decree which shall embrace all matters incident to the controversy before it. It will be noted, we are not asked to enforce a judgment of the court of claims, for its judgment, to the extent to which it went, is now paid; but we are asked to say whether that judgment bore the incident of interest or not,—in substance, to decide what the court of claims has omitted to decide. In our opinion this question is one incidental to the original suit, and the court of claims is the proper forum for its determination. For the reasons set forth the demurrer is sustained.

ACHESON, Circuit Judge, concurs.

WETHERBY v. STINSON et al.

(Circuit Court of Appeals, Seventh Circuit. April 13, 1894.)

No. 142.

1. JURISDICTION OF FEDERAL COURTS—CITIZENSHIP.

Where jurisdiction depends on diversity of citizenship, and the bill shows that complainant and one of the defendants are citizens of the same state, and such defendant, although he files a disclaimer, is not dismissed out of the case, the suit should be dismissed.

2. REVIEW ON APPEAL—OBJECTION NOT RAISED BY COUNSEL.

On appeal from a decree dismissing a suit for want of equity the appellate court should take notice of a lack of jurisdiction, appearing from the bill, even though it is not suggested in the briefs or at the hearing.

Appeal from the Circuit Court of the United States for the Western District of Wisconsin.

This was a suit by George Wetherby against James Stinson, the Superior Consolidated Land Company, Sarah B. Anderson, and Daniel A. Robertson. Defendant Robertson filed a disclaimer, and the other defendants demurred. The demurrer was sustained, and the bill was dismissed for want of equity. Complainant appealed.

The appellant, a citizen of Minnesota, brought his bill of complaint against the defendants, alleging that three of them were residents and citizens respectively of Illinois or Wisconsin, and the fourth, Daniel A. Robertson, a resident and citizen of Minnesota. The averments of the bill are, in substance: That Lafayette Emmett, the appellant's grantor, being the owner of the north-east quarter of a certain section of land in Douglas county, Wis., entered into an agreement with a syndicate, consisting at first of eleven and afterwards of twelve persons, for the conveyance of the land to a trustee, to be platted in connection with lands belonging to the members of the syndicate as the city of Superior; that in pursuance of that agreement, on the 29th of June, 1854, he joined in the execution of a deed conveying the land to the said Robertson as trustee "for the purpose of platting as aforesaid and not otherwise," and for no other consideration; that in August, 1854, the twelfth person joined the syndicate, and all authority theretofore given Robertson by the

original eleven, of whom he was one, was revoked, and Newton and Nelson, who were also members, were selected as, and by deed in writing were made, trustees and attorneys in fact of the twelve, in lieu of Robertson, to apportion among the several members of the syndicate, and to convey to them, their respective shares in the platted lands; that on December 16th Robertson executed to his principals, the original eleven, a formal release and conveyance of all lands conveyed to him, including the said quarter section; that after August, 1854, the proposed platting was done, and made a matter of record; that there exists, and has ever existed, on the records of Douglas county, evidence of the original agreement among the members of the syndicate of eleven, and of the annulment thereof, and of the revocation of the trusteeship and authority of Robertson, and of the subsequent agreement among the twelve who composed the second syndicate; that at the request of the original syndicate Emmett executed "his certain formal deed for the south half of said northeast quarter to said twelve persons, respectively, in pursuance of, and in modification of, the original agreement for the platting of said northeast quarter, which deed bears date November 24, 1854, and was duly recorded," as were all the deeds before mentioned; that thereafter, on June 18, 1857, pursuant to the original and modified agreements, the twelve, in compliance with the original agreement between Emmett and the eleven, and after the plat of Superior was made and recorded, did execute to Emmett, by and through Newton and Nelson, as attorneys in fact, a reconveyance of all the blocks in and according to the plat of Superior upon the south half of the said southeast quarter, which deed was recorded March 26, 1858; that Robertson never made any conveyance of the north half of said northeast quarter, or of any part thereof, save and except to said eleven persons as aforesaid; and that since the formation of the new syndicate, and the designation of Newton and Nelson as trustees, and the revocation of his own powers, "Robertson has ever treated and regarded said powers conferred upon him by and under said agreement with said Lafayette Emmett, as aforesaid, as fully terminated, and absolutely revoked, and of no further life, force, or effect;" that upon a judgment for costs in the sum of \$213.67 against the twelve composing the new syndicate, rendered in a certain suit begun by them in the Douglas circuit court, and dismissed on their motion, execution was issued and levied upon certain lands as the property of the twelve, including a part of the north half of said northeast quarter, and thereafter a sale and pretended conveyance was made by the sheriff to E. W. Anderson, Jr., for \$36.75, the deed bearing date February 3, 1871; that on June 30, 1868, a pluries execution issued, by virtue of which the sheriff levied upon and sold other lands as the property of the twelve, including the remainder of the north half of said northeast quarter, to the respondent James Stinson, one of the twelve judgment debtors, for \$240; that no redemption was made from either of the sales; that on April 20, 1875, said Anderson died, leaving the respondent Sarah B. Anderson his sole devisee, and she makes claim to the portion of the land so sold and conveyed to her devisor; that Stinson is, and ever has been, a large stockholder in the Consolidated Land Company, one of the respondents, and, solely in consideration of stock in that company, has within the past two years made pretended assignments and conveyances to that company of a portion of the north half of said northeast quarter, purchased at sheriff's sale as aforesaid; that the said north half of the said quarter section has ever been, and now is, wholly vacant and unoccupied, and is of the value of \$3,000; that the twelve judgment debtors aforesaid never, either jointly or severally or otherwise, had in said land, or any part thereof, any property or rights, legal or equitable, leviable under execution; that the deed of Emmett to Robertson conveyed no leviable interest or property in the land; that Stinson, as one of the judgment debtors, was primarily and at all times absolutely liable individually for the payment of the said judgment, and, well knowing the fraudulent character of the sheriff's sale, made no attempt to obtain a deed thereunder until more than 21 years after the date of the sale, when, on March 10, 1890, without any order of court therefor, he fraudulently and unlawfully received from the sheriff of the county a deed which was filed for record four days later by said corporation, which at all times had full notice, both actual and constructive, of the infirm and worthless character of Stinson's

son's title; that the pretended transfers to the corporation by Stinson were the result of a conspiracy and fraudulent combinations between the corporation and him to harass the complainant, and to becloud and depreciate the value of his title; that immediately after the platting of the land—for which Emmett paid his proportionate share of the expense—Emmett demanded of Robertson a formal conveyance of the platted blocks in the north half of the said quarter section, which he neglected and refused to make; that Emmett made like demand of the syndicate of twelve after the pretended conveyance by Robertson to the original eleven, and before the pretended sheriff's sales, which demand was neglected and refused; that the defendants, and each of them, neglect and refuse to release and discharge of record or to surrender to the plaintiff their pretended and ostensible claims of record to said north half of the said northeast quarter section, and to any part thereof; that Emmett, "for full value paid to him," sold and conveyed the north half of said premises to the plaintiff by deed, which was afterwards duly recorded on the 23d of January, 1890; that the claims and acts of the respondents Stinson, the Consolidated Land Company, Sarah B. Anderson, and Daniel A. Robertson are contrary to equity, and constitute unjust clouds upon the complainant's title; that neither the complainant nor his grantor, Emmett, had notice or knowledge of the sales made by the sheriff, or either of them, and of the claims of the defendants thereunder, until within the past one and one-half years. The prayer of the bill, among other things, is "that the said instrument to Daniel A. Robertson be decreed an unexecuted trust as against your orator, and that no property, in fact or in law, ever passed to any one by virtue thereof, and that legal title to said premises be decreed conveyed to your orators."

To this bill Robertson, by counsel, filed a disclaimer, which, omitting signatures, was of the following tenor: "This defendant now and at all times hereafter saving and reserving unto himself all benefit and advantages of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in the said complainant's bill of complaint contained, for disclaimer thereunto, or unto so much, or such parts thereof, as this defendant is advised is or are material or necessary for him to make disclaimer unto, this defendant, disclaiming, saith that he doth not know that he, this defendant, to his knowledge and belief, ever had, nor did he claim or pretend to have, nor doth he now claim, any right, title, or interest of, in, or to the estates and premises situate," etc., "in the said complainant's bill mentioned, and every part thereof. And this defendant denies all, and all manner of, unlawful combination and confederacy, wherewith he is by the said bill charged; without this that there is any other matter, cause, or thing in the said complainant's said bill of complaint contained material or necessary for this defendant to make answer unto, and not herein and hereby well and sufficiently answered, traversed, and avoided or denied, is true to the knowledge or belief of this defendant. All of which matters and things this defendant is ready and willing to aver, maintain, and prove, as this honorable court shall direct, and humbly prays to be hence dismissed, with his reasonable costs and charges in this behalf most wrongfully sustained."

The other defendants demurred to the bill. This was in March, 1892, and on the 15th of August, 1893, at a special term, the court sustained the demurrer, ordered the bill dismissed as without equity, and adjudged that the defendants, including Robertson, recover of the complainant their costs. Appeal was prayed "from said final decree, and the whole thereof," Robertson's name being included with the others in the petition for appeal and assignment of errors.

J. N. True, for appellant.

A. L. Sanborn, for appellees.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

WOODS, Circuit Judge (after stating the case). The bill shows that when the suit was begun the complainant and Robertson, one

of the respondents, were citizens of the same state, and, though not suggested in the briefs or at the hearing, we are compelled to recognize the lack of federal jurisdiction over the case. *Railway Co. v. Swan*, 111 U. S. 379, 382, 4 Sup. Ct. 510; *Parker v. Ormsby*, 141 U. S. 81, 11 Sup. Ct. 912; *Burnham v. Bank*, 10 U. S. App. 485, 3 C. C. A. 486, 53 Fed. 163. Robertson's disclaimer did not cure the defect, because, if for no other reason, he was not dismissed out of the case, but remained a party to the end. *Pirie v. Tvedt*, 115 U. S. 41, 5 Sup. Ct. 1034, 1161; *Sloane v. Anderson*, 117 U. S. 275, 6 Sup. Ct. 730; *Phelps v. Oaks*, 117 U. S. 236, 6 Sup. Ct. 714; *Wire Hedge Co. v. Fuller*, 122 U. S. 535, 7 Sup. Ct. 1265; *Torrence v. Shedd*, 144 U. S. 527, 12 Sup. Ct. 726. In fact, his disclaimer was not to the entire bill, but was accompanied by a denial of the alleged confederacy and combination, and therefore did not entitle him to be dismissed with costs. *Story*, Eq. Pl. § 844; 1 *Daniell*, Ch. Pl. 707. "The proper course to be pursued by the plaintiff," says *Daniell*, at page 709, "after a disclaimer to the whole bill has been filed, is either to dismiss the bill as against the party disclaiming, with costs, or to amend it; or, if he thinks the defendant is not entitled to his costs, he may set the cause down upon the answer and disclaimer, and bring the defendant to a hearing." It does not follow, therefore, from the mere filing of a disclaimer, no matter what its scope, or what the nature of the case, that the one disclaiming ceases to be a party, though, if he be charged only with asserting a claim, he may, by disclaiming, become entitled ordinarily to be dismissed with costs. It is seldom, however, that a disclaimer may be put in alone or without answer, and in this case, irrespective of conspiracy and combination, of which Robertson was not directly charged, it is doubtful whether a disclaimer was appropriate or admissible. The bill shows that Emmett had conveyed the land in controversy to Robertson in trust, to be platted by him, and that Robertson conveyed or attempted to convey to the eleven persons who composed the original syndicate. These facts involve important questions, which, it would seem, cannot well be determined in a suit to which Robertson is not a party. For instance: Did Emmett part with his title, or did he confer upon Robertson simply a power to do the platting contemplated? And, when that was done, did the conveyance or deed cease to be of effect, or was it necessary that there should be a reconveyance to Emmett? Whatever the right, title, or power conferred upon Robertson, could he make a transfer to others, and was his deed to the eleven totally void, or did it vest the grantees with some right, title, or power? If the title remained in Robertson, it is doubtful whether, by a disclaimer, especially when signed, as this was, only by his counsel, he could divest himself of the title. To say the least, it was important, as the plaintiff recognized it to be, that Robertson should be made a party to the case, and, notwithstanding the disclaimer, it was hardly less important that until final decree was rendered he should remain a party. No motion or order for his discharge was made, and he in fact continued in the case to the end, and, with the other defendants, was given judgment for costs. Whether or not, even if the disclaimer had been complete

and appropriate to the entire bill, and the party had been dismissed from the case, the jurisdiction would have been thereby established or acquired, we need not consider. Upon the facts as they are, the lack of jurisdiction is clear, and it follows that the decree dismissing the bill for want of equity should be set aside, and a dismissal for want of jurisdiction should be entered, but without costs. *Mayor v. Cooper*, 6 Wall. 247; *Barney v. Baltimore City*, Id. 280; *Hornthall v. Collector*, 9 Wall. 560; *Railway Co. v. Swan*, supra; *Grace v. Insurance Co.*, 109 U. S. 278, 3 Sup. Ct. 207; *Fuel Co. v. Brock*, 139 U. S. 216, 11 Sup. Ct. 523. We think, too, that costs should not be allowed in this court. So ordered.

PRESIDENT, ETC., OF YALE COLLEGE v. SANGER, State Treasurer.

(Circuit Court, D. Connecticut. June 26, 1894.)

1. FEDERAL COURTS—JURISDICTION—SUIT AGAINST STATE OFFICER.

A federal court cannot take jurisdiction of a suit against a state officer to compel or coerce the state to perform its obligations or abide by its contracts, when the officer has neither committed nor threatened to commit an injury to the property of complainant, but may take jurisdiction of a suit against an officer who, under the authority of an unconstitutional statute, has attacked or threatened to attack and injure the vested pecuniary rights of complainant in his property.

2. AGRICULTURAL COLLEGE LAND SCRIP—VESTED INTEREST—INJUNCTION TO PREVENT DIVERSION OF INCOME.

The title which Yale College has under the contract with the state of Connecticut inviolably securing to said corporation the income of the fund (Act June 24, 1863) derived from the avails of land scrip donated under the act of congress of July 2, 1862, which were invested in bonds and constituted a separate fund, is a vested beneficial right in such securities, and the state treasurer may be enjoined, at the suit of the college in a federal court, from a threatened diversion of the income under the authority of an unconstitutional state statute, but will not be compelled to pay the income to the college, as such relief is, in effect, an attempt to compel the state to execute its contract.

This was a suit by the president, etc., of Yale College, against the state treasurer of the state of Connecticut, to prevent a threatened diversion from complainant of the income of the "Agricultural College Fund," created by act of congress. Defendant demurred to the bill.

Charles R. Ingersoll and Bristol, Stoddard & Bristol, for complainant.

Wm. Edgar Simonds and E. Henry Hyde, Jr., for defendant.

SHIPMAN, Circuit Judge. The matter in dispute between the parties arises under the laws of the United States. The complainant states in its bill in equity the following case:

(1) In 1863 the state of Connecticut received from the United States government, under the act of congress of July 2, 1862, land scrip subsequently sold for \$135,000, "for the uses and purposes prescribed in said act." The prescribed "uses and purposes" was the investment of the money as "a perpetual fund," of which the interest was to be inviolably appropriated to the "endowment, maintenance, and support" of some college or colleges in Con-

necticut (to be provided by the state within five years), where the leading object should be to teach certain branches of learning relating to agriculture and the mechanic arts.

(2) The state of Connecticut, having accepted the donation "upon the terms contained in said act," thereupon, within the five years, selected the college of the complainant for the endowment provided by the act of congress, and by act of its general assembly of June 24, 1863, set apart the fund (subsequently styled the "Agricultural College Fund") for the purpose of such endowment, placing it in the special custody of the commissioner of the school fund, and appropriating the whole interest accruing therefrom thereafter to the complainant, in consideration of the complainant's engagement, by contract in writing, to fulfill the duties and perform the obligations required by the act of congress.

(3) The complainant complied with this condition of the endowment, and, "at large expense," equipped the department of its college known as the "Sheffield Scientific School" with the means of the prescribed instruction; and thereupon the college of the complainant became established, under the provisions of the act of congress, as the sole college in Connecticut entitled to the benefits of the endowment fund; and the complainant at once became possessed of the entire beneficial interest in said fund for the "endowment, maintenance, and support" of its college so established, and thereafter, down to the time of the threatened acts of the defendant complained of, has continued to enjoy for that purpose all the rights, privileges, and benefits belonging to such beneficial interest.

(4) By act of congress approved August 30, 1890, the United States government appropriated out of the United States treasury other sums, payable thereafter annually, for "the more complete endowment and support of the colleges for the benefit of agriculture and the mechanic arts established under the provisions of an act of congress approved July 2, 1862," which sums were directed to be paid by the secretary of the treasury of the United States to the state treasurer (in the absence of other designation by the state), by whom said sums were directed to be paid over "immediately" to the treasurers of the college entitled to receive the same; and, under the provisions of this act, such appropriations for the respective years ending June 30, 1890, June 30, 1891, June 30, 1892, June 30, 1893, were received by the state treasurer of Connecticut, and by him immediately paid over to the treasurer of this complainant, as the party entitled to receive the same for the benefit of its college "established" and "endowed" under the act of congress of July 2, 1862, as already stated.

(5) At the bringing of this suit, the defendant, being the state treasurer of Connecticut, had in his hands — dollars, which he had received from the commissioner of the school fund, as interest accrued from the agricultural college fund in the custody of said commissioner, and which, by the Connecticut act of June 24, 1863, had been granted to this complainant, as already stated, and had then by said act become payable to the complainant. The defendant also had in his hands the sum of \$19,000, which he had received from the secretary of the treasury of the United States under the act of congress of August 30, 1890, and which, by said act of congress, he was directed to pay over immediately to this complainant, if the complainant was entitled to the same.

(6) The defendant, having these sums of money in hand, refused to pay over either of them to the complainant, and threatened to pay over the same, or the substantial part thereof, to the Storrs' Agricultural College, an institution of the state of Connecticut, established by act of its general assembly approved April 21, 1893; his reason for such refusal and such threatened action being that he was directed so to do by the said act of the general assembly of the state.

(7) The complainant, claiming that by the act of congress of July 2, 1862, and the act of the general assembly of Connecticut of June 24, 1863, pursuant thereto, a property right in "the perpetual fund" by said acts constituted, had vested in the complainant by the grant or executed contract of the state of Connecticut, entitling the complainant to all the beneficial interest of said fund for the endowment of its college, established under said act of

congress, and also to all the sums of money appropriated by the act of congress of August 30, 1890, for the more complete endowment of its college so established, which vested property right cannot be annulled or impaired by any act of the general assembly of the state, and of which the complainant cannot be divested otherwise than by some due process of law, brings this suit against the defendant to prevent his threatened violation of the complainant's rights, as aforesaid, and his threatened injury to the complainant's property by depriving its college of the means of maintenance and support provided by its endowment under the acts of congress, and to require the defendant to perform towards the complainant the duty imposed upon him by the law, of paying over to the complainant the sums of money in question, as would have been his duty had the wrongful and unconstitutional action of the general assembly of Connecticut of April 21, 1893, not been had.

The defendant has demurred to the bill, upon the ground that it is, upon its face, in effect, a suit by the complainant against the state of Connecticut, and not against the defendant, except as, in his official capacity, he represents said state; and that the bill, therefore, upon its face, does not state a case which entitles the complainant to relief against the defendant. The immunity of the state from suit by an individual was the substantial question which was presented upon the argument. That a state cannot, without its consent, be sued in a circuit court of the United States by one of its own citizens, upon a suggestion that the case arises under the constitution or laws of the United States, and therefore cannot be coerced or compelled by suit of one of its citizens to perform its contracts, was decided in *Hans v. Louisiana*, 134 U. S. 1, 10 Sup. Ct. 504. It is equally well settled that an officer of the state who, as an aggressor, invades the property or vested pecuniary rights of an individual in his specific real or personal property, cannot, in a suit at law against him for his tort, or in a bill in equity to restrain the commission of the intended injury, when adequate relief cannot be otherwise afforded, successfully justify his conduct upon the ground that he is acting in obedience to the authority of an unconstitutional statute of the state. In the infinite variety of circumstances which arise in modern legislation, the question whether the state is the only aggressor often becomes a puzzling one, and the injured citizen is tempted to undertake to seek relief by making an officer the defendant, when he has committed no aggressive act upon the complainant's specific property. The distinction which runs through the cases, and which differentiates the class in which attempt has been made to coerce the state by compelling its officers to affirmatively perform the state's obligations, from the class which seeks to restrain the officer from committing an aggressive injury, under the pretended authority of an unconstitutional statute, upon the rights of an individual in his specific property, is stated in *Pennoy v. McConaughy*, 140 U. S. 1, 11 Sup. Ct. 699, one of the last cases which came before the supreme court upon this subject. The court says that suits of the second class are not within the meaning of the eleventh amendment,—“Actions against the State,”—and further defines the second class as follows:

“The other class is where a suit is brought against defendants who, claiming to act as officers of the state, and under the color of an unconstitutional

statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the state. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the state, or for compensation in damages, or in a proper case, where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain, legal duty, purely ministerial, is not, within the meaning of the eleventh amendment, an 'action against the state.'"

Examples of the two classes are given with clearness in the opinion of the court, and perhaps ought not to be restated here, but a knowledge of the facts in the respective cases greatly tends to an understanding of the meaning of the general expressions which are used in the various opinions of the supreme court, and which without such knowledge might seem to be inharmonious.

In the case of *Osborn v. Bank*, 9 Wheat. 738, a case which still maintains its original importance, the power of the circuit court of the United States for the district of Ohio to restrain, by injunction, an officer of the state of Ohio from levying upon the property of a corporation, in order to enforce the collection of an unconstitutional state tax upon the corporation, was sustained. In *Davis v. Gray*, 16 Wall. 203, the same restraining power was upheld which had been exercised by the circuit court to prevent the officers of a state from selling the real estate of a railroad company, which the state had, in violation of its contract, declared to be forfeited.

In *Board v. McComb*, 92 U. S. 531, the state of Louisiana, in violation of a prior contract with the holders of the "consolidated bonds" of the state, had passed an act authorizing the board, having charge of the bonds, to issue a portion of them in liquidation, at par, of a debt which was not one of those for the founding of which the bonds had been issued. The original statute, also, provided that the new bonds were to be exchanged for specified bonds and warrants, at the rate of sixty cents in the new bonds for one dollar in the pre-existing securities. Upon a bill in equity by a holder for value of the new bonds to restrain the board from using any consolidated bonds, as proposed, the supreme court was of opinion that inasmuch as the threatened action destroyed "all the benefits anticipated from the funding, on which benefits those who accepted its terms had a right to rely," and injured the pecuniary rights of the complainant, an injunction, so far as it restrained the funding of the debt in consolidated bonds, was properly granted.

In the case of *Poindexter v. Greenhow*, 114 U. S. 270, 5 Sup. Ct. 903, 962, which was most elaborately discussed both at the bar and by the court, the court directed judgment for the plaintiff, in an action of detinue for personal property distrained by the defendant, an officer of the state of Virginia, "for delinquent taxes, in payment of which the plaintiff had duly tendered coupons cut from bonds issued by the state of Virginia," which were by the funding act of 1871 receivable in payment of taxes, and held that the subsequent act of the state which forbade the receipt of the

coupons for taxes was "a violation of the contract, and void as against coupon holders," and furnished no defense to the officer of the state for his seizure and sale of the plaintiff's property.

So, also, in *Allen v. Baltimore & O. R. Co.*, one of the series of "Virginia Coupon Cases," 114 U. S. 311, 5 Sup. Ct. 925, 962, where the injured taxpayer became complainant in a bill in equity, the court sanctioned the remedy by injunction to prevent the officers of Virginia from collecting taxes by distraint upon the personal property of the complainant, "after a tender of payment in tax-receivable coupons."

The facts in *Pennoyer v. McConnaughy*, *supra*, are of marked importance in the ascertainment of the proper line of demarkation between suits nominally against officers of a state, but actually against a state, and suits properly brought against officers to prevent the threatened commission of injuries to the property of the plaintiff. The complainant had, under an existing statute of Oregon, acquired the right to purchase, upon specified terms, a described tract of swamp or overflowed land, belonging to the state. A subsequent statute declared certificates of sale of such lands, on which 20 per cent. of the purchase price was not paid prior to a named date, to be void, and required the board of commissioners to cancel them. The board threatened to sell the land described in the complainant's certificate. The supreme court, after holding that the new statute, under which the board was proceeding to act, impaired the contract theretofore made with the complainant, and that, under the facts of the case, he had a vested right to the land, held that a suit in equity, brought by him against the members of the board to restrain them from selling the tract to which he had acquired the equitable right, was not a suit against the state.

The important examples of cases which are suits against a state, and in which the complainants have sought to compel the performance of contracts by the state under the form of suits against the officers, present, with perhaps a single exception, a more complex state of facts. That exception is the case of *Cunningham v. Railroad Co.*, 109 U. S. 446, 3 Sup. Ct. 292, 609, in which the complainants desired to foreclose a mortgage upon a railroad, and, for that purpose, to set aside a prior sale of the railroad to the state of Georgia, under a foreclosure of the first mortgage, the railroad being in possession of the state by virtue of its purchase. This was obviously a suit against the state, and not against the officers who were made nominal parties thereto.

The case of *Louisiana v. Jumel*, 107 U. S. 711, 2 Sup. Ct. 128, presents the following state of facts: Louisiana stipulated, by act of 1874, with the holders of the new bonds which were described in *Board v. McComb*, *supra*, and which were issued in exchange for valid outstanding bonds, that an annual tax of 5½ mills should be levied, and the income therefrom applied to the payment of the new bonds and coupons, and no further authority than that contained in the act should be required to enable the taxing or the disbursing officers to proceed. Owners of bonds demanded

of the state officers payment of the coupons which fell due January 1, 1889. Payment was refused on the ground that it was forbidden by an ordinance of the constitution of 1879. Certain bondholders brought an action at law for a mandamus, and a bill in equity for an injunction, forbidding the members of the board of liquidation to recognize as valid the ordinance. It will be seen that the members of the board had not moved against the bondholders, and that no particular act was asked to be performed by the board, but the court was asked to direct that the proper officers should administer the finances of the state in accordance with the act of 1874, and in that way to bring about payment of the bonds; and, further, it will be observed that there was no special fund which belonged to the bondholders. All the funds in the treasury were commingled, and were the property of the state, without an equitable lien thereon or title thereto on the part of any bondholder, and no duty was imposed upon the board "to separate from the other money in the treasury that realized from the taxes in question, and to hold it in trust for the bondholders." The court held "that the money in the treasury of Louisiana is her property, held by her officers, not in trust for her creditors, nor as their agents; and that the courts cannot control them in the administration of her finances, and thus oust the jurisdiction of the political power of the state." In this decision there was no undue refinement because the complainants were compelled to proceed upon the theory that a federal court could direct the officers of the state in respect to the management of the general funds of the state, no special duty having been imposed upon them by contract to keep any portion of the fund reserved for the bondholders. The bill was not an attempt to prevent an aggressive act by an officer of the state upon the complainant's property, which impaired its value.

The kernel of the decision in *Hagood v. Southern*, 117 U. S. 52, 6 Sup. Ct. 608, is thus stated in the syllabus: "State scrip which declares on its face that it is receivable," in payment of all taxes and dues to the state, "gives the holder no right to maintain a suit to compel its receipt for taxes, unless he owes the taxes for which it is receivable." The contract is with the holder, who is also a taxpayer, and who undertakes to pay his taxes with the scrip; and, if the scrip is refused, the contract is then, and not previously, broken. "The discredit cast upon the scrip by the general refusal to accept it by the tax collectors of the state, and the depreciation in value occasioned thereby, are not actionable injuries." The bill was brought to accomplish the general purpose of rectifying the legislation of South Carolina in regard to this scrip, and not to ward off the injury to be inflicted upon any one taxpayer; and, in view of this distinction, the court say:

"A broad line of demarkation separates from such cases as the present, in which the decrees require, by affirmative official action on the part of the defendants, the performance of an obligation which belongs to the state in its political capacity, those in which actions at law or suits in equity are maintained against defendants who, while claiming to act as officers of the state, violate and invade the personal property rights of the plaintiff, under color of authority, unconstitutional and void."

A case of very great importance is *In re Ayers*, 123 U. S. 443, 8 Sup. Ct. 164, because it embodies the principles contained in the two cases which were last cited, and because the facts bring it into marked distinction from those in the case of *Allen v. Baltimore & O. R. Co.*, *supra*, which sanctioned an injunction at the suit of a taxpayer against proposed illegal distraints of his property; and it shows with considerable plainness the line which divides the two classes of which I have spoken. The original proceeding was a bill in equity by aliens, subjects of Great Britain, in behalf of themselves and all others similarly situated, against the auditor and attorney general of Virginia, the treasurers and the commonwealth attorneys of counties, cities, and towns in Virginia. The complainants, the owners of bonds, the coupons of which were to be received for payment of taxes, sought to enjoin the defendants from bringing suits "against taxpayers reported to be delinquent, but who had tendered, in payment of the taxes sought to be recovered in such suits, tax-receivable coupons, cut from the bonds of the state." It will be perceived that the complainants were not taxpayers, and had not presented to the collecting officers coupons in payment for taxes. The officials had not moved against them or their property, and had not threatened to commence aggressive acts against them as in the *Baltimore & Ohio Case*; and the refusal of the collectors to accept the coupons of others created no legal cause of action on the part of the complainants. The court thereupon held that:

"If the holder of Virginia coupons, receivable in payment of state taxes, sells them, agreeing with the purchaser that they shall be so received by the state, the refusal of the state to receive them constitutes no injury to him for which he could sue the state, even if it were suable, and cannot be made the foundation for preventive relief in equity against officers of the state."

And further declared that it did—

"Not intend to impinge upon the principle which justifies suits against individual defendants who, under color of the authority of unconstitutional state legislation, are guilty of personal trespasses and wrongs; nor to forbid suits against officers in their official capacity, either to arrest or direct their official action by injunction or mandamus, where such suits are authorized by law, and the act to be done or omitted is purely ministerial, in the performance or omission of which the plaintiff has a legal interest."

The result which is reached by this, perhaps wearisome, statement of the facts in the decided cases, is that the supreme court has been scrupulous not to permit suits against state officers to compel or coerce states to perform their obligations or abide by their contracts, when the officer has neither committed, nor threatened to commit, an injury to the property of the complainant, and has been willing to permit suits against officers who, under the authority of unconstitutional statutes, have attacked, or threatened to attack and injure, the vested pecuniary rights of the complainant in his property. Thus, when the state of Oregon, which had the legal title of a tract of land in which the complainant had a vested equitable title or interest, had passed a statute instructing its officers to disregard such equitable title and sell the land to other parties, the officers could be prevented by injunction from making such sale,

to the injury, if not destruction, of the complainant's equity; and the officers of the state of Louisiana could be prevented, by like writ of injunction, from a disposition of the bonds of the state in their possession and control, which would materially injure the pecuniary value of the bonds which the complainant had acquired.

The question remains whether, under the averments of the bill, the complainant has shown a similar injury and a right to a similar remedy. I shall confine myself to its interest in the fund derived from avails of the land scrip under the act of 1863. The United States gave to the state of Connecticut, in 1862, land scrip for a specified number of acres of land, which scrip was to be sold. The avails thereof were to be invested by the state, and the interest of the fund was to be inviolably appropriated for the endowment and support of at least one agricultural college, to be provided by the state within five years. The state accepted the grant, upon the conditions of the act of congress, and selected the complainant as its appointee, provided the college should contract with the state, in writing, to perform all the duties and obligations imposed upon it by the statute. Subsequently, the general assembly of the state, this contract having been entered into, and having been approved by the governor, declared, by resolution, that the act of 1863 and the agreement of the college constituted "a binding contract, inviolably securing to said corporation the income of the fund provided for in said act, so long as said corporation shall continue on its part to comply with the terms and conditions of said contract." The fund arising from the sale of the scrip was thereafter invested in bonds, indorsed and known as "Agricultural College Bonds," and constituting a separate fund, called the "Agricultural College Fund," and which is not a part of the general funds of the state. The income was continuously paid to the college, without further act on the part of the state, until 1893, when, by a statute of the general assembly, the treasurer of the state was directed not to pay the interest of the fund to Yale College until a new contract should be made. The statute does not proceed upon the theory or assumption that the college had ceased to comply with the terms and conditions of the contract of 1863, and there is no suggestion that the new act was not a breach of the pre-existing contract. Indeed, the act provides that should any question of damages, growing out of the provisions of the act, arise between the college and the state, such question shall be settled by arbitration.

In considering the right of the complainant to relief, three facts are to be borne in mind: First. The position of the college is not that of a creditor of the state; nor does its right grow out simply from a breach of contract. If the legislature should improperly refuse to permit a contractor for the erection of a public building to continue his work, no action would lie against the treasurer. If the complainant has a capacity of suing, it arises from its right to protect itself against the attack of an individual upon a piece of its property. Second. The fund is a separate one, and so carefully distinguished from the other property of the state that its securities are always capable of identification. Neither it nor its income is

a part of the general funds of the state, and the court is not called upon, as in *Louisiana v. Jumel*, to interfere with the management of the state treasury. If the legislature had by statute directed the treasurer to pay to Yale College, from the general funds of the state, a sum equal to 5 per cent. upon \$135,000, which was due to the college by contract, and had thereafter repealed the statute, no action would lie against the treasurer to compel him to disregard the repealing act; for, having committed no trespass upon the individual property of the college, he is not a tortfeasor. Third. The state has the legal title to this fund, which it holds to the use of the complainant. This trusteeship did not arise from the state's promise that it would be a trustee. Such an agreement could be broken by the state, which could divert the income, and the *cestui que trust* would be remediless. *Trustees v. Rider*, 13 Conn. 87. When the state accepted the grant upon the terms contained in the act of congress, selected the college as the sole appointee, provided it would equip itself to do the required work, and the equipment was made, "at large expense," the state became a trustee by operation of law. It did not merely agree to hold, but it held, the fund for the use of the college, and the college held the equitable title. The relations of the state to this fund were the same as they would be to a fund bequeathed by the last will of a testator, to the state, to hold, as trustee, for the perpetual benefit of the person who should be the presiding judge of the highest court of the state, and the state had accepted the trust. The entire beneficial interest of the fund is in the complainant, and the income is its property, which it is the ministerial duty of the treasurer to transfer to its owner.

The hinge of the case is whether, under this state of facts, when the treasurer threatens to move the income away from the college, he becomes a tortfeasor upon its property; for, if he is a tortfeasor, it is immaterial whether he commits the trespass self-moved, or in obedience to a void statute; in other words, whether the interest of the college in the specific fund, and its title to the income, is such a piece of property that it is capable of being aggressively moved upon and injured, or is the refusal to hold it to the use of the college simply a refusal to comply with an obligation of the state? From the *McComb* and the *McConaughy* Cases it appears that it is not important whether the property is or is not in the possession of the state, nor whether the title of the complainant is absolute or equitable, and that the fact of the state's legal title thereto is also immaterial. The title which the college has to the fund is a vested beneficial right in a separate parcel of securities, capable of as exact description as the boundaries of a tract of land; and, "where one holds property for another, the vested right which the law regards is not that of the trustee, but of the beneficiary." *Cooley*, Const. Law, 322. The duty of the state is not merely a duty to pay a sum of money, but its duty, and that of its officers, is not to divert the beneficial right in a piece of property from the rightful beneficiary. That the right of the complainant in the fund does not

permit it to handle the property is not important, for, although it cannot handle the securities, and its interest in the corpus of the fund is also intangible, the right is one which is well defined and clearly known by the law. The tangible fruit of this equity is income, and, where the income is diverted by the treasurer from the rightful owner, he individually commits that which the law styles a "wrong." It may be said that in the McComb Case the defendants were trustees, whereas the state, and not the treasurer, is the trustee of the fund, and that an improper use of it which is directed by the state is its tortious act, and not that of the treasurer. This begs the question. The state is, in this class of cases, always the original wrongdoer; but, as the officer cannot protect himself by a void law of the state from the consequences of his own acts, he is considered a wrongdoer also.

My conclusion is that the college is entitled to its preventive remedy by an injunction to restrain the defendant from paying the income of the land-scrip fund to any other person than itself; but it does not necessarily follow that, under this bill in equity, the complainant is entitled to affirmative relief, because affirmative relief, viz. a decree that he should pay the income to the complainant, may be considered an attempt to compel the state to execute its contracts, and the power of the court may be regarded as exhausted when it prevents an officer from invading the property rights of the complainant. *Hans v. Louisiana*, 134 U. S. 1, 10 Sup. Ct. 504; *Pennoyer v. McConnaughy*, *supra*. As the demurrer goes to the entire bill, it is not absolutely necessary, at this time, to consider the alleged rights of the complainant to the annual appropriations which are being made by the United States under the act of 1890, and which will amount in time to \$25,000 annually; but I am not willing, by silence, to have it inferred that I absolutely concur in the position of the complainant's counsel that since the establishment of the complainant's college by its endowment, under the federal statute of 1862, the state of Connecticut has no power to establish another college under the provisions of that act, or to make any other disposition of the appropriations under the federal statute of 1890 than those which it had specified in the state statute of 1863. The complainant's counsel think that, having selected an appointee, the state had, under the United States act of 1890, no new power to select another appointee, or to endow it; and that the power of appropriation was exhausted; and that, as to colleges which had been established under the act of 1862, the appropriations under the act of 1890 are directly for their benefit, and not for the benefit of new institutions. The provisions of the act are vaguely expressed, and a construction of the statute is postponed until a decision is necessary. I also doubt whether the selection of the complainant by the act of 1863 was more than a selection to be the cestui que trust of the fund arising from the sale of the particular land scrip which had been then donated, and properly included an absolute and exclusive right to receive moneys which should thereafter be appropriated by congress,—a right in-

capable of interruption, although the state had, by its silence of two or three years, assented to the payment to the complainant of such appropriations. The demurrer is overruled.

TYLER et al. v. HAMILTON et al.

(Circuit Court, D. Oregon. June 12, 1894.)

No. 1,946.

1. CORPORATIONS—RECEIVERS—SETTING ASIDE CONTRACTS WITH DIRECTOR.

Leases of property of a corporation to a director, who held nearly all its stock, were assented to or ratified by the other directors, who held all the remaining stock. *Held*, that a receiver of the corporation, appointed in a suit to foreclose a mortgage of its property, could not contest the validity of the leases, he not representing creditors, and no circumstances being alleged vesting in him equities to maintain such a suit or to question the lessee's rights.

2. RAILROAD COMPANIES—FORECLOSURE OF MORTGAGES—RIGHTS OF PURCHASERS.

Leases by a railway company of lands on which the lessee erected warehouses and platforms, containing provisions for the purchase of such improvements by the lessor or their removal by the lessee at the end of the term, were made subsequent and subject to mortgages of the land. *Held*, that assignees of the leases were not necessary parties to a suit to foreclose the mortgages, and a failure to make them parties thereto did not operate as a recognition of their status as tenants and a ratification of their leases; and, so far as the mortgagee was concerned, their rights were extinguished by the foreclosure sale.

This was a suit by W. D. Tyler, receiver of the Oregon & Washington Territory Railroad Company, against Hamilton and another, to have certain leases of property of the railroad company which had been assigned to defendants declared void. By a supplemental bill, the Washington & Columbia River Railroad Company was joined with the receiver as a complainant.

J. L. Sharpstein, Joseph Simon, and L. L. McArthur, for complainants.

J. J. Balleray and R. S. Strahan, for defendants.

GILBERT, Circuit Judge. A bill in equity was filed by W. D. Tyler, the receiver of the Oregon & Washington Territory Railroad Company, against Hamilton and Rourke as defendants, and thereafter a supplemental bill was filed, in which the Washington & Columbia River Railway Company was joined with the receiver as complainant. In these two bills it is alleged that in a former suit, brought in this court by the Farmers' Loan & Trust Company against the Oregon & Washington Territory Railroad Company to foreclose its mortgage bonds (58 Fed. 639), W. D. Tyler was appointed receiver of the mortgaged property, which consisted of a railroad, right of way, rolling stock, and other property and assets. That after the issuance and sale of said mortgage bonds, and on or about November 11, 1890, the board of directors of said Oregon & Washington Territory Railroad Company, consisting of five members, held a pretended special meeting, at which but three of the directors were present or notified, and that at such meeting

G. W. Hunt, one of the directors, and at the same time the president and manager of the company, fraudulently, and for his own gain, procured to be passed by himself and the other two directors present a resolution authorizing the corporation to lease to him for 20 years certain warehouse and platform property on the line of the right of way of said road, and belonging to the said company, describing the same; and that, on November 12, 1890, leases were executed and delivered to said Hunt, pursuant to said resolution. That the rental of said property, as expressed in the leases, was \$1 per year, whereas the real value thereof was at least \$7,300 per annum. That, prior to said leasing, warehouses and platforms had been constructed at some of the stations along said road, but none have been constructed since. That on May 2, 1891, Hunt transferred all his rights under said leases to the defendants, but the defendants took the same with notice of all the foregoing facts, and of the equities between the lessor and the lessee. That in said foreclosure suit of the Farmers' Loan & Trust Company, the railroad, right of way, rolling stock, and the appurtenances of said railroad company, together with said warehouse and platform property, were, upon the 20th day of April, 1892, sold at foreclosure sale to C. B. Wright, and said sale was thereafter confirmed by the court, and a deed of said property was thereafter made to said Wright; and that said Wright thereafter sold and conveyed the same to the complainant the Washington & Columbia River Railway Company, which company is now operating the road. That the defendants are in possession of said leased property, but that it is essential to the operation of said road by the owner thereof that it should have control of said leased grounds and of said warehouse and platform property, all of which, at the time of making said lease, was owned, legally or equitably, by the said Oregon & Washington Territory Railroad Company. The prayer of the bill is that the leases be declared void, and that the defendants account for the profits derived by them thereunder. The answer denies that the warehouse or platform property was included in the sale to Wright, or in the conveyance from him to the Washington & Columbia River Railway Company. Admits that the resolution to lease was adopted at a meeting of three directors; but alleges that the others had notice of the meeting, and that they assented to the same, and that the lease was for the benefit of the lessor; that the lessor had no money to erect warehouses or platforms to accommodate the trade of the road; that said G. W. Hunt was the owner of 98,985 shares of the stock of said company, and the other directors owned the remaining 1,015 shares thereof; and that to secure traffic for said road, said Hunt was solicited and requested by the other directors to construct warehouses at his own expense, and to take leases of parcels of land along the right of way for that purpose, and that, in consequence thereof, he did, at his own individual expense, and at a cost of \$48,000, construct the warehouses mentioned in the bill.

The evidence taken upon these issues shows that at the time the mortgage bonds were issued and sold there were no warehouses

on the line of the road, but that shortly thereafter G. W. Hunt, who was practically the owner of the road, he holding in his own name all of the stock excepting about 1 per centum thereof, which had been placed in the names of the other directors, apparently to qualify them to act in that capacity, constructed the warehouses and platforms in question at his own expense, and at a cost of about \$48,000, with the understanding that he was to have the leases, which were subsequently made on the 12th of November, 1890. Although there were but three directors present at the meeting which adopted the resolution to lease, the other directors were fully aware of the meeting, and of the intention to grant the leases, and the evidence shows beyond question that they subsequently accepted and ratified the action then had. The receiver is in no attitude to contest the validity of those leases. He was a receiver appointed in the foreclosure suit to take charge of the mortgaged property pending the foreclosure. He is not shown to represent creditors, and no circumstances are alleged to exist which would vest in him equities to maintain this suit, or to question the rights of the defendants under the leases. A court of equity will, under certain circumstances, set aside a contract between a corporation and its directors, at the option of its stockholders, or at the suit of creditors. It may be said that, in general, the dealings of the directors with the corporation are viewed with suspicion. The director occupies a fiduciary relation to the stockholders whom he represents, and his contracts concerning the property which is the subject of the trust are generally voidable at the instance of the party whose interest he represents. But such dealings are not absolutely prohibited, and they will be sustained if they are fair, and have been entered into in good faith, and no advantage has been taken of the fiduciary relation. *Oil Co. v. Marbury*, 91 U. S. 587-589; *Hotel Co. v. Wade*, 97 U. S. 13; *Stark v. Coffin*, 105 Mass. 328; *Buell v. Buckingham*, 16 Iowa, 284. In the case before the court the stockholders were all directors of the company, and they all assented to and ratified the leases. Hunt's relation to the other directors was not that of a trustee to *cestuis que trustent*. He sustained no fiduciary relation to them that they did not likewise sustain to him. In making the leases, he represented not the other stockholders, but himself; and they represented themselves, and not Hunt. They were not in the attitude of stockholders who had confided their interests to a board of directors, but they were themselves clothed with the power of directors, and were in a position each to protect his own interest. None of these stockholders is now here attacking the leases; neither does the corporation offer to rescind the same. No creditor of the corporation is here asserting his rights, and, if there were, no facts are shown upon which equitable relief to creditors might be predicated.

It remains to be considered what are the rights of the Washington & Columbia River Railway Company. That company is the successor in interest to the property purchased upon the foreclosure sale, and it has acquired all the rights that were vested

in the purchaser at that sale. The Farmers' Loan & Trust Company brought its suit to foreclose three several mortgages, made to secure the mortgage bonds. In these mortgages, following the specific description of the property, is a general description, which includes:

"All the lands, tenements, and hereditaments acquired or appropriated, and which may be hereafter acquired or appropriated, for the purpose of a right of way for said railroad and branch, or either thereof, and all the easements, appendages, and appurtenances thereunto belonging or in any wise appertaining, and all the railways, ways and rights of way, depot grounds, and other grounds, tracks, side tracks, spur tracks, bridges, viaducts, culverts, fences, and other structures, depots, station houses, engine houses, car houses, freight houses, warehouses, fuel houses, machine shops, repair shops, water tanks, turn tables, superstructures, erections, and fixtures, whether now held and owned, or hereafter to be acquired and owned, for the company, for the use of said railroad and branch, or for either of them."

The lien of these mortgages extended to and covered all the real estate upon which the warehouse and platform improvements were subsequently erected by Hunt. By the foreclosure of the mortgages, and the sale thereunder, the title to the property passed to the purchaser. The leases had been executed and placed of record before the foreclosure suit, and it is not contended that either the complainant in the foreclosure suit or the purchaser at the foreclosure sale was ignorant of their existence. The leases contain the provision that at the end of the term thereof the lessor may purchase the improvements placed upon the leased property by the lessee, or, in case of failure so to do, that the lessee may remove the improvements. That right was not destroyed by the foreclosure suit, and undoubtedly it still subsists in the defendants. They may sell their warehouses and platforms, or remove the same from the leased premises. I am unable to perceive that they have other rights. The leases were made subsequent and subject to the mortgages. The contract of leasing was wholly between the mortgagor and the lessee. The mortgagee had no privity with the lessee. It did not assent to the leases, and its rights were not affected thereby. The lessee, while in possession as tenant of the mortgaged premises, had no seisin thereof. His possession was the seisin of the lessor, who held the legal title. The tenants in possession were not necessary parties to the foreclosure suit. They had no lien upon the land, and no equity of redemption therein. The foreclosure sale operated to evict them by title paramount. From and after the sale they were trespassers, unless they attorned to the purchaser, or the purchaser recognized their rights as tenants. *Rogers v. Humphreys*, 4 Adol. & E. 299; *McDurmot v. Burke*, 16 Cal. 580; *Teal v. Walker*, 111 U. S. 248, 4 Sup. Ct. 420; *Haven v. Adams*, 4 Allen, 80. There is nothing in this case to show attornment upon the part of the tenants, or a recognition of their tenancy by the purchaser at foreclosure, or by his successor in interest. The defendants are before the court, not seeking the intervention of equity for the protection of their rights by redemption from the mortgage sale, but contending that the failure of the mortgagee to bring them in as parties defend-

ant to the foreclosure suit operated as a recognition of their status as tenants, and a ratification of their leases. This contention cannot avail them, for, as we have seen, they were not necessary parties to that suit, and, so far as the mortgagee was concerned, their rights were extinguished by the foreclosure sale. In this view of the case there is no ground for the equitable intervention of this court on behalf of either of the parties complainant, since the receiver has no standing for relief in equity, and the Washington & Columbia River Railway Company had its plain and adequate remedy at law. The bill must be dismissed.

GREEN et al. v. ROOT et al.

(District Court, S. D. Iowa, E. D. August 31, 1893.)

1. HOMESTEAD—CHANGE—CODE IOWA, §§ 2000, 2001.

One who has acquired a homestead right in property, as surviving husband of the owner of the fee, which descended to her son, is the "owner," within the meaning of Code Iowa, §§ 2000, 2001, relating to change of homestead.

2. SAME—RIGHTS OF CREDITORS WHERE TITLE TO NEW HOMESTEAD TAKEN IN WIFE'S NAME.

One who acquired a homestead right in property as surviving husband sold the same to the owner of the fee, and invested the proceeds in a new homestead, the title to which was taken in the name of his second wife. *Held*, that his creditors had no ground of complaint, and could not subject the new homestead to payment of their judgment, so far as it came within the homestead limits provided by law.

3. SAME—ADDITIONAL CONSIDERATION—RIGHT TO SET APART HOMESTEAD.

The property so purchased consisted of 102 acres of land, and part of the consideration was paid by the wife without knowledge of any judgment against the husband. On a bill to subject the land to payment of a judgment, respondents prayed that the new homestead be regarded as bought with the proceeds of the old homestead, and that the wife's contribution be placed on the land outside the homestead, with prior claim over complainant's judgment. *Held*, that the statutory limit of 40 acres (Code Iowa, § 1996) should be set apart as a homestead, free from lien of his creditors, to the extent of the value of the old homestead; that, as to the remainder of the property, the owner of the mortgage given to take up a purchase-money mortgage should have first claim, and the wife a second claim, to the extent of the money paid by her as part of the purchase price; and that complainant's judgment should have third claim, and the excess value of the homestead part should be applied on any unpaid portion of the wife's claim.

This was a suit by the executors of Harly Green against A. M. Root and Eliza Jane Root and others to subject certain real estate to payment of a judgment against said A. M. Root.

H. Scott Howell and W. C. Howell, for complainants.

T. J. Truelock, for respondents Root.

Theo. Guelick, for respondent Biklin.

W. E. Blake, for respondent Burlington Ins. Co.

WOOLSON, District Judge. This is an action to subject real estate to the payment of a judgment. The following facts appear, and are by me found:

A. M. Root and Eliza Jane Root are husband and wife, and residents and citizens of Iowa. In 1862 certain real estate in the city of Burlington, Iowa, became, by due conveyance, the property in fee of Dorinda Root, who was at that time the wife of said A. M. Root. From that time until her death, which occurred in March, 1887, said property was the homestead of said A. M. Root and his said wife Dorinda. After the death of his said wife Dorinda, A. M. Root continued, with his son, William H. Root, who was the only child of said Dorinda, to occupy said Burlington property as his homestead. In March, 1888, said A. M. Root married the respondent Eliza Jane Root; and she at once took up her home with her said husband and said William H., on said Burlington property, as her homestead. Presently, there arose such difficulties or estrangements among the members of the family that said William H. left this Burlington homestead. During the lifetime of Dorinda, A. M. Root became insolvent, and out of employment. Dorinda consented to and did execute a mortgage on this homestead (which has since been paid off and discharged) to secure a loan, whose proceeds purchased certain ferry stock, and at her instance the stock was put in the name of the said William H. It also appears that A. M. Root, during a large portion of his insolvency, kept his bank account with, and in the name of, said William H. After the estrangements above referred to, A. M. and his son, William H., presented to each other accounts, the one against the other, with a view to the settlement thereof. The evidence is conflicting as to the respective aggregates of these accounts. Some evidence is introduced, tending to show that the account presented by the father against the son was considerably larger than that by the son presented against the father. I do not find it necessary to determine what these aggregates were. There were attempts at adjustment of these accounts. Whether these accounts finally entered into the transaction pertaining to the homestead, or not, is in conflict in the evidence. But the evidence shows that A. M. Root and his wife Eliza Jane executed to said William H. Root a deed for the Burlington homestead property, and said William H. paid to A. M. Root \$1,500. The preponderance of the evidence shows that this \$1,500 was paid to the father by the son for said deed, whose expressed consideration is that sum. Upon delivery of this deed, and payment of said sum, A. M. Root and wife delivered possession to said son of said Burlington homestead property. Thereupon was purchased the property involved in this action,—about 102 acres,—and also 25 acres adjacent thereto, which have since then, and before the bringing of this action, been sold. This property was situated in Des Moines county, Iowa, and is specifically described in the bill herein. The evidence shows that the purchase price of this newly-acquired property was about \$3,100, but that costs and taxes amounting to about \$300 additional were paid, to clear up the title; so that this property (hereafter called the “farm property,” in contradistinction from the Burlington or city property, above spoken of) cost about \$3,400. This \$3,400 was arranged for as follows: The \$1,500, proceeds of city homestead, was paid on

this farm property. Eliza Jane paid \$200 which she had received from her father, and \$1,700 of the purchase price was secured to the defendant insurance company by a mortgage on the farm property. Subsequently, and before the bringing of this action, this mortgage was paid off, and a mortgage, upon Feb. 22, 1890, executed by Root and wife to respondent Biklin, guardian, etc., for \$1,200, drawing 7 per cent. interest from date. The answer of said Biklin shows that on February 22, 1892, said principal of mortgage debt had, by payment, been reduced to \$600; so that there now remains due to said Biklin, thereon, the sum of \$600, with interest at 7 per cent. from February 22, 1892. The evidence shows that respondent Eliza Jane Root has paid on said farm property, and of her own money, obtained from her father, the sum of \$900, inclusive of the original \$200, paid at time of purchase. By sale of the 25 acres of the farm, above referred to, and before this action was brought, there was realized \$800, which was at once paid in on the then outstanding insurance company mortgage. The payments made, including those on principal and interest of mortgages, may thus be summarized: Money of Eliza Jane Root, \$900; proceeds of Burlington homestead, \$1,500; from proceeds of other property, \$800; leaving outstanding \$600, and interest from February 22, 1892. This applies to the farm, as originally purchased. If we omit the \$800, proceeds of the sale of said 25 acres before this action was brought, the payments applied to the property involved herein, before the bringing of this action, are summarized thus: Money of Eliza Jane, \$900; proceeds of city homestead, \$1,500; leaving outstanding Biklin mortgage, of \$600 (principal). In September, 1873, one Joseph Payson, as assignee, etc., recovered in this court judgment against said A. M. Root for \$310 damages and \$127 costs, which judgment (exhibited with bill) was duly assigned to Harly Green, a resident and citizen of the state of Illinois. At date of his death, which occurred in 1887, Green owned said judgment. The complainants are executors of the last will, etc., of said Green, duly commissioned by circuit court of Lee county, Iowa. Executions were duly issued upon said judgment in December, 1873, and August, 1890, and were, by the marshal, returned nulla bona. Complainants' contention is that the \$1,500—money received from the son, William H., at time of deeding city homestead—is liable to said judgment, the same being placed in the farm property in name of Eliza Jane, the wife, with intent to hinder and defraud creditors, to wit, complainants, in the collection of said judgment. The respondents Root contend that this farm is the property of said Eliza Jane, and not liable to said judgment; that the payment of said \$1,500 to A. M. Root was the proceeds of sale to said William H. of his (A. M.'s) homestead right, and was exempt from complainants' judgment, as was the homestead itself; that said sale of homestead was with the intent of purchasing with the proceeds another homestead, and said \$1,500 was at once paid for the new homestead, which said A. M. and said Eliza Jane at once and ever since have occupied, and now occupy, as their homestead, and same is, to the same value as the old homestead, exempt from complainants' said judgment. Eliza Jane also

claims that she had no knowledge of any claim of complainants' judgment when she paid in thereto her \$900, and she asks her interest may, to the extent of said money, be protected, and decreed to be prior to any claim of complainants thereon.

The questions to be determined in this action involve the proper construction of the statutes of Iowa relating to homesteads. This court is bound by the construction placed thereon by the supreme court of that state. Rev. St. § 721; *Nichols v. Levy*, 5 Wall. 433. These homestead laws have, for their beneficent purpose, protection to the family, and the preservation of the homes of the state. Under these statutes, no person is justified in giving credit because of ownership of homestead, unless he shall obtain a contract expressly making the homestead liable; for the statute plainly notifies him that the homestead is only liable for those general debts which were contracted before the homestead right attached. Code Iowa, §§ 1988, 1992. The supreme court of Iowa are abundantly and unquestionably justified in construing these statutes liberally in favor of homestead exemptions. The lawmaking power of that state has recognized that the beneficial effects of these statutes would necessarily be largely reduced if the debtor must, in order to avail himself of these homestead exemptions, continuously occupy the original homestead thus exempt. If removal to a new homestead made the new homestead liable to debts as to which the old homestead was exempt, the opportunity of the debtor to better his condition, and his ability to earn, and to place his family in more comfortable surroundings, and perhaps to engage in employment of much benefit to the public, would largely be cut off. To meet this difficulty, sections 2000 and 2001 of the Code of Iowa provide:

(2000) The owner may, from time to time, change the limits of the homestead by changing the metes and bounds, as well as the record of the plat and description, or may change it entirely, but such changes shall not prejudice conveyances or liens made or created previously thereto.

(2001) The new homestead, to the extent and value of the old, is exempt from execution in all cases where the old or former homestead would have been exempt, but in no other, nor in any greater degree.

The essential points under these sections which establish the exemption of the new homestead are, if the old homestead is sold, that such old homestead was exempt from the debt, and that it must have been sold with a view to obtaining a new homestead, and the proceeds must be put into the new homestead, and the latter occupied as such. Then, to the value of the old homestead, the new is exempt, to the same extent as was the old. This general statement should perhaps receive the qualification that the proceeds, pending transfer into new homestead, be not diverted to any intervening use, wherein such proceeds became, for the time being, liable to execution for the claim against which the old homestead was exempt. Thus, in *Dalton v. Webb*, 83 Iowa, 478, 50 N. W. 58, where proceeds of the old homestead, in Iowa, were invested in land in another state, and said land subsequently exchanged for land in Iowa, held, the Iowa land was not exempt, although it would have been exempt, had the exchange been directly from the old home-

stead into Iowa land. There is, in the case at bar, no contest as to the old homestead having been exempt from the debt set out with bill herein. But complainants, at the threshold of the matter, insist that the term "owner," as used in said section 2000, *supra*, refers to, and only includes, the owner of the fee or title to the homestead. If this position be correct, decree must be herein for complainants; for A. M. Root had no homestead right in the city property, except as the same came to him as the surviving husband of his wife Dorinda, who, at her death, held the fee to that property; and the evidence herein shows that the fee descended to her son, William H., subject to the homestead rights of her said husband, A. M. Had the lawmakers thus intended to limit the right to make the exchange of homesteads, their intention could have been made plain, beyond possibility of dispute, by the addition of a very few words to the present statute. It is significant that words were not added, when, by the addition,—so easily made,—the limitation contended for would have been unmistakably manifest. Reference has above been made to the liberality of construction, given by the supreme court of Iowa to these homestead exemptions. This liberality has been manifest in many directions. For illustration, the question has frequently arisen as to what property, or interest in property, other than a fee interest, can become the basis of a homestead right. In determining this, the supreme court of the state have repeatedly decided that a tenant in common may acquire a homestead right in the land held in common. *Thorn v. Thorn*, 14 Iowa, 49; *Wertz v. Merritt*, 74 Iowa, 686, 39 N. W. 103; *Bolton v. Oberne*, 79 Iowa, 278, 44 N. W. 547. And this is true, even though the tenant in common had only an equitable title thereto. *Hewitt v. Rankin*, 41 Iowa, 35. "Certainly, a homestead may be held under such a title," say the court. So, too, a leasehold interest, accompanied by actual family residence occupancy, will sustain a homestead right. *Pelan v. De Bevard*, 13 Iowa, 53; *Wertz v. Merritt*, *supra*. And a contract of sale (bond for deed) giving right to a deed when purchase money shall have been fully paid, accompanied with actual occupancy by the family, sustains a homestead right. *Stinson v. Richardson*, 44 Iowa, 373; *Donner v. Redenbaugh*, 61 Iowa, 269, 16 N. W. 127; *Drake v. Moor*, 66 Iowa, 58, 23 N. W. 263; *Lunt v. Neeley*, 67 Iowa, 100, 24 N. W. 739; *Belden v. Younger*, 76 Iowa, 567, 41 N. W. 317. And in *Lowell v. Shannon*, 60 Iowa, 716, 15 N. W. 566, the court, when considering the question of homestead rights as to creditors, say:

The material inquiry is, what are the metes and bounds of the homestead, as a homestead? And there is nothing in the statute requiring that the title thereto should be in either the husband or wife.

These cases settle conclusively any question that might arise as to whether, in Iowa, the homestead right may exist without the basis thereunder of a fee ownership, or holding of legal title.

The cases cited under the last two points nearly all arose under the consideration of section 1990 of the Code, which declares "of no validity" a conveyance or incumbrance "by the owner," unless

concurrent in and signed by the husband or wife, if "the owner" is married. Thus, the term "owner," as applied to homestead, in said section, by the Iowa supreme court, includes one who, as tenant in common, has merely an equitable title in the land, one who has merely a term of years leasehold interest in the land, and also one who has merely the right to obtain the title by paying off the deferred purchase money. In the case at bar, A. M. Root unquestionably had a homestead right in the city property. The uncontradicted evidence shows he had elected to take his homestead right in lieu of distributive share. Complainants concede that such homestead right, after the death of his wife Dorinda, was of such a nature that neither heir nor creditor could remove him therefrom, against his will. The question may be here pertinently asked, under the liberal construction the Iowa supreme court have given to the homestead statute, why should he not be permitted to change his homestead thereunder? What useful purpose is to be subserved by compelling him to retain his residence in that city property, or else forfeit his homestead rights? And if it be found, as found it must be, that it is inconsistent with the general beneficent spirit of these statutes, as stated by the supreme court of the state, that he be thus restricted in his homestead to that one piece of property, and if it be in harmony with the construction and policy of the statute that this change may be made, there would seem small occasion for doubt as to the correct answer to be made. The supreme court of Iowa have held (*State v. Geddes*, 44 Iowa, 537) that the sale of the homestead may be made on credit, and yet the proceeds be exempt, as was the old homestead itself. In that case, Geddes sold his homestead to Eberhart, taking a mortgage thereon to secure \$1,400 of the \$1,600 sale price. Eberhart having failed to pay the mortgage debt, Geddes foreclosed the mortgage, and, nearly two years after the said sale, sold the same on foreclosure decree, Geddes bidding in the same for amount of debt and costs. Eberhart redeemed from this judicial sale, by paying the proper amount to the clerk of court. This redemption was made over two years after the sale by Geddes of the homestead to Eberhart. This redemption money was garnished in the clerk's hands on execution issued on judgment rendered against Geddes before the homestead was sold to Eberhart. The supreme court, after quoting sections 2000 and 2001, *supra*, say (page 539):

Here is an absolute right given to exchange one homestead for another, or to sell the homestead and acquire a new one, which shall be exempt to the same extent as the former one. There is no prescribed method as to how this shall be done. The statute does not provide that the sale must be for money in hand, which must be immediately invested in the new homestead: that is, that the selling of the old and the purchasing of the new must be simultaneous acts. We must give the statute a reasonable construction to effectuate its object. If a homestead be sold, and the proceeds applied to some other use, there is no doubt that the exemption would cease; but where the sale is made on credit, and with the intention of using the proceeds, when collected, in purchasing another homestead, and the proceeds are not put to any other intervening use, they are exempt while thus in transitu, so to speak, from the old homestead to the new. Any other rule would practically prohibit the changing of homesteads.

The liberality with which the Iowa supreme court have construed these statutes, with the purpose of carrying into most complete effect the beneficent policy therein attempted to be declared, is further illustrated in *Harsh v. Griffin*, 72 Iowa, 608, 34 N. W. 441. Section 1990, Iowa Code, above quoted, was under consideration; and its language expressly declares the conveyance to be "of no validity, unless the husband and wife, if the owner is married, concur in and sign the same joint instrument." The husband, Griffin, conveyed the homestead to his wife, the deed being executed by him alone. The point was expressly presented that the deed was, by the very terms of the statute, "of no validity," since the husband was married, and the wife did not "concur in and sign the same joint instrument" of conveyance of the homestead. The unanimous opinion overrules this point:

The case of a deed to the wife is not within the spirit of this section, which surely cannot intend that the wife should do the vain and absurd thing of executing, as grantor, a deed to herself, as grantee.

This same idea of ascertaining the spirit of these sections, and deciding accordingly, even though an inflexibly strict construction of the letter of the section be to the apparent contrary, has continuously marked the decisions of that eminent court on these homestead sections.

As illustrating this suggestion, we may refer to a class of cases in which has been considered the question as to voluntary conveyance of the homestead while judgments were standing against the owner, which, but for the homestead character of the land, would have been statutory liens against it. The court, in numerous cases, citation whereof is here not necessary, have held and enforced the rule that abandonment of the homestead property would make the property liable for debts, judgments, etc., as to which, while occupied as a homestead, it was not liable. In other words, as a general proposition, whenever the title holder, by his act, deprived the property of its homestead character as to him, he exposed it to liability for debts and judgments then existing (save, of course, the excepted cases,—by statutes,—of change of, or bona fide sale of, homestead, etc.). Hence, the claim that a voluntary conveyance of homestead was such an abandonment thereof as to subject it to liability for existing judgments, etc. But the supreme court give no encouragement to this contention. On the contrary, that court uphold exemption of the homestead under voluntary conveyance. *Addicken v. Humphal*, 56 Iowa, 366, 9 N. W. 299. A widowed mother, against whom were outstanding judgments, which would have been active against the property but for its homestead character, executed to her son a voluntary conveyance of the homestead. There was averred, in the bill to subject the property to debts outstanding at time of this voluntary conveyance, the further ground that such voluntary conveyance was, as to existing creditors, fraudulent and void, under the general doctrine applicable to such a state of facts. But the court (*Delashmut v. Trau*, 44 Iowa, 613) decide adversely to this contention:

Suppose the conveyance was intended to keep the property beyond the reach of plaintiff. What legal ground of complaint has he? He could not reach the property for the satisfaction of his debt before the conveyance, and he was in no worse condition after it. His basis of relief must be that the conveyance was fraudulent as to him. But how is he to make this fraud appear? The most and all that he can claim is that the conveyance was voluntary, and made for the purpose of hindering him in the collection of his debt. But the conveyance does not create any exemption of property. It merely perpetuates one which existed before. In order to make a voluntary conveyance void as against creditors, it is indispensable that it should convey property which would be liable to be taken for the payment of debts.

This reasoning and opinion have been followed by that court in numerous cases, wherein the facts have presented many different phases, including voluntary conveyance from husband and wife. *Officer v. Evans*, 48 Iowa, 557; *Griffin v. Sheley*, 55 Iowa, 517, 8 N. W. 343; *Butler v. Nelson*, 72 Iowa, 732, 32 N. W. 399; *Payne v. Wilson*, 76 Iowa, 381, 41 N. W. 45; *Beyer v. Thoeming*, 81 Iowa, 519, 46 N. W. 1074.

As illustrating further the liberal construction given by that court to the homestead statutes of that state, and as also furnishing points for subsequent consideration herein, may be cited *Jones v. Brandt*, 59 Iowa, 344, 10 N. W. 854, and 13 N. W. 310. The city homestead, whose title was in the husband, was exchanged for a new city homestead and \$300 in money. With this \$300 the lot in question was purchased. This lot was not contiguous to the new homestead, nor was it used in connection therewith. Section 1995, Code Iowa, provides that the homestead "may contain one or more lots or tracts of land, * * * but must in no case embrace different lots and tracts, unless they are contiguous, or unless they are habitually and in good faith used as parts of the same homestead." In the deed of this lot, and by direction of her husband, plaintiff's name was inserted as grantee. Thereafter, a judgment creditor of plaintiff's husband, whose judgment existed at time of transfer of homestead, etc., sold this lot under his judgment against the husband. The controversy before the court was as to the liability of this lot, in plaintiff's name, for the said judgment against plaintiff's husband. The court say:

The old homestead was exempt from the debts of George W. Jones [plaintiff's husband]. He could have lawfully conveyed that homestead to his wife. If he had done so the creditors would have had no just ground of complaint. If the old homestead had been conveyed to plaintiff, and then exchanged for the new homestead and the lot in question, it is clear, it seems to us, that the creditors of George W. Jones could not have subjected the lot to the payment of his debts. It is apparent, therefore, that the creditors of George W. Jones had no legal claim upon the old homestead. They cannot claim that it is a fraud upon them that they have been deprived of its proceeds. Appellants insist that the case is just the same as though the lot in question had been conveyed to George W. Jones, and by him conveyed to plaintiff. With equal propriety it might be claimed that the case is the same as though the old homestead had been conveyed to the plaintiff, and by her exchanged for the new home and the lot in question. It is said that, if the lot in question had been conveyed to George W. Jones, the judgment against him would have been a lien against it. This must be conceded. Whether the proceeds of the homestead shall become liable for the debts depends always upon the manner of dealing with it. If the homestead should be exchanged for another, the new would be exempt; but, if it should be ex-

changed for a stock of merchandise, it would not be exempt. It does not advance the claim of appellant to say that the lot in question would have been liable for the husband's debts if the course of dealing respecting it had been different. The controlling facts in this case are that the title to the lot never was in the husband, and the conferring of title upon the wife placed the creditors in no worse condition than they were before. Under these circumstances, we think that the lot cannot be subjected to the payment of the debts of the husband, upon the ground that this conveyance, as to them, was fraudulent. *Delashmut v. Trau*, 44 Iowa, 613; *McFighe v. Bringhoff*, 42 Iowa, 455.

Under the Iowa statutes, I hold that A. M. Root was "the owner," within the intent and spirit of the sections relating to change of homesteads. The homestead right is such a present, vested right that it has been held sufficient to entitle the wife to redeem the homestead from tax sale, even after the treasurer has conveyed the property by his tax deed. *Adams v. Beale*, 19 Iowa, 61. While the homestead statutes are simply statutes of exemption, rather than a law conferring affirmative rights (*Burns v. Keas*, 21 Iowa, 257), yet the homestead right of the husband, where the title is in the wife, is of higher character—more in the nature of vested interest and title—than is his dower right in other lands (*Chase v. Abbott*, 20 Iowa, 158). Defendant A. M. Root, by his occupancy of the city homestead (that is, exercising his homestead right), could prevent his son, who was entitled to possession on termination of that homestead right, from receiving any revenue therefrom for years,—for many years, should the father live out his expectancy. The evidence shows the rental value of that property to be \$150 or more per year. The gross rental for 10 years would equal the amount the son paid the father for his deed. Besides, the property (buildings, etc.), during such occupancy, would naturally deteriorate, and the value thus depreciate. I see no good reason why the father might not transfer to the son his homestead interest,—or release same, if the expression be preferable,—in consideration of payment made by the son. Both parties are advantaged thereby. The fee holder secures immediate possession and use and rentals. The father secures his money with which to buy a new homestead.

I do not overlook the decisions of the Iowa supreme court, wherein that court hold that under the facts therein presented a surviving husband has no right or interest in the homestead he is occupying which will sustain a mortgage or conveyance thereof. But the reasoning—the argument—of these decisions, supports the position here taken. *Meyer v. Meyer*, 23 Iowa, 359, holds that the surviving husband cannot take both homestead right and distributive share in the homestead. (Under the Iowa Code, dower is abolished, and the surviving husband or wife is given one-third in fee, which is known as "distributive share.") Therefore, a mortgage from such survivor, who has taken his homestead rights, cannot be a lien on any distributive right he might have had therein; and he obtains no title to the homestead property from mere occupancy and possession thereof. *Butterfield v. Wicks*, 44 Iowa, 310, closely follows the line of this decision:

This brings us to inquire whether Stephen Wicks, by virtue of his homestead rights in the property, acquired any interest in the property which

would be the subject of mortgage. His right in the property was merely to possess and occupy it until otherwise disposed of according to law. Subject to this right of the husband, the wife might have disposed of the property by will. Code, § 2010. And, in the absence of will, we have no doubt that, when the husband's rights, by abandonment, or in any other manner, are at an end, the property passes by the ordinary rules of descent. The right of occupancy and possession confers no title to the property. *Meyer v. Meyer*, 23 Iowa, 370. It is a mere personal right. When the occupancy is abandoned, the right ceases. It would seem to follow that this right of possession confers no right which can be the subject of mortgage. No valuable interest could pass to the mortgagee, for upon the foreclosure of the mortgage and the eviction of the mortgagor, his homestead right would cease, and the property pass unincumbered to the heir or devisee.

Smith v. Eaton, 50 Iowa, 490, affirms substantially the same principle.

It will be noticed that in each of these cases the attempt was made by the surviving husband or wife to convey or incumber to a stranger the homestead right, which was the conditional right to occupy, etc., and the doctrine of the cases is that such homestead right or interest could not thus be transferred. But the reasoning of *Butterfield v. Wicks*, supra, supports the conclusion herein reached. A stranger could take nothing by deed or mortgage from such survivor, because, "when the husband's rights by abandonment, or in any other manner, are at an end, the property passes [to the holder of the fee] by the ordinary rules of descent." "When the occupancy [of the survivor] is abandoned, the right to occupy ceases." "No valuable interest could pass to the grantee [if a stranger, but, if the heir was the grantee, such valuable interest could pass], because, when the homestead right would cease [in the grantor], the property would pass [at once] to the heir." This reasoning, bottomed on the fact that "nothing could pass to the grantee," justifies the assertion that if something valuable,—the thing attempted to be conveyed,—could and did pass to the grantee, the deed is within the reasoning of the cases, and is valid. In case at bar, something valuable did pass thereby, viz. possession, and right to possession and use; and the fact that upon execution of such conveyance "the property would at once pass to the devisee or heir," instead of sustaining the conclusion of invalidity of deed, as under facts in 44 Iowa, is the strongest argument inducing acceptance of deed, and payment therefor by grantee.

The present case is not embarrassed by any questions which might possibly arise because of judgment lien against the premises. The bill does not aver that the judgment set out ever was a lien against any of the property in question. The relief prayed is solely on the ground that "A. M. Root, for the purpose of defrauding his creditors, and for the purpose of hindering and delaying petitioner and his other creditors in the collection of their legal claims against him, fraudulently caused the deed * * * for said lands so bought and paid for by said A. M. Root to be made out to and in the name of his wife, said Eliza Jane Root, and she still has and retains the naked and legal title." The specific relief prayed is that this court "will find and adjudge said lands * * * to be in fact the lands of said A. M. Root, and will order the same to be sold to

pay the judgment of petitioner, subject to any bona fide lien of defendant Biklin," etc. This brings me to the charge that the new farm property is really the property of A. M. Root, and title thereto was fraudulently placed in the wife, with intent to defraud, etc. The general principle applicable to this question is beyond dispute. Counsel do not differ in its statement, but, as usual in such cases, the controversy lies as to its extension and application to the facts in the case. The Iowa cases, *supra*, enable us to arrive at a satisfactory conclusion. A. M. Root says he gave the \$1,500, proceeds (and which I find to be the value) of his homestead right in the city property, to his wife Eliza Jane, and that she paid it on the farm homestead. Other portions of his and his wife's testimony leave in doubt the manual possession by her of this \$1,500. I do not regard such manual possession material. He had a right to sell the old, with a view to invest the proceeds of the old in the new homestead. While in transitu (*State v. Geddes, supra*) to the new homestead, such proceeds were not liable to complainants' judgment. When the proceeds had been paid into the new homestead, this homestead was exempt as a homestead. Now, had said A. M. Root invested such proceeds in a new homestead, in his own name, the exemption in the new homestead would have equaled the exemption in the old homestead. But he could lawfully have put the proceeds of the old into the new homestead, and have the title to the new homestead placed in his wife. *Jones v. Brandt, supra*. It therefore becomes immaterial whether he actually handed the money to his wife, and she paid it over. Whether he or she paid it over, no creditor is defrauded, if the exemption in the new homestead is of no greater degree than the old homestead possessed.

The underlying principle which provides a test as to whether a voluntary conveyance is fraudulent as to existing creditors is clearly and well stated by Judge Dillon, then one of the justices of the supreme court of Iowa, in *Wolf v. Van Meter*, 23 Iowa, 401. Having (page 405) stated the rule obtaining in England (that, to make a voluntary conveyance void as to creditors, it is indispensable that it should transfer property liable to be taken in execution), he states that in this country, the rule obtained that:

If the property transferred by the debtor be such as could be reached by the creditor through the act of a court of equity, though it could not be seized on execution at law, a voluntary conveyance of such property, to the prejudice of creditors, would be void. But when the property transferred was that upon which the creditors had no claim, either at law or equity,—that is, was property which the creditor would have no right to call upon either court to apply towards his debt,—it cannot be predicated of the transfer of such property that it was fraudulent.

Tested by this rule, and regarding the placing of the title to the property in her as a voluntary conveyance from her husband, the conveyance, as to the new homestead, is not fraudulent as to complainants' judgment. In A. M. Root's name the new homestead would be exempt to the same degree as was the old homestead. Hence, he may execute to his wife a voluntary conveyance thereof, and same is not fraudulent as to complainants. The extracts above given from *Delashmut v. Trau* abundantly confirm the conclusion

thus reached; and, if the new property had been limited in area to that provided by the Iowa statutes, the decree herein would have been easily rendered. But there are 102 acres, whereas the Iowa Code (section 1996) limits the homestead, when not within a town plat, to 40 acres. The case at bar is not, as in *Jones v. Brandt*, supra, an exchange of homesteads, else, on authority of that case, the entire tract, in wife's name, might have been exempt. In case at bar, the old homestead, not liable to complainants' judgment, was sold for cash in hand, and the intent, carried out, of therewith purchasing new homestead, carries with the purchase the like exemption to the new homestead, if of no greater value than the homestead so sold, and if limited to the statutory extent of area.

Further complications arise from the fact that the wife's \$900 has been placed with the old homestead's \$1,500, and the aggregate paid in on the new property, while the title is put in the name of the wife. As between the husband and wife, if she so demanded, the wife might perhaps have primary right, under the statute, to determine the boundaries of the homestead in the 102 acres, the fee title being in her name, since section 1998 apparently gives the owner of the title, as contradistinguished from the husband or wife of such owner, the first right to plat the homestead. But, turning to the pleadings herein, I find that defendants Root, in their joint answer, as amended, referring to the 102 acres, state that, immediately after its purchase, they took possession of said real estate, and have ever since resided upon the same, as their homestead, and, to the same extent in value of the former homestead, they claim the same as exempt from execution, and in no manner, nor any part thereof, liable to plaintiffs' debt. There is in this statement no demand on the part of respondent Eliza Jane, who holds the fee title, that her \$900 shall be set off as a homestead. Indeed, the other averments of the answer, as amended, rebut such idea, and expressly state that the old homestead was sold with the design of purchasing with proceeds of such sale a new homestead. These allegations would justify the conclusion that both A. M. Root and his wife expected and understood the \$1,500 was to go into the homestead on said property. This conclusion derives additional strength from the following extract from the answer of respondents Root:

They further say that Eliza Jane Root had no knowledge or information whatever of any claim of plaintiffs at the time of such purchase, and that she in good faith invested in said property \$900 of her own money; and to that extent she prays the court that her interest in said real estate may be protected, and declared to be prior to any claim of the plaintiffs herein.

Apparently, and construing this, so far as practicable, in harmony with the other averments, the intention of the respondents Root is (1) that the new homestead be regarded as bought with the proceeds of the old homestead; and (2) that Eliza Jane's \$900 be thereby placed on the land outside of the homestead, with prior claim thereon over any claim of complainants' said judgment. May this court grant the first point just named? *Henderson v. Rainbow*, 76 Iowa, 320, 41 N. W. 29, involved the boundaries of a homestead. The husband owned 40 acres, and the wife 120 acres adjoining. The

dwelling was built partly on each tract. Section 1995, Code Iowa, provides that the homestead may embrace different subdivisions or tracts, if contiguous, etc., not exceeding 40 acres. The court say:

It is plain that the homestead is upon two subdivisions of land. It must include the dwelling. The dwelling is upon two tracts of land. The homestead, therefore, is to be selected and marked out upon both.

And in refusing to permit the husband to plot his entire 40 as a homestead, and thus place it all beyond reach of creditors, the court say:

If plaintiff may claim his forty as exempt, because a part of the house is on it, the wife may claim that her land is exempt for like reason.

In case at bar there is no claim of the wife that her \$900 should be regarded as invested on the homestead 40. The pleading, as above shown, negatives this idea.

While not decided upon facts which make them controlling authority in this case, there have come under consideration by the Iowa supreme court other cases which have brought that court to consider the question of the right of homestead, when related thereto, and to adjacent lands which comprised part of the same tract. Section 1998, Iowa Code, directs that, if the homestead has not already been platted, an officer, having execution against the property of judgment defendant, may cause the homestead to be marked off, platted, etc. Under such sections, the supreme court of Iowa have held (*Owens v. Hart*, 62 Iowa, 620, 17 N. W. 898) that where the parties entitled to homestead did not object to sale of entire tract without platting of homestead therein, such failure to object did not validate the sale en masse; and this although the sale was under a special execution, describing the entire tract for the sale, and not mentioning any homestead as included therein. In *Martin v. Knapp*, 57 Iowa, 336, 10 N. W. 721, held that, although, after the sale there yet remained of the tract, unsold, the dwelling house and more than enough land for the statutory homestead, the sale would be set aside because of the officer having failed to set off the homestead. And such court has repeatedly held that a sale by an officer of any portion of the tract which might have formed part of the homestead is invalid, if the homestead has not been platted. *White v. Rowley*, 46 Iowa, 680; *Lowell v. Shannon*, 60 Iowa, 713, 15 N. W. 566. It is not necessary that the premises selected for a homestead shall correspond with a government subdivision of 40 acres, but the selection may be made in such a way, from a larger tract, as to include the buildings used in connection with the homestead, although situated on different subdivisions. *Schlarb v. Holderbaum*, 80 Iowa, 394, 45 N. W. 1051. And, where the homestead is not platted, a conveyance by the husband, in which the wife does not join, of a portion of the tract which might be part of the homestead, is invalid. *Woolcut v. Lerdell*, 78 Iowa, 668, 43 N. W. 609. The case of *Lowell v. Shannon*, 60 Iowa, 713, 15 N. W. 566, has been cited above. But, in this connection it may be well to note with more particularity the holding, and reasoning of the court which led to that holding. Michael W. Woods, the husband of Catharine Woods, and father of the minor defendants, disappeared in 1874.

Whether living or dead, was not known. He was never heard of after his disappearance. When he left, he owned in fee 63 acres of land adjoining a 60-acre tract, which his wife, mother of the minor defendants, owned in fee. These tracts were used as one farm, from which came the support of the family. The dwelling house was on the wife's land, but much of her tract was barren, and not tillable. For that reason the chief support of the family was the husband's land. A creditor attached the land of the husband after he had disappeared, and, while the sheriff was proceeding to enforce the execution against the land, the wife served on the sheriff a demand for the setting off of a part of the husband's land as her homestead. The sheriff disregarded the demand, and sold the land to plaintiff, who had notice of these facts. The mother had since died.

The principal question—and, indeed, as it appears to us, the only question—in the case, is this: May a homestead be claimed by a family, in lands of a husband, as against creditors of the husband, where the husband and wife own contiguous tracts of land, and occupy the two tracts as a homestead, with the dwelling house on the land of the wife. * * * If the right of homestead attached to the land of Michael Woods, a sale by the sheriff, without platting the same, is invalid. * * * The claim and demand made by the wife to the sheriff operated for the benefit of the family as effectually as if made by the husband and father. We come, then, to the merits of the controversy. If the dwelling house of the family had been located upon the land in controversy, there would be no question of the homestead right, as claimed. But, because the dwelling house is upon the land of the wife, it is maintained that the homestead cannot be made to embrace any part of the husband's land. It is true, section 1994 of the Code provides that "the homestead must embrace the house used as a home by the owner thereof," etc. But the term "owner" cannot have much force in determining this question, because the ownership, as between husband and wife, is not a material question in determining homestead right. The homestead is exempt from judicial sale, "whether owned by husband or wife," and either may make the homestead selections. Code, §§ 1988, 1998. And it may embrace different lots and tracts, if they are contiguous. Section 1995. Now, it appears to us to be immaterial, so far as the rights of creditors are concerned, whether the legal title to the homestead be in the wife or husband, or whether one of them holds the legal title to one tract, and the other to another tract. The material inquiry is, what are the metes and bounds of the homestead, as a homestead? and there is nothing in the statute requiring that the title thereto should be in either husband or wife. The object of the law is to secure to the family a homestead exempt from judicial sale; and, to attain this end, regard is had as to which particular forty acres of farm is the homestead, rather than to the question whether the legal title to this part or that is in the husband or wife. *Lowell v. Shannon*, supra.

My conclusion is that the homestead 40 acres are exempt from complainants' judgment, if of no greater value than \$1,500. That the situation of the remaining 62 acres, outside of the homestead, as to said judgment, is as follows: (1) The mortgage to respondent Biklin (\$600, and interest at 7 per cent. from February 22, 1892) has first claim thereon. The mortgage to Burlington Insurance Company has been fully discharged, and bill, as to said company, should be dismissed. (2) The \$200 paid on purchase of farm by Eliza Jane Root, and so much of the remainder of the \$900 paid by her as was paid on the principal of the deferred purchase money, is the next (second) claim thereon. This money was paid by her without knowledge of complainants' claim, and in good faith, before the bringing of

this suit, but any portion thereof which was applied to discharge interest on mortgage is not to be included in said second claim. (3) That complainants' said judgment is the next (third) claim on said 62 acres. (4) That, if said 40-acre homestead shall be of more than \$1,500 value,—which does not seem probable, under the evidence,—then the excess of said value over said \$1,500 shall be applied towards the \$900 claim of respondent Eliza Jane Root; that is, so much of said \$900 as is included in said above (second) claim.

No evidence has been submitted as to the bounds of said homestead. The evidence submitted does not enable me to determine with any accuracy the relative values of said homestead 40 and the land outside. This cause is therefore referred to A. Hollingsworth, Esq., who is hereby appointed special master herein. He will proceed to take evidence, determine, find, and report: (1) Boundaries of homestead 40. If not already platted, he will require respondents Root to file herein, within 20 days from notice of such requirement, a properly acknowledged plat of said homestead boundaries. If same is not so filed, said master will proceed to plat and fix such boundaries, at time and place of which due notice is given counsel on either side. (2) Find value of said homestead as so platted. If same exceeds \$1,500, find excess of such value. As I construe the evidence submitted, said 40 acres will not equal \$1,500. (3) Find what amount of said \$900 paid in by Eliza Jane Root was applied on purchase money of said 102 acres, or on the principal of debt secured by mortgage for deferred purchase price of same. (4) Find value of said 62 acres lying outside of said homestead 40. (5) Find such further and relevant facts as counsel on either side may, in writing, request, or said master deem important in settling decree herein on basis hereinbefore stated. Said master will fix time and place of hearing, and thereof duly notify counsel of record in this action, and will report to the court the evidence taken, his findings as above directed, and such other matters as he may deem proper and relevant herein, under the evidence already or hereafter submitted. The clerk will record order forwarded herewith, appointing said special master, and defining his duties, as above set forth.

FINANCE CO. OF PENNSYLVANIA et al. v. CHARLESTON, C. & C. R. CO. et al.

BOSTON SAFE DEPOSIT & TRUST CO. v. RICHMOND & D. R. CO.

(Circuit Court of Appeals, Fourth Circuit. May 22, 1894.)

No. 58.

1. RAILROAD COMPANIES—MORTGAGE FORECLOSURE—APPLICATION OF PROCEEDS OF SALE.

The order appointing a receiver of a railroad in a foreclosure suit authorized him to pay balances due to other carriers; and leave was afterwards granted him, without objection, to issue certificates to meet such obligations. Interveners filed a claim for such balances accruing before the receiver's appointment, praying payment out of earnings, and general relief; but no proceedings were had thereon until after sale of the road on fore-

closure. The receiver's earnings had been absorbed by running expenses, and there had been no diversion of income to pay interest. *Held*, that an application of the interveners for payment out of the proceeds of sale was properly granted.

2. SAME—COLLATERAL SECURITY FOR CLAIM.

As against an account for freight and balances of freight exchange between two railroad companies, the creditor company held the debtor's note, secured by its mortgage bonds, on an agreement that the note was "to be payment when paid." *Held*, that this was not a waiver of a right to claim payment from proceeds of the sale, on foreclosure, of the debtor company's railroad.

Appeal from the Circuit Court of the United States for the District of South Carolina.

The facts, as sufficiently stated by counsel, are these: On December 10, 1890, the Finance Company of Pennsylvania and others, complainants, filed their bill in the circuit court of the United States for the District of South Carolina, against the Charleston, Cincinnati & Chicago Railroad Company, the Boston Safe Deposit & Trust Company, and others, alleging: The incorporation of the railroad company, for the purpose of constructing and operating a railroad from Charleston, S. C., to Ashland, Ky., a distance of 620 miles; the execution and delivery to the Boston Safe & Deposit Company, on August 9, 1887, of a mortgage upon said railroad, to secure an issue of bonds to the amount of \$15,500,000, which were delivered to said Boston Company; a contract for construction of the railroad, with a construction company, the partial performance of this contract, and the delivery to the construction company of over \$7,000,000 of these bonds, and the purchase by complainants from said company of a portion of said bonds; the completion and operation of a part of the railroad; the insolvency of the construction company, and its inability to complete its contract; the insolvency of the railroad company; its inability to complete the road or to operate the completed portion; want of rolling stock; suits pending; no credit with which to purchase fuel, oil, waste, and other necessary supplies; nonpayment of employes for several months. Complainants therefore prayed the appointment of a receiver.

The railroad company and the construction company answered, joining in the prayer; the deposit company admitted the first three paragraphs of the bill, and required proof of the remainder.

On December 10, 1890, Samuel Lord was appointed temporary receiver, but the order made no provision for payment of any balances to connecting lines, or for the payment of any ante-receivership indebtedness. On February 26, 1891, D. H. Chamberlain was appointed permanent receiver, by an order of said court, "with all the authority and duties prescribed in the order hereinbefore made, naming Samuel Lord, Esq., temporary receiver," which order contained the following provision: "That said receiver be further authorized to pay all the wages due to the employes, at the date of the order appointing the temporary receiver herein, for labor and services within ninety days before the same, and also all balances due to other carriers and connecting lines, and necessary to be paid for the conducting of the said railroad." On March 16, 1891, Chamberlain, the receiver, filed his petition asking to be allowed to issue \$30,000 of certificates to pay certain obligations found due and unpaid upon entering upon his duties as permanent receiver, aggregating \$48,901.93. These consisted of taxes, freight balances due on December 10, 1890, freight balances and freight due since that date, and amounts for cross-ties, coal, and other supplies. With the cash on hand, and estimated receipts for some days in March, and the proceeds of these certificates, the receiver stated in his petition he would be able to pay off all said indebtedness, except \$5,247.12. This he proposed to pay along with the future current expenses, out of the future current earnings. Leave was granted to issue said certificates, March 17, 1891.

On August 4, 1891, the Richmond & Danville Railroad Company filed its intervening petition, setting out its account against the railroad company in full, accruing both before the appointment of the temporary receiver and subsequently, and praying that it be paid out of the earnings of the road, and for

general relief. This was referred the same day to a special master, to take testimony and report, but no proceedings were had under this order until after the sale of the road, when, on July 11, 1893, the reference was proceeded with. The account consisted of four classes of items: (1) Amount due on account of claims, \$75.44; (2) amount due on Blacksburg Crossing, \$1,057.65; (3) amount due on freight, \$5,422.94; (4) amount due on freight balances, \$8,095.58.

It appeared, in the testimony returned by the master, that the Richmond & Danville Company held, as against the account in question, a note of the Charleston, Cincinnati & Chicago Company for \$10,000, secured by certain first mortgage bonds of that company, the note "to be payment when paid," and counsel for the deposit company, trustee, claimed that, upon the settlement of the account, the trustee was entitled to the return of the collateral bonds, or to an accounting for their value.

It was admitted that the Charleston, Cincinnati & Chicago Company was run at a loss, both before and since the appointment of a receiver, and that the earnings of the receiver had been more than absorbed by running expenses; also, that there had been no diversion of income to payment of interest.

The master having made his report, the application of the interveners to be paid out of the proceeds of sale came on to be heard in the circuit court, before Simonton, J. The court allowed the first item, which was admitted; disallowed the second item; allowed the third and fourth items,—and rendered a decree August 24, 1893, for the sum of \$13,421.95 (made up of the three items allowed, with a deduction of credits amounting to \$172.01), with interest from December 11, 1890. From this decree, the Boston Safe & Deposit Company prayed an appeal to this court, and assigned errors as follows:

1. That the court erred in ordering the sum of \$5,422.94, made up of items of freight charges of the Richmond & Danville Railroad Company against the Charleston, Cincinnati & Chicago Railroad Company for cars and other articles of freight carried by the former company for the last-named company, and delivered to it as consignee and owner, to be paid out of the proceeds of sale.

2. That the court erred in ordering the freight balance of \$4,376.19, due by the Charleston, Cincinnati & Chicago Railroad Company to the Richmond & Danville Railroad Company, to be paid out of the proceeds of sale.

Samuel Lord, for appellants.

T. P. Cothran, for appellees.

Before Mr. Chief Justice FULLER, GOFF, Circuit Judge, and JACKSON, District Judge.

Mr. Chief Justice FULLER (after stating the facts as above). It was conceded, on the argument, that the item mentioned in the second assignment of error related to a balance due by the receiver of the Charleston, Cincinnati & Chicago Railroad Company to the Richmond & Danville Railroad Company, which had accrued subsequent to his appointment, and which, as a matter of fact, had been paid, and we assume that the intention of counsel was to question the allowance of the fourth item for \$8,095.58, and it will be so regarded. The two items complained of were for freight on shipments of coal, cars, oil, etc., consigned to the Charleston, Cincinnati & Chicago Railroad Company for its own use, and which were turned over by the agent of the Danville road to the agent of the former road at Blacksburg, the Danville road being charged with all back charges, and paying them; and for balances of freight exchange found to be due by the Charleston, Cincinnati & Chicago Company to the Danville Company. The order of February 26, appointing the permanent receiver, expressly authorized him "to pay all the

wages due to employes, at the date of the order appointing the temporary receiver herein, for labor and services within ninety days before the same, and also all balances due to other carriers and connecting lines and necessary to be paid for the conducting of said railroad." This was such an order as is frequently made in these cases, and cannot properly be construed as limited to payment out of current earnings, especially in view of the condition of the road. The liabilities which made up the two disputed items accrued prior to December 11, 1890, and the bill was filed, and the temporary receiver appointed, on December 10. On March 16, 1891, the permanent receiver was granted leave to issue \$30,000 of certificates, with which to meet obligations, which included freight, balances for freight, cross-ties, coal, and other supplies, which certificates were necessarily a charge upon the corpus of the estate. It does not appear that appellant raised any objection to either of these orders, although, if it considered them objectionable or injurious to its interests, it might well have applied to the court to cancel or modify them. *U. S. Trust Co. v. Wabash W. Ry. Co.*, 150 U. S. 287, 303, 14 Sup. Ct. 86; *Miltenberger v. Railroad Co.*, 106 U. S. 286, 1 Sup. Ct. 140.

It must be regarded as settled that a court of equity may make it a condition of the issue of an order for the appointment of a receiver of a railroad company that certain outstanding debts of the company shall be paid from the income that may be collected by the receiver, or from the proceeds of sale; that preferential payments may be directed of unpaid debts for operating expenses, accrued within 90 days, and of limited amounts due to other and connecting lines of road for materials and repairs and for unpaid ticket and freight balances, in view of the interests both of the property and of the public, that the property may be preserved and disposed of as a going concern, and the company's public duties discharged; and that such indebtedness may be given priority, notwithstanding there may have been no diversion of income, or that the order for payment was not made at the time, and as a condition, of the receiver's appointment, the necessity and propriety of making it depending upon the facts and circumstances of the particular case, and the character of the claims. *Miltenberger v. Railroad Co.*, 106 U. S. 286, 311, 1 Sup. Ct. 140; *Trust Co. v. Souther*, 107 U. S. 591, 594, 2 Sup. Ct. 295; *Union Trust Co. v. Illinois M. Ry. Co.*, 117 U. S. 434, 6 Sup. Ct. 809; *Morgan's L. & T. Railroad & Steamship Co. v. Texas Cent. Ry. Co.*, 137 U. S. 171, 11 Sup. Ct. 61; *Kneeland v. Foundry Works*, 140 U. S. 592, 11 Sup. Ct. 857. Of course, the discretion to enter such orders should be exercised with great care, but as late as *Thomas v. Car Co.*, 149 U. S. 95, 110, 13 Sup. Ct. 824, the supreme court quoted the remarks upon the doctrine and its proper application in *Miltenberger v. Railroad Co.*, *supra*, with approval, although, as observed by this court in *Bound v. Railway Co.*, 58 Fed. 473, 7 C. C. A. 322, the tendency of that case was to narrow the limits within which an equity court should confine itself in making such allowances.

We are of opinion that the order of February 26, 1891, was providently entered, and that the circuit court did not err in its decree.

The petition was sufficient, and the relief awarded, being consistent with the case made, was grantable under the prayer for general relief. The allowance of interest from the date of the appointment of the temporary receiver was, perhaps, open to question, but no error is assigned in regard to it, and, under the circumstances, we do not feel called upon to disturb the decree on that account.

Something was said upon the argument in respect of the note and bonds of the Charleston, Cincinnati & Chicago Company, taken and held by the Danville Company, but that was as collateral to the original obligation, and the express agreement was that the note was to be considered as payment only "when paid." This was no waiver of the right to come upon the fund, and, when the amount of the decree is paid, whatever rights in that collateral appellant may be entitled to, by way of subrogation or otherwise, can be adjusted and determined.

Decree affirmed.

McCLASKEY et al. v. BARR et al.

(Circuit Court, S. D. Ohio, W. D. June 18, 1894.)

1. PARTITION—COMPENSATION FOR IMPROVEMENT—NECESSITY OF CROSS BILL.

A plea by defendants in possession, setting up the statute of limitations and adverse possession, was overruled, on the ground that they were rightfully in possession as cotenants. *Held*, that any equities they might have as cotenants to compensation for improvements might be allowed, without a cross bill, as incidental to the partition, under the general prayer for relief. Dictum in 48 Fed. 137, disapproved.

2. SAME—IMPROVEMENTS BY COTENANTS—TAXES.

In partition between cotenants, defendants having exclusive possession, who had bought in what they supposed to be all the outstanding interests in the land, may be allowed, under the laws of Ohio, for improvements made by them after such purchase and after the termination of a preceding life estate, and before suit for partition was brought, to the extent that the value of the property was enhanced by such improvements, not exceeding their cost; but they cannot be allowed for taxes and assessments except by way of offset to rents.

8. FEDERAL COURTS—STATE LAWS RULES OF DECISION.

State laws relating to compensation for improvements upon land, made in good faith, are rules of property, which federal courts will recognize and follow.

This was a suit by Sarah E. McClaskey and others against Robert Barr and others for partition of lands. The court rendered a decree for partition (48 Fed. 130), and there was a reference thereupon to a special master. Complainants excepted to the special master's report as to claims by defendants for compensation for improvements.

H. T. Fay, for complainant.

S. T. Crawford and W. S. Thurston, for cross complainants.

Richard A. Harrison, Stephens, Lincoln & Smith, and Bateman & Hooper, for respondents.

SAGE, District Judge. This case is before the court on exceptions to the special master's report, which present questions relating to the propriety of the award of attorneys' fees.

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ing to claims for compensation for improvements made by the defendants who are tenants in common in possession. These questions may be classified under three heads: (1) Those relating to improvements made during the life tenancy; (2) those relating to improvements made after the termination of the life tenancy, and before the institution of this suit; (3) those relating to improvements made pending this suit.

It is objected on behalf of the complainants that no relief can be given to defendants on account of improvements, for the reason that there are no pleadings authorizing any such relief. In support of this contention counsel cite 1 Daniell, Ch. Pr. 712, as follows:

"If the defendant states upon his answer certain facts as evidence of a particular case, which he represents as a consequence of those facts, and upon which he rests his defense, he will not be permitted afterwards to make use of the same facts, for the purpose of establishing a different defense from that to which, by his answer, he has drawn the plaintiff's attention."

The defendants by plea set up the statute of limitations with adverse possession. That plea was overruled. They now cite cases to the point that no trespasser, intruder, or volunteer can recover for improvements made by him while he was such. The court overruled the plea for the reason that it found that the defendants in this case were not trespassers or intruders or volunteers, but cotenants in possession, which distinguishes this case from cases cited, in which it was held that by the English law and by the common law of this country the owner recovers his land by ejectment without being subject to paying for the improvements which may have been made upon it.

In the case of *Winthrop v. Huntington*, 3 Ohio, 327, 333, the complainant, having been ejected from land claimed by him as owner in consequence of a recovery at law, filed his bill seeking to be considered as trustee for the lands in the character of absolute owner. This he claimed on the ground that, as the improvements and payments of taxes were for the benefit of the respondents, equity might well consider those acts as performed in the character of agent, so as thus to be enabled to do justice to the parties. The court said that the complainant acted in all that he did as a volunteer; that it was impossible to give him any other character; and that there was not only no case, but no principle, in which a mere volunteer could maintain a suit in law or equity for compensation; although there were many cases in which the party might be benefited by such interference, and in which an award of compensation would seem to be just. "Nevertheless," added the court, "were it once permitted that one man could volunteer his services to another, and coerce compensation, it would subvert the fundamental doctrines of contract, and open a door for incalculable mischiefs and litigations. The complainant's counsel are too sensible of this to assert that a mere volunteer can recover; hence they attempt to establish an agency in their client, and do not seem to perceive that to convert a volunteer into an agent, against the consent of the alleged employer, is but maintaining the principle abandoned, in different terms, differently applied."

In *Blanchard v. Brown*, 3 Wall. 249, the complainant had been defeated in an action of ejectment, and then filed a bill in equity, asking to have the estate upon equitable terms. The supreme court said that, having failed before the jury, he was estopped from investigating the same matters in another jurisdiction. In the ejectment case he risked his whole defense on the impeachment of his adversary's title for fraud, and, having been defeated, sought to have the question of fraud litigated in a court of chancery, which could not, under the circumstances, be done. In this case the defendants pleaded the statute of limitations, and relied upon adverse possession. The complainants successfully resisted on the ground that the defendants were not trespassers, nor holding adversely, but rightfully in possession as cotenants. It results that defendants are entitled to whatever equity they may have as cotenants to compensation for improvements. An obiter is to be found in a former opinion in this case, reported in 48 Fed. 137, to the effect that such relief can be afforded only upon cross bill. That proposition is supported by two or three authorities which were not at hand, but are cited in a footnote to section 504, *Freem. Coten.*, which was cited by the court. Upon subsequent examination it was found that they were based upon local statutory rules of pleading, and in conflict with the general course of the authorities upon that subject. This is a forcible illustration of the unreliability of obiter dicta. The court is now clear that any equities to which the defendants may be entitled in this behalf may be allowed as incidental to the partition, under the defendants' general prayer for relief, and therefore that the citation from *Daniell's Chancery Practice*, above referred to, does not apply. The determination of the questions presented will depend upon the principles of equity, and the rules of decision applicable thereto.

Under the statutory provision (Rev. St. § 721) making the laws of the several states, except where the constitution, treaties, or statutes of the United States otherwise require or provide, rules of decision in trials at common law, in the courts of the United States, in cases where they apply, it has been repeatedly held that the construction of the statutes of the state relating to land are rules of property which the federal courts will recognize and follow.

In *St. John v. Chew*, 12 Wheat. 168,—one of the earlier cases,—the supreme court said that:

"Whether these rules of land titles grow out of the statutes of a state or principles of the common law adopted and applied to titles, can make no difference. There is the same necessity and fitness in preserving uniformity of decision in the one case as in the other."

In *Miles v. Caldwell*, 2 Wall. 44, the supreme court held that a claim for improvements made upon land in good faith by the complainant must depend wholly upon the statutes of Missouri, in which state the lands were situate. In *Bucher v. Railroad Co.*, 125 U. S., at page 583, 8 Sup. Ct. 974, Justice Miller, delivering the opinion of the court, said:

"It is well settled that where a course of decisions, whether founded upon statute or not, have become rules of property as laid down by the highest

courts of the state, by which is meant those rules governing the descent, transfer, or sale of property, and the rules which affect the title and possession thereto, they are to be treated as laws of that state by the federal courts."

The authorities to the same effect are collected in a note to section 375, on page 779, *Fost. Fed. Pr.* (2d Ed.). We must look, then, first to the decisions with reference to improvements made by the supreme court of Ohio, and applicable to this case.

In *Taylor v. Foster's Adm'r*, 22 Ohio St. 255, tenants in common held real estate under a will, which devised it to them in fee simple but subject to the contingency that, if either of them died without issue the survivor should take the whole estate. One of them having made permanent improvements on the land while the other was a minor, and without knowledge of the character of the title, mortgaged his interest in the real estate to secure a loan of money, and died without issue. The supreme court held that the improvements passed with the land, under the will, to the surviving tenant, and that neither the land nor the improvements could be subjected, under the mortgage, to the payment of the mortgage debt. Judge Day, in announcing the opinion of the court (the syllabus from which the above statement is taken being, under the rules of that court, the authoritative statement of the points decided), said that it was claimed that the improvements were made by Foster in good faith, believing himself to be a joint owner of the land, and that, therefore, on principles of natural justice, he had an equitable interest in the land to the amount of one-half of the value of the improvements, and added:

"The principle relied upon is undoubtedly recognized by courts of equity when resort is had to them for relief against a party in possession of land, who has made improvements under a belief of ownership of the land; for in such cases a party seeking equity must do equity. But this is not that case. Here a party, at best standing in the shoes of a tenant out of possession, invokes equitable relief. In *Putnam v. Ritchie*, 6 Paige, 390, Chancellor Walworth said that he had not 'been able to find any case, either in this country or in England, where the court of chancery had assumed jurisdiction to give relief to a complainant who has made improvements upon land, the legal title to which was in the defendant, where there has been neither fraud nor acquiescence on the part of the latter, after he had knowledge of his legal rights.'"

See, also, *Corbett v. Laurens*, 5 Rich. Eq. 301.

The judge then proceeded to say that it was well settled that no compensation could be had where the improvements were made with notice of the true state of the title. In that case Foster knew the nature of the title, and, to say the least, was sufficiently advised of its character to put him on guard as to its true legal effect, and it was held that improvements could not be subjected to the claim of his mortgage.

There are three reported cases in Ohio in which the right to equitable relief to improvers of real estate was recognized by the supreme court. The first is *Bomberger v. Turner*, 13 Ohio St. 263. In that case, lands fraudulently transferred by the instrumentality of a judicial sale descended to the heirs of the alienee, who, ignorant of the fraud, assigned the same in partition to one of their number,

who took possession, paid taxes, and in good faith made valuable improvements. A judgment creditor filed his petition to set aside the transfer for fraud, and subject the premises to the payment of his judgement. The court held that the heir, who, innocently and in good faith, had made the improvements for the benefit of the estate, was entitled to be equitably compensated out of the proceeds of the sale which was ordered. The court held that the fraud of the ancestor, of which the heir was ignorant when the improvements were made, should not deprive him of compensation for his expenditures; especially where the laches of the creditor left him for a series of years in possession of the premises, thereby inducing a belief that his title was indisputable.

In *Preston v. Brown*, 35 Ohio St. 18, it was held that the act for the relief of occupying claimants of land operates only in cases where the defendant in possession has been evicted by a title both paramount and adverse. A similar ruling has been made in other cases, and it is the settled law of Ohio. The occupying claimant law therefore has no bearing upon this case. In *Preston v. Brown* the court recognized the rule of the common law, subject to certain exceptions, that all erections or improvements made upon real estate become a part of the freehold, and the property of its owner. The court said that:

"Among the exceptions to the rule are those that arise at law, under the act for the relief of occupying claimants, and under the act creating liens in favor of mechanics in certain cases; and in equity in particular cases, where the provisions of the statutes do not apply. It also seems to be settled that a bona fide occupant, sued by the owner of the premises for rents and profits, may at common law recoup the value of the meliorations by him made while in the occupancy of the premises."

The court allowed the improvements also upon the application of the rule that, if an owner of an estate stands by and suffers another, acting in good faith, and without notice of his title, to place improvements thereon which add permanent value to the estate, such improvements will constitute a lien thereon. 2 Story, Eq. Jur. § 1237.

The third case is *Youngs v. Heffner*, 36 Ohio St. 232. That was a suit in partition. The plaintiff, the owner in fee simple of two undivided sevenths of a farm, had been absent and unheard of for nearly 30 years, when proceedings for partition were instituted by persons who would have been his heirs had he then been deceased. Under these proceedings, the premises, not being divisible without manifest injury to the value thereof, were sold by order of the court, and bid off by the defendant, who was the owner of the other five-sevenths of the farm, and who, after the purchase, made valuable improvements thereon. It was held that the defendant, by his purchase, acquired no title to the interest of the plaintiff in the land, but that in the partition he was entitled to the benefit of the improvements he had made to the extent that they enhanced the value of the premises. The court said that, whether the circumstances under which the plaintiff left his home and remained absent were such as to authorize the presumption of his death at the expiration of seven years was not material, since that presumption, whenever

it arises from any length of time, is but *prima facie*, and is wholly rebutted whenever it is made to appear that the person whose death is thus presumed is still living. That was a cause in which the defendant who had made the improvements, had no notice of the title of the plaintiff, and, on the other hand, had the right to presume that the plaintiff was dead.

It is not necessary to refer to the cases cited for the defendants in argument. None of them are Ohio cases. *Searl v. School Dist.*, 133 U. S. 553, 10 Sup. Ct. 374, was much relied upon, and, if it were an authority binding in this case, would be very strongly in favor of the defendants. But it depends upon the interpretation of a statute of the state of Colorado, where the premises were situated, and it has no application here.

Clearly, upon the Ohio decisions, the rule adopted by this court in the *McArthur Case*,¹ and in other subsequent cases, is the correct one. Under that rule the defendants will not be entitled to any compensation for improvements made during the life estate of Maria Bigelow. They will be entitled to compensation for improvements made between the date of her death and the commencement of this suit, the defendants having, as they supposed, bought in all the outstanding interests in the land, and become the sole owners. The bringing of the suit was notice to them that there were interests outstanding which the court has recognized by its decree, and no compensation will be allowed for improvements subsequently made. The allowances for improvements will be measured by determining to what extent, up to, but not beyond, their cost, they have enhanced the present value of the premises. The defendants, having had exclusive possession, will not be allowed for taxes or assessments, excepting by way of offset to rents. The complainants will be entitled to rents, subject to allowances for taxes and assessments as above, from six years prior to the bringing of this suit.

JACKSON, Circuit Justice, concurs.

HELFENSTEIN et al. v. REED et al.

(Circuit Court of Appeals, Eighth Circuit. June 11, 1894.)

No. 384.

LACHES—CLAIM OF TITLE TO LAND.

Claimants of land under a sheriff's sale, with full knowledge of the origin and character of their claim, entered into an agreement for its prosecution with an attorney, on terms indicating that it was regarded as of doubtful validity. An effort made, accordingly, to establish their title, was unsuccessful, and the claim was apparently abandoned for 25 years. During that time the land was laid out into lots, which were bought in good faith by numerous persons, many of whom placed valuable improvements thereon, and taxes and assessments for more than that time were paid by them. *Held*, that a bill to establish the claim was barred, notwithstanding a general averment therein denying laches.

¹ Unreported.

Appeal from the Circuit Court of the United States for the District of Nebraska.

This was a suit by John P. Helfenstein and others against Abraham L. Reed and others to establish complainants' title to certain lands. The circuit court dismissed the bill for laches. Complainants appealed.

On the 15th day of September, 1857, Robert Shields entered at the United States land office at Omaha, Neb., the W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 10, and the N. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 15, town 15 N., range 13 E. of the sixth principal meridian, situated in Douglas county. On the 24th day of November, 1857, Helfenstein, Gore & Co., wholesale grocery merchants doing business at St. Louis, Mo., brought suit by attachment against Shields for \$1,200 in the district court of Douglas county, and caused the undivided half of the lands entered by Shields to be attached. Helfenstein, Gore & Co. recovered judgment in the attachment suit against Shields for \$1,204.80 and costs at the March term, 1858, upon which a special execution was issued on the 25th of June, 1858, commanding the sheriff to sell the lands which had been attached in the action; and in compliance with the command of the writ the sheriff offered the lands for sale on the 28th day of July, 1858, and Helfenstein, Gore & Co. became the purchasers thereof for the sum of \$65; and on the 19th day of October, 1863, the sheriff, pursuant to an order of the court, executed a deed to the purchasers for the lands, which was filed for record the same day, and duly recorded in the recorder's office of Douglas county. The complainants are the heirs and grantees of the members of the firm of Helfenstein, Gore & Co., and entitled to whatever rights that firm acquired to the lands under their purchase at the sale thereof on the special execution against Shields. These lands, at the date of their entry by Shields, were within the corporate limits of the city of Omaha, and upon that, and probably other, grounds the validity of Shields' entry was contested for some time with varying results; but, in the view we take of this case, it is not necessary to go into a history of that litigation, or determine what rights, if any, Shields acquired under his entry. The lands were laid out into lots and blocks by persons claiming adversely to Shields, and became a part of the city of Omaha. Thomas J. Slaughter, a member of the firm of Helfenstein, Gore & Co., sued out the attachment against Shields, and had charge of this business, and conducted most of the correspondence relating thereto. The following letters relating to this land were written at their respective dates to Helfenstein, Gore & Co. by Mr. Poppleton, their attorney:

"Omaha, September 10, 1863.

"Thos. J. Slaughter—Dear Sir: You recollect the attachment levied on an undivided half of the property occupied by Shields in the fall of 1856, in favor of H., G. & Co.; that judgment was obtained thereon in March, 1858, and the property sold in July following, at a nominal price, the pre-emption of Shields having in the meantime been set aside as fraudulent and void. The sale took place after my sickness began, and all the subsequent actions in regard to it were managed by others, until in 1860, when Smith's Bro. made his entry of the land, and I sought to enforce his contract, without success. Well, in the course of time this matter takes a new complexion, and a few months ago Smith's entry was canceled by the general land office, and Shields' entry restored, and finally a patent issued to Shields. This coming to my knowledge, though the matter had really passed out of my hands, I have taken occasion to look into the condition of the proceedings had by Lake after the commencement of my sickness. I find some of the files in the case mislaid or lost, and the whole thing in confusion. The sale appears to have taken place regularly, but beyond that it seems not to have been carefully looked after. No deed has ever been made to H., G. & Co., and no steps taken to perfect their title. The reason I suppose to be that Lake, supposing the title worthless, as it was then, supposed it was unnecessary to incur the trouble and expense of perfecting his proceedings. There is still a way open possibly to make good your title, but it involves a long litigation and a large expense. Do you wish me to take any action in regard to it? If so, upon what terms? I will take

hold of it for a regular fee in cash, or for one-half the interest if I succeed and nothing if I fail, or, in case of success, I will pay your debt and take the land. The title is still in controversy in court between Shields & Smith (is the brother), and may in the end go against Shields. So you see there is still risk. Write me fully at once.

"Yours, &c.,

A. J. Poppleton."

"Omaha, September 21, 1863.

"Messrs. Helfenstein, Gore & Co.—Gentlemen: Yours of the 15th inst. is at hand. There is too much uncertainty about the result of the controversy to justify me in paying any considerable sum for your claims against Shields, and taking all the risk. While I am willing to risk my services, I cannot add much to them to throw into the scale. If you will give me in your reply the very lowest amount in cash you will take for the claim, it is possible I may accept it; but I fear I cannot give what you would feel justified in taking. Please, therefore, give your lowest figure (and they must be very low if accepted), and at the same time state what course you desire me to take (if any) in case I do not come to your figures. I addressed Mr. S. in my last, and address this letter to him now because of his personal knowledge of this matter.

"Yours, respectfully,

A. J. Poppleton."

"Omaha, October 3d, 1863.

"Thos. J. Slaughter, Esq.—Dear Sir: Yours of September 28th is at hand. As I anticipated, there is no prospect of our coming together on a purchase of the Shields claim. While the land is sufficiently valuable to make it a good operation in case of success at the price you fix, there is altogether too much risk to justify the venture. Whatever steps you take in the matter should be taken soon, as our next district court sits November 9th. I shall be absent from town about two weeks, but any letters addressed to me will be attended to on my return.

"Yours, respectfully,

A. J. Poppleton."

"Omaha, October 20th, 1863.

"Messrs. Helfenstein, Gore & Co.—Gentlemen: Yours of October 10th is at hand, accepting one of my original propositions, viz. to prosecute your claim at my own cost and expense, and, in case of success in establishing your title, I to have the land and to pay your debt, principal and interest, you to be liable to no costs, fees, charges, expenses in any event, and I to incur no liability to you in case of failure, risking only my services, costs, and expenses. I believe we are agreed upon these terms, and, so understanding it, I accept them, and open the campaign at once.

"Respectfully yours,

A. J. Poppleton."

Mr. Poppleton testifies as follows: "Q. State whether you ever advised the firm of Helfenstein, Gore & Company of the fact that you had secured some lien or interest in the Shields land, and was endeavoring to make their claim out of it, and whether they knew of that fact. A. I did advise them, I think the latter part of 1863, and they did know of it at that time; that is to say, I advised them of the fact that the Shields title had been re-established. And I want to say right here that at the time the attachment was levied Shields' title was regarded as good. At the time of the sale, his title was regarded as bad. Afterwards—just when I can't say—a ruling was made by the proper land officer, either by the land commissioner or secretary of the interior, which re-established Shields' title. After that, though this particular business was out of my hands as attorney, I advised Helfenstein, Gore & Company of the situation, and of my belief that there was still a chance for them to make their money. Q. State whether, after you so advised the firm of Helfenstein, Gore & Company, any arrangement was made between that firm and you, by which you were to prosecute their claim, and make it out of the Shields land, if you could. A. I made an arrangement which was in substance this: I was to take my own course in proceeding to enforce the judgment, and to establish the interest of Helfenstein, Gore & Company in the land, and was to be paid nothing by them if I failed. If I succeeded, I was to have their interest in the land acquired under the sale upon paying them

the amount of the judgment and interest. That is my best recollection of the matter. I think this was the latter part of 1863. Q. State whether or not, in pursuance of this arrangement, you filed the cross bill, and took proceedings to collect the claim? A. My recollection is that the appearance in the Root Case was a part of the proceedings that I thought necessary to protect their interests."

Mr. Poppleton appeared for Helfenstein, Gore & Co., and filed an answer and cross bill in their name in a suit then pending involving the title to the land. Writing to Mr. Slaughter under date of July 26, 1869, he says: "If you understand the history of the present litigation, you know that when it was opened it was upon a title adverse to the one under which you claim. I came in, representing your title under the attachment, and set up your rights, and in the belief that I could sustain them; but upon careful investigation, as I progressed in the case, I became satisfied that I could not, and ceased to defend on those grounds. The reason I could not sustain your rights was because the sale and proceedings subsequent to judgment (which were conducted by other parties) were so irregular as to prevent me from establishing a title. As it turned out, however, it would have made no difference, for when the case came on for hearing the Root title was sustained, and the Shields title held void. From this judgment an appeal was taken to the Sup. Ct. of the U. S., and pending this appeal this settlement is made. The terms of the settlement I do not fully understand, as I was not a party to them. In the situation the matter now is, I have no hope of realizing your claim except by a proceeding against Smith, which I shall try."

The defendants deny that they are cotenants of the plaintiff, and, among other defenses, plead the statute of limitations and laches. The lower court dismissed the bill on the ground of laches, and the complainants appealed.

Upton M. Young and George W. Covell, for appellants.

William D. Becket, R. S. Hall, and J. H. McCulloch, filed briefs for appellees.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

CALDWELL, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

If the complainants and those under whom they claim ever had any right or title to the land in controversy, it was acquired by the purchase thereof at the sheriff's sale on the 28th of July, 1858. The sheriff's deed to the land was executed and recorded in 1863, and in that year the agreement was entered into between Helfenstein, Gore & Co. and Mr. Poppleton to the effect that he was to prosecute their claim to the land, and, if he was successful, he was to have the land and pay their debt, and, if unsuccessful, he was to pay all costs and expenses and receive no fees. Acting under this agreement, Mr. Poppleton made an unsuccessful effort to establish the Helfenstein, Gore & Co. title to the land by filing an answer and a cross bill in a suit instituted by Aaron Root against Shields, Helfenstein, Gore & Co. and others to establish and quiet his title to the land. In 1867 the circuit court of the United States sustained Root's title to the land, holding the Shields title void. *Root v. Shields*, Woolw. 340, Fed. Cas. No. 12,038. From this decree an appeal was taken to the supreme court of the United States, which was afterwards dismissed. It is claimed that Helfenstein, Gore & Co. were not concluded by the decree in that case. Assuming, but not deciding, that this contention is well founded, it cannot affect the result in this case.

The complainants' claim to the land had its inception in 1858. From that time down to the commencement of this suit, in 1892, Helfenstein, Gore & Co., or their representatives, resided in St. Louis, and their attorney resided in Omaha. During all this time the complainants and their grantors and their attorney knew all about the origin and character of the claim now set up to this land. That it was then regarded by them as of doubtful validity is shown by the arrangement entered into between Helfenstein, Gore & Co. and Mr. Poppleton for its prosecution. The effort then made to establish this title was unsuccessful, and the claim abandoned by Mr. Poppleton, who was perfectly familiar with all the facts, and who was the party to be chiefly benefited by establishing the title. For a quarter of a century the claim now set up by the complainants for this land was permitted to slumber, and appeared to have been abandoned by them and their attorney. Years ago the land was laid out into lots and blocks which have been bought and sold in good faith, and with no suspicion of the claim now set up by the complainants. Numerous persons have become the owners thereof, many of whom have placed valuable improvements on their holdings. The present owners and grantors have paid the public taxes and assessments on these lots for 35 years or more. The complainants and their attorney could not have been ignorant of these facts. The general averment is made in the bill that the complainants and those under whom they claim have "not been guilty of any laches in asserting their rights," but this is merely the statement of a legal conclusion, and goes for nothing in the face of the indisputable facts in the case. If the complainants and those under whom they claim ever had any rights in this land, they are barred by their laches from asserting them now against the present owners of the property. It is unnecessary to repeat here the conditions upon which courts of equity will impute laches. The rules applicable to this class of cases have been recently stated and applied by this court in several cases. *Naddo v. Bardon*, 4 U. S. App. 642, 2 C. C. A. 335, 51 Fed. 493; *Railroad Co. v. Sage*, 4 U. S. App. 160, 1 C. C. A. 256, 49 Fed. 315; *Lemoine v. Dunklin Co.*, 10 U. S. App. 227, 2 C. C. A. 343, 51 Fed. 487.

The facts of this case bring it clearly within the rules laid down in the cases cited, and upon the authority of those cases, and the citations therein contained, and without repeating what is there said, the decree of the circuit court dismissing the bill for want of equity is affirmed.

LEWIS v. BALTIMORE & L. R. CO. et al.

Ex parte STREET.

(Circuit Court of Appeals, Fourth Circuit. June 1, 1894.)

No. 88.

1. MANDAMUS — COMPELLING ALLOWANCE OF APPEAL — DISCRETION OF TRIAL COURT.

A circuit court will not be compelled by mandamus to allow an appeal from a denial of a motion to consolidate causes (that being wholly within

its discretion), nor from a denial of a petition to be made a party to a cause, filed by one not a necessary party thereto, and whom, even if a proper party, it was a proper exercise of discretion to exclude, because he was prosecuting other proceedings for the relief sought, wherein all his rights would be examined and protected.

2. APPEALABLE ORDERS—DENIAL OF LEAVE TO INTERVENE.

An order denying leave to intervene in a cause is in no sense a final judgment, and is not appealable.

This was a petition by Joseph M. Street for a mandamus to the circuit court of the United States for the district of Maryland, directing the allowance of an appeal from certain orders or decrees of that court in the case of Charles E. Lewis, trustee, against the Baltimore & Lehigh Railroad Company and others.

S. A. Williams and E. Beverly Slater, for petitioner.

R. M. Venable and William A. Fisher, for Mercantile Trust & Deposit Co., trustee.

Before GOFF and SIMONTON, Circuit Judges, and HUGHES, District Judge.

SIMONTON, Circuit Judge. The petitioner, a stockholder in the Maryland Central Railroad Company (which afterwards was consolidated with another company, and was known as the Baltimore & Lehigh Railroad Company), filed his bill of complaint against the Maryland Central Railroad Company, the Baltimore & Lehigh Railroad Company, the Mercantile Trust & Deposit Company, trustee of the first and second mortgage of the Maryland Central Railroad Company, William Gilmor, and others. This bill was filed in Hartford county, Md., and after reciting the existence of the first mortgage upon the property of the railroad company (the validity of which, and of the bonds issued thereunder, was not disputed), and the existence of a second mortgage upon the same property (the validity of which, also, was not disputed), it charged the managers of the company and certain of its agents, codefendants in his suit, with fraudulent conduct in the management of the affairs of the company, and with the fraudulent use of a very large part of the \$900,000 worth of bonds issued under the second mortgage. The cause was removed from the state court of Hartford county to the circuit court of the United States for the district of Maryland. In his original bill, the relief sought by the complainant is directed against the managers and the agents of the railroad company in the fraudulent disposition of its property, and of the bonds under the second mortgage. It seeks, also, the appointment of a receiver for the railroad property. Under this bill a receiver was appointed in the state court, and after that the cause was removed to the circuit court of the United States, where his supplemental bill was filed. Its prayer for relief is directed against the same fraudulent acts, and in addition thereto the bill contains this prayer:

"(6) That the defendant the Mercantile Trust & Deposit Company, trustee under the said first mortgage, and also trustee under the said general or second mortgage, may, by an order in the nature of an injunction, be restrained from selling said railroad, under either the first mortgage or the said general mortgage, pending this suit, or until such time as your honors may

deem necessary and proper to allow for the ascertainment of the reasonable value of the said railroad property, and its prospects in the near future; the liens thereon, and the indebtedness thereof; and for the protection of the rights of the stockholders, and all persons interested therein."

On the 14th of October this special prayer was set down for argument before the circuit court. The hearing was had on the 15th of November of that year, and the prayer was refused, the court giving its reasons at length. Subsequent to this order the Mercantile Trust & Deposit Company, trustee of both the first and the general or second mortgage, surrendered the trust under the general or second mortgage; and, after sundry substitutions of trustees, Charles E. Lewis, a citizen of New York, was duly appointed and recognized as trustee. On the 21st of March, 1894, as such trustee, Charles E. Lewis filed his bill for foreclosure of the general or second mortgage in the circuit court of the United States for the district of Maryland. To this bill he made the Maryland Central Railroad Company (now known as the Baltimore & Lehigh Railroad Company), the Baltimore Forwarding & Railroad Company, and the Mercantile Trust & Deposit Company of Baltimore, trustee of the first mortgage, parties defendant. The trustee of the first mortgage obtained leave to file, and did file, its cross bill in this cause, on the 31st of March, 1894, praying the foreclosure of its first mortgage. All the other parties to the cause filed their answers to this cross bill, and by stipulation of counsel the cause was submitted for decree on this cross bill on the 7th of April, 1894. Joseph M. Street, the petitioner, filed his petition in the circuit court of the United States for the district of Maryland in this cause of Lewis, Trustee, v. The Baltimore & Lehigh Railroad Company; setting forth all that he had done in his own proceedings, and all the proceedings thereunder, and praying that the suit of Charles E. Lewis, trustee, be consolidated with his suit. This petition was dismissed by the circuit court on the 7th of April, 1894, "without prejudice to the right of the petitioner to renew his application at a later time, or to a similar application by any other party to the case hereafter." On the same day the petitioner, Street, filed his petition in the same court, praying that he be made a party to the Lewis suit. The prayer of this petition was denied, also, and the application dismissed, "without prejudice to the right of the petitioner to renew the same at a later time." Street excepted to the dismissal of each petition. On the same day a decree for the foreclosure of the first mortgage was entered. In this decree, after providing for the satisfaction of the lien of the first mortgage, it was ordered that the amount, if any there be, in excess of the payments above specified, shall be applied as the court shall hereafter direct.

On the 14th of May, 1894, Street filed his petition for an allowance of his appeal from the rulings of the court refusing his petition for consolidation, and his petition to be made a party. Accompanying this petition were the following assignments of error:

(1) That the said circuit court was in error in overruling the petition for a consolidation of this with the case of Street v. The Central Maryland Railroad Company and others; (2) that the circuit court was in error in overruling the

petition filed by the petitioner, praying to be made a party to the cause; (3) that the circuit court was in error in decreeing a sale of the property mentioned in the decree.

The petition was dismissed, its prayer having been denied. He now comes before this court, praying that a mandamus be issued to the judges of the circuit court of the United States for the district of Maryland, commanding them, or one of them, to grant the petitioner an appeal from the orders and the decree aforesaid, and to accept a supersedeas bond, and that such an appeal may be allowed as of the date the original application was refused by the said court.

With regard to the motion for consolidating the case of *Street v. The Central Maryland Railroad Company* with that of *Lewis, Trustee, v. The Central Maryland Railroad Company*, this was addressed to the discretion of the court and was wholly within its discretion. Rev. St. U. S. § 921. We cannot, by mandamus, interfere with the circuit court in this exercise of its discretion.

So, also, as to the petition to make Street a party in the Lewis Case. He was not a necessary party, and, even were he a proper party, still, this was within the discretion of the court. In the present instance this discretion was wisely exercised. Street already has his day in court. He has instituted, and is now prosecuting, proceedings in which all of his rights will be examined, and, if any exist, will be protected. In these proceedings, among other things, he prayed practically the same relief which he now seeks, and his prayer was considered and denied. His desire to be a party in this case is to enable him to appeal from and supersede the decree of foreclosure of the first mortgage, and to arrest the sale under this mortgage. On this very question in his own case he has had his day in court, has made his effort, and has failed. The renewal of the motion would only be vexatious. Nor does it seem equitable to impose the delay he seeks on the holders of the first mortgage. The validity of this mortgage is admitted by all parties, the valid use of all of its bonds is admitted, and the right to a foreclosure is indisputable. The petition asks that the bondholders be held up until two contingencies shall be determined: The one is that it be ascertained, in a hotly-contested and prolonged litigation, whether his charges of fraud in the use of some second mortgage bonds be true or not. In this question the first mortgage bondholders have no privity and no interest whatever. And the other is until it be ascertained whether the property, heretofore unproductive, will not become more valuable, so that parties wholly unconnected with, and having rights subordinate to, the first mortgage, may have a chance of benefit. In the meantime the experiment is to be made at the risk and cost of the first mortgage bondholders. In its final decree the circuit court has shown due regard to the interest of all parties subordinate to the first mortgage, and to the questions raised by the petitioner. While the rights of the first mortgage creditors are recognized and preserved, the contingent interest of other parties is impaired as little as possible. All funds not needed for the first mortgage are reserved for the future order of the court. No right of the petitioner has been finally adjudicated by any of the orders

of the court. Besides, this refusal of the circuit court to admit Street as a party is not an appealable order. It is in no sense a final judgment. It concludes no right. In the language of Waite, C. J., in *Ex parte Cutting*, 94 U. S. 22: "No appeal lies from the order refusing them leave to intervene to become parties. That was a motion in the cause, and not an independent suit in equity, appealable here." Were the courts of last resort to entertain appeals to make a person a party, causes would be constantly going up piecemeal, great confusion would be created, and insufferable delays caused. The petitioner, not being a party to the suit, cannot be heard on an appeal therefrom. *Ex parte Cutting*, *supra*. The motion for a mandamus is refused.

AETNA INS. CO. v. PEOPLE'S BANK OF GREENVILLE.

(Circuit Court of Appeals, Fourth Circuit. May 22, 1894.)

No. 63.

1. FIRE INSURANCE—PROOFS OF LOSS—DESCRIPTION OF PROPERTY.

Under a policy requiring, if a fire should occur, a statement of the cash value of each item of the property and the amount of loss thereon, where the property insured is 100 bales of cotton, it is sufficient to state the number and weight of each bale and the value in the aggregate.

2. SAME—MAGISTRATE'S CERTIFICATE.

A policy contained a condition that, if a fire should occur, the insured should, if required, furnish a certificate of a magistrate or notary to an examination of the circumstances. Such a certificate was attached to the proofs of loss, but the company objected thereto as defective, requiring additional particulars to show compliance with the policy. *Held*, that this amounted to a requirement of such certificate by the company.

3. SAME.

A policy contained conditions that, if a fire should occur, the insured should furnish a certificate of a magistrate or notary not interested in the claim nor related to the insured, living nearest the place of fire, to an examination of the circumstances, and that no action should be sustainable on the policy until after full compliance with its requirements. The certificate furnished was made by one who was related by affinity to the insured, and who was not shown to be the magistrate or notary living nearest the place of fire. *Held*, that there could be no recovery on the policy.

In Error to the Circuit Court of the United States for the District of South Carolina.

This was an action by the People's Bank of Greenville, S. C., against the Aetna Insurance Company, on a policy of insurance, brought in a court of the state of South Carolina, and removed therefrom to the United States circuit court, which denied a motion to remand, the cause. 53 Fed. 161. At the trial the jury found a verdict for plaintiff. A motion by defendant for a new trial was denied, and judgment for plaintiff was entered on the verdict. Defendant brought error.

Geo. M. Trenholm, for plaintiff in error.

M. F. Ansel, of Cothran, Wells, Ansel & Cothran, for defendant in error.

Before Mr. Chief Justice FULLER, GOFF, Circuit Judge, and JACKSON, District Judge.

GOFF, Circuit Judge. On the 12th day of May, 1892, the People's Bank of Greenville, S. C., loaned one W. W. Benson the sum of \$3,000, taking his note of that date for the same, payable 30 days after date, and receiving from Benson as security for its payment four receipts of the Travellers' Rest warehouse, for 100 bales of cotton, which were pledged for the payment of said sum of money. As additional security, a policy of insurance had been issued by the Aetna Insurance Company, of Hartford, Conn., on said cotton, insuring Benson to an amount not exceeding \$3,000 thereon, and providing that the loss, if any, should be payable to said bank, as its interest might appear. The warehouse was destroyed by fire on the 12th day of June, 1892, while said policy was in force, and it is claimed that the 100 bales of cotton were lost by such fire. It was provided in the policy that, if a fire should occur, the insured should within 60 days thereafter, unless the time should be extended in writing by the company, render a statement, signed and sworn to by him, setting forth his knowledge and belief as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof,—and the amount of loss thereon; all incumbrances thereon,—together with other matters required by said policy, but not necessary to be mentioned in this connection, except the following conditions, which were part of said policy:

"And shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances, and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify." "No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

A statement relative to the loss under the policy, by the fire on June 12th, was made by Benson, under date of June 27, 1892, the same being signed and sworn to by him, which was called the "proofs of loss," and was sent by registered letter from the post office at Travellers' Rest, S. C., June 29, 1892, addressed to Aetna Insurance Co., Hartford, Conn., and duly received by that company. Attached to and part of such statement was the following certificate:

"State of South Carolina, County of Greenville—ss.: I, J. E. Watson, a notary public, residing in Travellers' Rest, S. C., most contiguous to the property before described, hereby certify that I am not concerned in the loss or claim above set forth, either as a creditor or otherwise, or related to the insured or sufferers; that I have examined the circumstances attending the fire, or damage alleged; and that I am well acquainted with the character and circumstances of the insured, and do verily believe that he has by misfortune, without fraud or evil practice, sustained loss and damage on the property insured to the amount of thirty-two hundred dollars. In testimony whereof, I have hereunto set my hand and seal, this 28th day of June, A. D. 1892.

"J. E. Watson, Notary Public, S. C."

On the 23d day of July, 1892, Henry E. Rees, adjuster of said company, writes from Marietta, Ga., to Benson, acknowledging the receipt of the papers before mentioned, calling his attention to what was considered deficiencies in the same, and requesting further and more specific information as to the number of bales of cotton, the marks thereon, with the weights and grade of same. He also inclosed the form of an affidavit to be made in connection therewith, and closed his communication with these words:

"Furthermore, you will please state what is the exact relationship of J. E. Watson to you, and in what other way he may or may not have been connected or associated with you in business or other interests at the time of fire. Upon the receipt of this information, without which we can reach no conclusion as to your loss, we will give the claim further consideration. We hold the papers subject to your orders."

On the 5th day of August, 1892, Benson, by attorney, answers this letter, and sends what he calls "additional proofs" concerning his loss by fire at Travellers' Rest on the 12th of June, 1892, but does not give in detail the data called for by Rees, nor does he furnish the affidavit called for in the letter of July 23d, or answer the inquiries made relative to Watson. No further correspondence took place between the parties until after the suit was instituted by the bank, on the 15th day of September, 1892.

On the 8th day of August, 1893, the cause came on for trial, when a jury was impaneled, evidence offered, argument of counsel heard, and a verdict rendered for the plaintiff for the sum of \$3,209.10. A motion for a new trial was made by the defendant, and overruled, whereupon judgment was entered for the plaintiff for the sum found by the jury, with costs, and this writ of error was prayed for and allowed.

During the trial, the policy of insurance was offered in evidence by the plaintiff, and admitted by the court. The party insured, Benson, was examined as a witness, and, among other things, stated that he had received from Rees the letter dated July 23, 1892; that he had gone to a party named Alexander for the purpose of obtaining the certificate required of the magistrate or notary public living nearest the place of the fire, and not interested in the claim or related to the insured, who had declined to give the same, because he had already made an affidavit or statement about the matter to the company or its adjusters; and he also testified that Watson, who did afterwards make the certificate, had married a cousin of his (the witness and the party insured). The plaintiff then offered the "proofs of loss" in evidence, and the defendant objected to their introduction, because the same had not been prepared in accordance with the requirements of the policy of insurance, and because the conditions contained in the same had been ignored in the preparation of said proofs; and for the further reason that it did not appear positively in them that the property insured was actually destroyed by fire, nor was the value of each item of property and the amount of loss thereon given; and also because the certificate attached thereto was not made by the magistrate or notary public not interested in the claim as a creditor or otherwise, nor related to the

assured, living nearest the place of fire. The court overruled the objections, and admitted the proofs, to which action the defendant objected, and exceptions were duly taken, which constitute the first assignment of error.

The proofs of loss, so far as the description of the property and the value of it is concerned, are, we think, substantially as provided for in the policy. The statement made by the assured was on a form furnished by the company for that purpose, one of its blanks in general use. It gave the number and weight of each of the 100 bales of cotton, and the value of the same in the aggregate. The number of pounds was set out in detail, each separate package being given, and the rate per pound was consequently apparent, showing the method by which the amount of loss was reached. The condition in the policy referring to the cash value of each item of property and the amount of loss thereon must be construed as requiring only a full and accurate statement of the property destroyed, with the value of the same, as the assured, without fraud and free from fault, is, under all the circumstances, able to furnish. The statement furnished by Benson contained all the information necessary to enable the company to understand the particular property destroyed, the quantity thereof, and the value of the same, as claimed by the party insured. The loss was all on one class of property, and there were no "items" to describe other than the different bales of cotton, which were set forth by number and weight. We think this was all that was intended by the contract, or that should be required of the party insured. It gave sufficient data on which to base an adjustment, and was all that was essential to a fair settlement of the questions relating to the property destroyed and its value.

The next objection to the admission of said proofs was that the certificate attached thereto was not made by the magistrate or notary public not interested in the claim, and not related to the assured, living nearest the place of fire. The defendant in error insists that this certificate, given by Watson, was an unnecessary or superfluous paper, filed by Benson, with his proofs of loss, for the reason that, by the terms of the policy, such certificate was to be given only "if required" by the insurance company, and that no such requirement had been made by it. Considering all the circumstances attending the presentation of the proofs of loss, can this claim be sustained? The party insured had 60 days after loss in which to file his statements, and the company the like time in which to demand the certificate. It may be conceded that it was not necessary for Benson to attach the certificate to the proofs in the first place, but he did do so, and thereby obviated the necessity of the requirement by the company. The fire was on June 12, 1892, and the proofs were sent in on the 29th of June, 1892. The company in its reply, dated July 23, 1892, alludes to the Watson certificate, and, in effect, gives the party insured notice that it is defective, requiring additional particulars that will show compliance with the conditions of the policy. Surely, we must hold this to be a requirement on the part of the company that the terms of the

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policy relating thereto must be respected by the insured. Benson then still had ample time in which to do so, but he did not; and afterwards, on August 5, 1892, in replying to said communication from the company, he did send additional information as to the property destroyed and its value, but he absolutely ignored this demand relative to the Watson certificate.

The parties have made their own contract, have agreed on their own terms, and assented to certain conditions. The court cannot change them, and must not permit them to be violated or disregarded. They may be hard to comply with. The conditions may seem harsh or useless, but the contract has been duly made by parties capable in law to enter into it, and they have provided the terms and restrictions usual in such agreements, such as have been found from long business experience to be essential to the safe and proper disposition of such matters. The courts have uniformly enforced them. If they have not been waived, or one party been prevented from complying by the act of the other, they must be respected and enforced. From the earliest cases on fire insurance policies to the present, these conditions have been sustained. The following cases show their necessity, and the reasons given for requiring their enforcement: *Oldman v. Bewicke*, 2 H. Bl. 577, note; *Routledge v. Burrell*, 1 H. Bl. 254; *Worsley v. Wood*, 6 Term R. 710; *Mason v. Harvey*, 8 Exch. 819; *Langel v. Insurance Co.*, 17 U. C. Q. B. 524; *Leadbetter v. Insurance Co.*, 13 Me. 265; *Inman v. Insurance Co.*, 12 Wend. 452; *Roumage v. Insurance Co.*, 13 N. J. Law, 110; *Insurance Co. v. Pherson*, 5 Ind. 417; *Johnson v. Insurance Co.*, 112 Mass. 49; *Daniels v. Insurance Co.*, 50 Conn. 551. The supreme court of the United States has held to the same effect. *Insurance Co. v. Lawrence*, 2 Pet. 25, 10 Pet. 507. In the case just mentioned, it was decided that where a policy required the production of a certificate from a magistrate or notary of the town or county in which the fire occurred, relative to the facts connected with the same, the insured could not recover in the absence of such certificate, and that a certificate which had been furnished that did not comply with the requirements of the conditions of the policy would not be accepted.

In the policy now under consideration the conditions are the usual terms in such cases, and they are reasonable, and not hard to comply with, provided the party insured has honestly sustained a loss under the same. It is certainly lawful to so provide. It has been assented to by the parties, and has not been waived. The insurance company has the right to insist upon compliance with the terms of the contract, and, if the insured is permitted to violate or avoid them, it results in a new contract being made for the parties by the court. The party in whose name the insurance was carried endeavored to procure the certificate from another before he applied to Watson for it. This he admitted in his testimony. Presumably, this other party was qualified, by the terms of the policy, to give the certificate; but he refused, for some reason not fully explained, to do so. It was shown by Benson himself that Watson was related to him, by affinity, if not consanguinity, and therefore disqualified, under the policy, to make the certificate. The testimony of Ben-

son shows the falsity of at least a part of the certificate that he had caused to be filed. The policy requires the certificate to be given by the magistrate or notary "living nearest the place of fire," and it is not shown that was done, either by the certificate itself or by other testimony. We think that the failure of the insured to furnish a certificate, when he was, as we have shown, requested to do so, of the character required by the policy, was fatal to his right to recover thereon, and that the objection of the defendant below to the introduction of the "proofs of loss," as offered by the plaintiff below, should have been sustained. The plaintiff had not proved the case—had not shown the facts—upon which the defendant had promised to make indemnity. We do not find it necessary to further consider the errors assigned. The judgment of the court below will be reversed, and the case remanded, the verdict of the jury set aside, and a new trial ordered.

ANDERSON v. AVIS.

AVIS v. ANDERSON.

(Circuit Court of Appeals, Fourth Circuit. May 22, 1894.)

No. 64.

1. APPEAL—EXCEPTION TO REFUSAL OF INSTRUCTIONS.

Where an instruction of a general character is refused as a whole, a general exception, not directing the attention of the court to any specific proposition of law covered by the instruction, is too indefinite.

2. TRIAL—INSTRUCTIONS—COMMENTING ON EVIDENCE.

On a sale by defendant of land for \$10,000 in cash and \$44,000 in stock of a certain company at par to purchasers procured by plaintiff, plaintiff brought suit against defendant for the excess of the price over \$50,000. The court stated to the jury that the contract showed that the price agreed on was \$54,000, to be paid in the form of \$10,000 in cash, \$44,000 in stock. *Held* error, as the jury might have understood that the stock was to be treated as equivalent to the amount of money it represented.

3. SAME.

The court further stated to the jury that the sale was made without the concurrence and consent of plaintiff. *Held*, that this was error, it not appearing that plaintiff held such a legal relation to the property as to require defendant to secure his concurrence and consent before selling.

4. SAME.

Stating to the jury that the evidence seems to prove certain facts, on a strongly-contested point, where there is evidence to the contrary, without instructing them that they are not bound by the opinion of the court on the question, is error.

In Error to the Circuit Court of the United States for the Eastern District of Virginia.

This was an action by B. D. Avis, trading as B. D. Avis & Co., against Archer Anderson, administrator of Joseph R. Anderson, deceased, for breach of contract. The jury found a verdict for plaintiff, and judgment was entered thereon. Both parties brought error.

Charles V. Meredith, for plaintiff.

Edmund Waddill, Jr., for defendant.

Before GOFF and SIMONTON, Circuit Judges, and JACKSON, District Judge.

JACKSON, District Judge. In this case writs of error have been sued out by both parties from the circuit court of the United States for the eastern district of Virginia.

B. D. Avis & Co. brought their suit at law against Archer Anderson, personal representative of Joseph R. Anderson, deceased, claiming \$10,000 damage. The plaintiff's contention is that he had a contract with Joseph R. Anderson, in his lifetime, for the sale of 30,000 acres of land in the state of Maryland, which, if made by him, he was to have all over \$50,000 the land sold for. On the other hand, the defendant, Anderson, denies that the plaintiff was at any time his agent to sell the land, but admitted that he had given him permission to sell the land if he could before he (Anderson) disposed of it, upon the express condition that it was a sale in gross which should net the defendant, Anderson, \$50,000, refusing at that time and always afterwards to surrender the control of the land to any one as agent to sell it. No express written contract was entered into between the parties, but a large amount of correspondence passed between the defendant, Anderson, in his lifetime, and his agent, C. M. Miller (who lived near the lands), and the plaintiff in the action, which plaintiff claims constituted a contract between the parties, and entitled them to receive any excess over \$50,000.

In the view we take of this case, it is unnecessary at this time to review the evidence, to ascertain either its relevancy, or to determine whether a contract existed between the parties for a sale of the land, as the defendant admits that, if Avis brought him a purchaser, he would be entitled to any excess the land sold for over \$50,000, which is all the plaintiff demands in this action. Whether there was any such excess in the sale is a question of fact for the jury to decide, under the law as given them by the court.

Under our practice, we only examine the evidence so far as may be necessary to ascertain whether the question of law raised upon the hearing and predicated upon it as given at the trial is correct. It is therefore unnecessary at this time to notice the first exception taken by the defendant to the admission of the plaintiff's evidence, as we think the question of law arising on the refusal of the court to grant the instruction prayed for by the defendant, and the charges given by the court, will dispose of the case.

As to the instruction asked for by the defendant, it is to be remarked that, while many points are intended to be covered by it, yet it is substantially one in the form of a charge. It is therefore general in its character, and the exception to its refusal is too indefinite for the court to determine whether or not the defendant was aggrieved by its refusal. It is true that the court refused it "as a whole," but it is equally true that the exceptant failed to direct the attention of the court to any specific proposition of law it contained. It was offered as a whole to cover the law, as the defend-

ant claimed. A portion of it, as asked for, may have propounded good law, and a portion of it bad law, as possibly was the case; yet, if the exceptant fails to direct specially the attention of the court to any proposition of law covered by it, when it is refused as a whole, and excepts generally to the ruling of the court in refusing the instruction, we hold that the exception is not well taken. Rule 10, U. S. Cir. Ct. App. 4th Cir., 47 Fed. vi. Had the attention of the court been specially directed to the different propositions of law propounded, and each had been ruled and rejected, and an exception taken to each ruling, an opportunity would then have been given the court to correct itself, if it desired to do so, which we think is often done. The practice observed in this case we think unjust to the court, and should be discouraged by the appellate court. As to that part of exception first taken to the charge of the court, it is subject to the same objection we have just considered, and of course nothing is saved by it to the defendant.

We come now to the consideration of the second bill of exceptions, which is more specific, and points out those portions of the charge to which the defendant took exceptions. The court, in its charge, says that "Avis & Co. brought to Gen. Anderson, as proposed purchasers of the land, the two men, Segal and Armstrong." These two men became the purchasers of the land. Anderson and wife's deed, conveying it to them, recites the price paid was \$54,000. "The contract of May 25, 1892, between Gen. Anderson and Segal and Armstrong, shows that the price agreed on was fifty-four thousand dollars, which was to be paid in the form of \$10,000 in cash, \$44,000 in the stock of the Paper Mill and Bag Co. of Camden, New Jersey."

As to the first paragraph, it is urged that the court erred in charging the jury as it did in regard to the meaning of the contract, and that it was not sufficiently clear as to the consideration Anderson received for the land. It appears from the contract made between the parties May 25, 1892, that the consideration was "ten thousand dollars payable in cash, and the balance was forty-four thousand dollars payable in the stock of the Victor Paper Mill and Bag Co., at par." It will be observed that the words "at par," found in the contract, are omitted in the charge as given. This omission, we think, is fatal to this portion of the charge, for the reason that, while Anderson was willing to accept the stock in payment for the land at par, it does not follow that it was "par stock," having a cash value of \$44,000. The sale, as disclosed by the contract, was for cash \$10,000, and the balance in stock representing a face value of \$44,000, which not only the negotiations between the parties, but the evidence, shows had no fixed, ascertained, or market value. It does not appear that Anderson, in accepting the stock at its face or par value, estimated or valued it as worth the amount of money it represented. The jury might have understood the court as deciding that the sale was to be treated as a cash sale, and that the stock was equivalent to so much money, which would entitle the plaintiff to \$4,000,—the amount

the jury found for the plaintiff. If this is what is intended by the charge, we do not concur; on the contrary, we think the court should have informed the jury that the sale was for \$54,000,—\$10,000 cash, \$44,000 in stock,—and that, under the contract, the plaintiff would be entitled to any excess over \$50,000 in cash that the land brought. If the money and stock would not realize over \$50,000, the plaintiff could not recover in this action, but any amount the money and stock together realized over and above that amount, he was entitled to a verdict for the excess.

The exception taken to the second paragraph of the charge, which instructs the jury that "the evidence seems to prove that Anderson agreed upon \$54,000 as the price of the land, and to receiving \$44,000 of the price in stock of the paper company without previously informing Avis & Co., and without their concurrence and consent," we think, should be sustained. That portion of the charge tends not only to mislead the jury, but to withdraw from it the consideration of all the evidence bearing on the points to which it is directed. It is misleading, because the court tells them "that the evidence seems to prove" the facts stated in that portion of the charge. What the evidence proves should have been left alone to the jury for it to determine.

In this connection, we cannot overlook the two letters of Avis & Co., both bearing date May 19, 1892,—one addressed to Anderson, Richmond, Va., and the other addressed to Miller, Anderson's agent, at Scranton, Md.,—which the defendant claims were not only a notice of the negotiations pending between Anderson, Segal, and Armstrong for the sale and purchase of the land, and the proposition made by Segal and Armstrong, but an undoubted admission of the fact. It may be said that the legal construction of all papers are questions that belong to the court. That is true; but where papers contain facts, and they are introduced as evidence of the facts they contain, what they prove is a question for the jury. It seems to us that the facts contained in those letters, or the inference that the jury might have drawn from them, has been overlooked by the court in its charge in the hurry of the trial, for they certainly tend to show the notice of the negotiations pending five or six days before the sale. Without expressing any opinion as to the facts found in this part of the charge, we are clearly of opinion, as this was a strongly contested and disputed point, that it should have been left to the jury without any intimation from the court of its opinion, unless the charge stated that the jury was not bound by the opinion of the court as to the question of fact. The mere expression of an opinion upon the part of the court, when so qualified, is not error; but the omission to do so, as in this case, we hold to be error. *Tracy v. Swartwout*, 10 Pet. 80; *Transportation Line v. Hope*, 95 U. S. 297.

In this case the court states in three different paragraphs of the charge that "the evidence seems to prove" certain facts stated in the charge, which, we think, is such an expression of opinion upon the part of the court as to what were the facts proved, without any qualification whatever, which would tend to mislead the jury.

For the reasons assigned, we are of opinion to sustain the exception to this part of the charge.

Exception is taken also to that part of the charge that tends to instruct the jury that the sale "was made without the concurrence and consent of Avis & Co." Whether this was true or not, we do not think that Avis & Co. held such a legal relation to the property as to require Anderson to secure their concurrence and consent before he could sell it. It does not appear that Anderson ever surrendered the control of his property to Avis & Co. He repeatedly refused to sign a paper appointing them as agents to sell the property. We think the letters filed show this, and in this connection we refer to the letter of Miller to Avis & Co., dated December 26, 1891, in which he expressly declines to place "this estate in the hands of an agent to sell." Whatever rights Avis & Co. had were purely permissive, not amounting even to an option. They took chances in their efforts to sell the land. If they succeeded, they were entitled to the excess over \$50,000 the land sold for, and nothing if the sale did not produce an excess. They did not sell it, but we assume that Segal and Armstrong derived their information from them, which induced Segal to write the letter of April 22, 1892, which opened up negotiations with Anderson, and not with Avis & Co. If this is true, they are the only parties that Avis & Co. ever brought to Anderson. Correspondence as to other parties took place, but it resulted in nothing. Why Segal should open up correspondence in regard to the property with Anderson if Avis & Co. "brought it to his attention" does not appear. If Avis informed Segal that he was the agent to sell, and satisfied him of that fact, he naturally would have commenced negotiations with him, instead of Anderson. There would have been no occasion for him to write to Anderson, informing him, as he did in his letter of April 22, 1892, that "a property of his had been brought to his attention." He would have most likely informed him, if there was any occasion to write him, who it was brought the property to his attention. But he did not, and the inference is that Avis did not tell him that he was the agent, for the reason that he could not truthfully say that he was the agent of Anderson to sell the property. The correspondence shows that Avis & Co. were fully apprised of the various stages of the negotiation, as their letter of May 19, 1892, to Anderson discloses, when they stated they "would accept \$2,500 in cash, and \$2,500 in the stock of the company, the par value of \$100 per share, to be paid when the sale is made." It is a significant fact that they did not, in express terms, claim in that letter that they were the agents of Anderson; but, in stating their claim for compensation, they predicate it upon the assumption that they were the agents, when, as we have seen, it nowhere appears that Anderson ever surrendered the control of his land to them. The letter of Miller, Anderson's agent, of December 26, 1891, addressed to Avis & Co., to which we before referred, is too plain to admit of any doubt. There is nothing in the case to show that the terms expressed in it were ever modified. It says:

"We do not wish to place this large estate in the hands of an agent to sell; but should you find a purchaser before we sell, who will comply with our terms, paying us \$50,000, we will agree to your having what you may obtain in excess of the purchase price just named as your compensation."

Mark the language employed. He refused not only to place the estate in the hands of an agent, but carefully fixed the amount the land must be sold for, and notified Avis & Co. that whoever sells the land must look to the excess of that price for their compensation. There is nothing in the case that justifies us in concluding that the terms expressed in the letter were so modified as to make Avis & Co. the agent of Anderson; on the contrary, the evidence tends to show that Anderson always refused to make them his agent.

We therefore conclude that the last exception to the charge must also be sustained.

It is unnecessary to notice the point raised that the action is premature.

The offer upon the part of Anderson to settle the matter upon the basis of paying the plaintiff \$1,000, is a matter that requires no attention in this court, as, if the parties agree to such an adjustment, it should be entered in the circuit court.

For the reasons assigned, the judgment of the circuit court is reversed, and the cause is remanded to the court below, with directions to award a new trial, to be proceeded with in conformity to this opinion.

THOM v. PITTARD.

(Circuit Court of Appeals, Fourth Circuit. May 22, 1894.)

No. 71.

1. RECEIVERS—RIGHT TO APPEAL.

A receiver of a railroad, appointed in a suit to foreclose a mortgage thereon, against whom a decree is rendered for damages for injuries to an employé from negligence in operating the road, is entitled to an appeal therefrom, when allowed by the court.

2. APPEAL—EXCEPTION TO INSTRUCTIONS.

A general exception to a charge, containing nothing special to any particular part of it, cannot be considered.

3. MASTER AND SERVANT—NEGLIGENCE OF FELLOW SERVANTS.

Railroad section men and laborers on repair trains, employed by the same master for the same general purpose of keeping the roadbed and track in order, and working for the same general result, are fellow servants; and the employer is not liable for injuries to one, caused by negligence of another, even though such other has control over either gang of men.

Appeal from the Circuit Court of the United States for the Eastern District of Virginia.

This was a suit by Newgass & Co. against the Atlantic & Danville Railroad Company to foreclose a mortgage on its road, in which Alfred P. Thom was appointed receiver. John B. Pittard filed a petition claiming damages for personal injuries received while in the employ of the receiver. The circuit court rendered a decree for petitioner. The receiver appealed.

Richard Walke, for appellant.

Robert M. Hughes, for appellee.

Before GOFF and SIMONTON, Circuit Judges, and JACKSON, District Judge.

GOFF, Circuit Judge. While the Atlantic & Danville Railroad Company was being operated by Alfred P. Thom (a receiver appointed by the circuit court of the United States for the eastern district of Virginia, in the suit of Newgass & Co. against said railroad company for the foreclosure of a mortgage on the same), John B. Pittard was employed by those representing said receiver as a laborer on a material or work train, which was used on the line of the railway, in hauling dirt, rock, and other material from one point to another, and in repairing the roadbed, and was injured by the collision of said train with a hand car which was then being used by a section boss in transporting his employes to their place of work. The collision took place on the morning of July 21, 1891, on the line of said railway between Boydton and Gill's station. The work train was under the charge of the foreman of the work gang, Jefferson Jones, who also acted as conductor, and the hand car was directed by Section Master King. The work train was moving east; the hand car, west,—and, as they were on the same track, they did not succeed in passing each other. It was the duty of Jones to assign the men to their work; to see to the hauling of dirt, rock, and material; and to keep his train out of the way of the regular trains on the road. He received his instructions direct from the supervisor of the road, who passed over the line daily, and gave him and the other foremen such special instructions as he deemed proper,—such as the condition of affairs required. It was the duty of King to keep his section of the road, about six miles in length, clear of obstructions, and to keep the track in good and safe condition, the bridges in repair, and to see that the men under him (five in number) properly discharged their duties. He had no control over any of the men on the work train, nor had Jones any authority over the section master and his gang. The work train in charge of Jones had the right of way over the road, in preference to the hand car controlled by King, which was only used in going to and returning from work at different points on the road, and when so used it was usually protected by a flagman. At the time of the collision the flagman was not on duty, but, a short time before, Jones had stopped the car, and, not hearing the work train, had proceeded on his way. In rounding a curve in a cut, the collision occurred, and two of the flat cars of the work train were thrown from the track, Pittard, who was on one of them, sustaining a fracture of the clavicle, with internal injuries, painful and dangerous in their nature, preventing him from engaging in work for some weeks. On the 18th day of May, 1892, he filed his petition, with the permission of the court in the chancery cause mentioned, against said receiver, who appeared, and answered it. In his petition he claimed that his injuries were on account of the carelessness, improper conduct, and neglect of the receiver and his agents; and he prayed for an

inquiry as to the amount of his damages, and that the same might be decreed to him. The receiver answered, denying the allegations of the petition; claiming that there was no liability on him on account of said accident and injuries, because the same had been caused by the acts of petitioner's fellow servants, the liability to which was imposed upon and assumed by petitioner when he accepted employment from and under said receiver. On the 20th day of April, 1893, the court directed that a jury be impaneled and sworn to try the issue joined on the petition and answer. On the 12th day of December, 1893, the jury heard the evidence, argument of counsel, and the charge of the court, and, after considering the case, assessed the damages at \$2,500. For this sum, with interest thereon, and costs, the court entered a decree in favor of petitioner against the receiver, and adjudged the same to be one of the liabilities of the receiver, mentioned in the decree of sale, which had been theretofore entered. The receiver petitioned for an appeal from said decree, which was duly granted by the judge holding the circuit court. During the trial three several bills of exceptions were granted, at the request of the receiver, to the action of the court, in the giving of instructions asked for by the petitioner, and in refusing instructions prayed for by the receiver. The same are relied upon in the assignment of errors, and now come before this court for review.

But first we have a motion to dismiss the appeal as improvidently awarded; made by the appellee; the reason assigned being that the receiver is in fact not a party to the suit, and therefore not entitled to an appeal. It is claimed that the receiver, the officer and servant of the court, subject to its orders, without personal interest in the funds under his control, which are to be accounted for as the court may direct, is not to be permitted to refuse to obey the court's orders by appealing from its decrees. But we must remember that the receiver represents all the parties in interest. He stands for the railroad company as well as for all persons having claims against it, and he speaks for the bondholders as well as for the stockholders. While he has no personal interest in the proceedings, except to faithfully and impartially discharge his duties, it is incumbent upon him to carefully protect the property confided to his keeping; to report to the court all matters connected therewith, relating to its safekeeping and proper disposition; to obtain permission to sue for debts due, and leave to pay claims owing by him. Permission given the receiver to sue, or direction to him to defend, should take with it the right to follow the suit to the court of last resort. It is a plausible argument that counsel for appellee submits, but it is, we think, without real merit. While it is true that any of the defendants to said chancery suit, interested in the property of the railroad company, and in its proper distribution, as also the plaintiffs, could have appealed from said decree in favor of appellee, proper steps therefor having been taken, still it does not follow that the receiver, who was in fact the defendant, so far as the issues raised by the petition were concerned, could not also appeal. In suits like the one in which this petition was filed, after the ap-

pointment of a receiver, there is no one but him to defend the issues presented by such pleadings; and it is, at least, not best to have it understood that the court's directions to him to defend extend only to the court that hears the trial. But, so far as this proceeding is concerned, there is no difficulty, as the court below, whose officer the receiver was, gave him permission to prosecute still further the questions raised by the petition, when it approved his application for, and granted, this appeal. We consider the question settled in favor of the right of the receiver to appeal in cases like the one we now examine by the decision of the supreme court of the United States in *Farlow v. Kelly*, 108 U. S. 288, 2 Sup. Ct. 555, and 131 U. S., *append. cci*. It is insisted for the appellee that the right of the receiver, as an abstract question of law, to appeal, was not involved in that case. But it must be admitted that the supreme court held that in cases where an appeal had been granted the appellate court would entertain the same, and treat the order granting it as permission to appeal. While it is true that under the provisions of section 692, Rev. St. U. S., it follows, of course, that an appeal will be granted if prayed for by one who has the right to it, still it is the duty of the trial court to determine if the party asking for the appeal stands in such relation to the case that he can demand it. If he does not occupy such position the court can properly refuse the appeal. If the appeal is refused in a case where it properly lies, mandamus will issue. *Ex parte Jordan*, 94 U. S. 248.

The appellant claims that the court below erred in its charge to the jury, to the giving of which he at the time excepted. The bill of exceptions relative thereto recites as follows, after setting forth in full the charge:

"And thereupon the defendant, by his counsel, objected to the giving of the said charge, which objection the court overruled, and gave the said charge, to which ruling of the court, overruling the said objection, and granting the said charge, the defendant, by his counsel, excepted, and prayed that this, his bill of exceptions, might be signed, sealed, and made a part of the record in this cause, and the same is accordingly done."

This is a very general exception, containing nothing special to any particular part of the charge. It does not comply with the form nor the spirit of the practice, as established by the supreme court, and it is in conflict with rule 10 of this court, which is as follows:

"The judges of the circuit and district courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court."

A general exception to the charge as a whole is not proper, and bills of exceptions so drawn should not be allowed. The court below was entitled to a full specification of the objection; and its attention should have been particularly called to those portions of the charge deemed objectionable, so that correction could then have been made, had the court thought it proper so to do. We must therefore decline to consider this bill of exceptions, and the assignments of

error based thereon. *Insurance Co. v. Raddin*, 120 U. S. 183, 7 Sup. Ct. 500; *Mining Syndicate v. Fraser*, 130 U. S. 611, 9 Sup. Ct. 665; *Anthony v. Railroad Co.*, 132 U. S. 172, 10 Sup. Ct. 53; *Block v. Darling*, 140 U. S. 234, 11 Sup. Ct. 832; *Burton v. Ferry Co.*, 114 U. S. 474, 5 Sup. Ct. 960; *Railroad Co. v. Varnell*, 98 U. S. 479; *Van Gunden v. Coal & Iron Co.*, 8 U. S. App. 229, 248, 3 C. C. A. 294, 52 Fed. 838.

The appellee contends that the appellant cannot avail himself in this court of the bill of exceptions taken to the ruling of the court below, refusing to give the three instructions asked for by the receiver, for the reason that but one bill of exceptions was taken relative thereto, from which it appears that the receiver, by his counsel, moved the court to give the jury the following instructions:

"No. 1. If the jury believe from the evidence that the petitioners were workmen or employes on the railroad, and at the time of the accident were, in the course of their employment, being carried by a material or work train of the Atlantic & Danville Railway Company, engaged in doing work on the railroad from Jeffress station eastwardly toward Gill's station, and that said work train was in charge of a conductor or foreman acting under the orders of the supervisor of the western division of the road, and who received his orders from the said supervisor in regard to the work on the road, and had been working under the instructions of said supervisor near Gill's station on said road, and that the accident was caused by the said material or work train coming into collision, a short distance east of Boynton, with a hand car of the company, in charge of a section master, with workmen or laborers under him, going westwardly, and in the opposite direction from that of the said work train, and that the duty of this section master was to keep in order and repair, with the workmen under him, about six miles of the road at or near Boynton, and if they believe from the evidence that the accident occurred from negligence on the part of the conductor or of the engineer of the said material or work train, then the court instructs the jury that the said petitioners were injured by the negligence of persons standing in the relation towards them of coemployes of the receiver of said company, whose negligence was a risk incident to the plaintiffs' or petitioners' employment, and the said company, or the receiver thereof, is not liable for such negligence, and they must find for the defendant, Alfred P. Thom, the receiver of said company.

"No. 2. If the jury believe from the evidence that the petitioners were workmen or employes on the railroad, and at the time of the accident were, in the course of their employment, being carried by a material or work train of the Atlantic & Danville Railway Company, engaged in doing work on the railroad from Jeffress station eastwardly towards Gill's station, and that said work train was in charge of a conductor or foreman acting under the orders of the supervisor of the western division of the road, and who received his orders from the said supervisor in regard to the work on the road, and had been working under the instructions of said supervisor near Gill's station on said road, and that the accident was caused by the said material or work train coming into collision, a short distance east of Boynton, with a hand car of the company, in charge of a section master, with workmen or laborers under him, going westwardly, and in the opposite direction from that of the said work train, and that the duty of this section master was to keep in order and repair, with the workmen under him, about six miles of the road at or near Boynton, and if they believe from the evidence that the accident occurred from negligence on the part of the section master in charge of the said hand car, then the court instructs the jury that the said petitioners were injured by the negligence of a person standing in the relation towards them of co-employe of the receiver of said company, whose negligence was a risk incident to the plaintiffs' or petitioners' employment, and the said company, or the receiver thereof, is not liable for such negligence, and they must find for the defendant, Alfred P. Thom, the receiver of said company.

"No. 3. The court instructs the jury, in reference to any question of negligence on the part of the conductor of the work train, that speed is not in itself negligence, and that the conductor was under no obligation to run his train at a slow or moderate speed from any expectation of meeting or coming into collision with the hand car."

"And thereupon the said petitioner, by his counsel, objected to the granting of each one of the said instructions, which objection the court sustained, and refused to give the said instructions, or either of them, to which said rulings of the court the defendant, by his counsel, excepted, and prayed that this his bill of exceptions might be signed, sealed, and made a part of the record in this cause, and the same is accordingly done," which said instructions, it is claimed by appellee, were presented as a single request, and that, as the court was certainly justified in refusing the third, it was proper for it to reject them all. U. S. v. Hough, 103 U. S. 71; Insurance Co. v. Smith, 124 U. S. 405, 8 Sup. Ct. 534. But we do not find that the rule here cited is applicable to the present case, as it appears from the bill of exceptions that the petitioner, "by his counsel, objected to the granting of each one of said instructions, which objection the court sustained, and refused to give said instructions, or either of them, to which said rulings of the court the defendant excepted," etc. Hence, it appears that the instructions so offered and rejected were not considered by counsel, nor treated by the court, as a single request.

Did the court err in refusing to give the said instructions, or either of them? On the questions raised by them, there has been great diversity of opinion. Authorities now differ, and recent cases conflict. Were all the men engaged on the work train fellow servants, in the sense in which those words are used in the decisions, of all those engaged on the hand car? We must closely scrutinize the testimony submitted to the jury before we can properly answer this question, for the facts alone must determine it. Some conductors and some supervisors or section masters may, in one sense, represent the master, and become vice principals, while other conductors and supervisors or section masters will always remain fellow servants of those employed with them. One may, in the discharge of his duties, have departmental powers, while another, of the same official name or grade, may be restricted to a small section, with no power to regulate the movement of trains, and no control over others beyond his immediate locality.

Foreman Jones and his men were engaged on the work train, in hauling sand, dirt, and material, part of which was used in repairing the road bed and track. Section Master King and his men were employed in keeping the same road bed and track in order, using for that purpose a portion of the load of the work train. The laborers on the train, as well as those on the hand car, were employed by the same master, paid from the same fund, and were engaged in a common work. The work train was used on but a few miles of the road, and the foreman of the gang, who acted as conductor of the train, was himself a laborer with his men. It is, we think, a misconception of the use of the words used in some of the decisions

on this question to designate the foreman, Jones, as "a vice principal," or the section master, King, as "the head of a department," or either of them as the "representative of the railroad," for whose negligence the company or receiver is responsible. These petty section officials surely do not occupy such official positions—do not have such authority and control—as will justify the courts in holding that they represent the railroad company, its alter ego, whose negligence is its negligence. To so hold would be to ignore the long-established rule relative to the employers' exemption from responsibility for injuries to their servants on account of the negligence of their fellow servants. Jones was not even a "conductor," in the sense in which that word is employed in the opinion of the supreme court in the case of *Railroad Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. 184, relied upon by the appellee. His train ran under no schedule, and to no station. It had no time for starting, and no special place to go to. Its duty was to do the work before mentioned, at such time as best it could; watching chances, utilizing time, and keeping out of the way of other trains. The men on this work train knew the character of work done by the men on the hand car, were aware that it traveled on the track, and that their train had the right of way over the track, in preference to said hand car. The men on these different cars were in the habit of passing each other, while going to and from work, and when engaged at it, the hand car being lifted from the track in order that the work train might pass. The section master was in control of only five men, and had no authority over any of the men on the work train, nor did the foreman of the latter have power over any of the men on the hand car. We have no difficulty in reaching the conclusion that these men were fellow servants, and the fact that in each gang there was one who exercised control over the others, does not affect the liability of the receiver, as their common employer, for injuries to one, the result of an accident caused by the carelessness of another. They were engaged to perform certain duties, the nature of which they were advised of, and the dangers attending the same they were aware of, and they, each and all, took the risk incident thereto, connected with their daily labor, and the going to and from the same; and it follows that, if one of them suffers by exposure to such risks, he cannot recover compensation from his employer. *Randall v. Railroad Co.*, 109 U. S. 479, 483, 3 Sup. Ct. 322; *Farwell v. Railroad Co.*, 4 Metc. (Mass.) 49; *Brown v. Maxwell*, 6 Hill, 592; *Railroad Co. v. Ross*, 112 U. S. 377, 382, 5 Sup. Ct. 184; *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914.

It is also shown by the authorities just cited, and by a long list of decisions referred to in them, that the employer will be exempt, though the servant whose negligence caused the injury was not of the same grade in the service as the party injured, nor engaged in the same kind of work. If the servants are employed for the same general purpose by the same master, and are working to produce the same result, as are section men and laborers on repair trains, then they are fellow servants, and the master is not liable for injuries to one caused by the negligence of another.

The appellee insists that it was the duty of the receiver to provide suitable machinery and a safe place for the laborers to work at; to furnish a safe track, free from obstructions, for the repair train to run on; and to provide proper rules and regulations for the protection of his workmen against the dangers incident to the performance of their duties. This may be conceded, but will not avail the cause of the appellee, as we see this case. It is not shown that any material defect existed in any of the machinery used by the workmen, and the safe place at which to work must be considered in connection with the dangers attending the labor, to do which the servant was employed. There is no testimony tending to show that the track was not in good order. It is shown that the trains passed over it safely, daily, and that it had no connection with the accident, unless, as is claimed, the hand car was an obstruction on the track, for which the receiver was responsible. But, if the two gangs of workmen were fellow servants, then the receiver was not responsible for such obstruction; and if the hand car was on the track when it should not have been, and if it caused the accident by the negligence of its foreman, then, under the facts of this case, the conclusion is not justified that the receiver failed in his duty to his employés. It has been repeatedly held that the negligent use by one employé of proper and safe machinery provided by the master will not be held a breach of the latter's duty to other employés. If appellee's contention in this respect can be sustained, then all negligent use of machinery, and all collisions of trains caused by negligence, must be held to be a breach of the master's duty to provide a safe place to work. We can find no authority to sustain this position, and we see no reason for it. The fact is that all men working on railroad trains, being aware, as they are, that many other trains must pass over the same track that their train does, assume the risk when they take employment of the negligence of those operating such other trains.

For the reasons mentioned, we think the circuit court should have given the first and second instructions asked for by the defendant below. We do not find it necessary to the proper disposition of this case to consider other questions referred to in the record, and argued by counsel. The decree appealed from will be reversed, the verdict of the jury set aside, and a new trial had.

THOM v. SMITH. SAME v. WALTERS' ADM'R. SAME v. PEACE'S ADM'R.

(Circuit Court of Appeals, Fourth Circuit. May 22, 1894.)

Nos. 72, 73, and 74.

Appeal from the Circuit Court of the United States for the Eastern District of Virginia.

This was a suit by Newgass & Co. against the Atlantic & Danville Railroad Company to foreclose a mortgage on its road, in which Alfred P. Thom was appointed receiver. Gilbert Smith filed a petition, claiming damages for personal injuries received while in the employ of the receiver, and R.

E. Cogbill, as administrator of E. S. Walters, and also as administrator of Nelson Peace, filed petitions claiming damages for the death of said Walters and said Peace, respectively. The circuit court rendered decrees for the petitioners, severally. The receiver appealed.

Richard Walke, for appellant.

Robert M. Hughes, for appellees.

Before GOFF and SIMONTON, Circuit Judges, and JACKSON, District Judge.

GOFF, Circuit Judge. These cases are separate appeals from three decrees rendered by the circuit court of the United States for the eastern district of Virginia, at Norfolk, in the chancery cause of Newgass & Co. against the Atlantic & Danville Railroad Company. The appellant in each case was the receiver of the said railroad company, operating the same under the appointment of, and by the direction of, such court; and the appellee Gilbert Smith was a laborer employed on said railway by the receiver. E. S. Walters was employed by the receiver, and was acting as flagman on a material or work train used by such receiver along the line of railway mentioned, and Nelson Peace was a laborer on such train. On the 21st day of July, 1891, a collision took place on said railroad between such work train and a hand car, in which the said E. S. Walters and Nelson Peace were killed. R. E. Cogbill was appointed administrator of the estate of the decedent E. S. Walters, and also of the estate of the decedent Nelson Peace, and as such administrator he is appellee in two of these cases. With the permission of the court, the said Gilbert Smith and R. E. Cogbill, as administrator of E. S. Walters and Nelson Peace, filed petitions in said chancery cause, claiming damages against the receiver,—Smith, because of injuries received by him; and the administrator, because of the death of Walters and Peace. It was charged in the petitions that the collision was on account of the carelessness and improper conduct of the receiver, and petitioners prayed for inquiries as to such damages, respectively, and that the same, when ascertained, might be decreed them. The receiver answered, denying any liability, and the issues made were tried to a jury; it being agreed that one jury might hear and determine the three cases, which was done, and verdicts returned in favor of the petitioners, on which the three several decrees complained of were rendered against the receiver. From these decrees, appeals were prayed for by the receiver, and allowed by the court. The testimony and the bills of exceptions are the same as in the case of *Thom v. Pittard*, 62 Fed. 232, decided by this court during the present term thereof. Reference is made to that case, as the facts are the same; and by agreement, as shown in the record, the evidence in all the cases was submitted to the same jury, and the one bill of exceptions was to be applicable to all. The assignments of error are the same, all of which are fully examined and disposed of in the opinion of the court, filed in said last-mentioned case. For reasons therein stated, it follows that the decree complained of in each of these separate appeals must be reversed, the verdicts rendered in favor of the respective petitioners must be set aside, and new trials of said issues had, and it is so ordered.

CITY OF NEW ORLEANS v. ABBAGNATO.

(Circuit Court of Appeals, Fifth Circuit. May 29, 1894.)

No. 227.

1. MUNICIPAL CORPORATIONS—LIABILITY FOR DAMAGES FOR DEATH BY ACT OF MOB.

In the absence of a statute giving a remedy, a city is not liable for damages for the taking of human life by a mob, although its officers may have been negligent in preserving the public peace.

2. SAME—CIV. CODE LA. ART. 2315.

Civ. Code La. art. 2315, declaring that "every act whatever of man that causes damage to another obliges him by whose fault it happened to repair

it," which, by subsequent amendments, is made applicable to cases of death through negligence, and is extended to damages sustained therefrom by surviving relatives of the deceased, when construed with regard to the principles of the system of laws of which it is part, gives no remedy for such damages against a municipal corporation for negligence in preserving the public peace, resulting in loss of life by acts of a mob.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

This was an action by the widow of Antonio Abbagnato against the city of New Orleans for damages for the death of said Abbagnato. At the trial, the jury found for plaintiff, and judgment for plaintiff was entered on the verdict. Defendant brought error.

This action was commenced in the circuit court by petition as follows:

"The petition of Widow Giovanni Abbagnato, an alien, and subject of the king of Italy, domiciliated at Palermo, Sicily, kingdom of Italy, herein appearing and prosecuting in her own behalf and in her own right, respectfully represents that the city of New Orleans, a municipal corporation, chartered and organized under the laws of the state of Louisiana, and a citizen thereof, and domiciliated within the jurisdiction of this honorable court, is justly and truly indebted unto your petitioner in ——— capacity, hereinabove recited, in the full sum of thirty thousand dollars (\$30,000) damages, for the following right and cause of action, which arose on March 14, 1891, in the city of New Orleans, state of Louisiana, and within the jurisdiction of this honorable court, viz.: That Antonio Abbagnato (Bagnetto), an alien, and a subject by birth of the king of Italy, domiciliated at Palermo, Sicily, kingdom of Italy, emigrated therefrom to the United States on or about the year 1884, and that he came to Louisiana, and established his residence in the city of New Orleans. That, while here residing, he was arrested on or about October, 1890, together with twenty or more other persons, on a charge of murder of the chief of police of said city, D. C. Hennessy, which had recently occurred; was prosecuted with said other persons for said crime before the criminal district court for the parish of Orleans, when, after a protracted trial, lasting ——— days, and after evidence adduced, argument of counsel, and charge of the presiding judge, the jury, on March 13, 1891, returned into court and pronounced a verdict of acquittal as to said Antonio Abbagnato (Bagnetto), and five other coaccused, and of mistrial as to three other coaccused. That, immediately after said trial and verdict, the said Antonio Abbagnato (Bagnetto), and the other coaccused, including such who had been acquitted and such as to whom there had been a mistrial, were, pending further legal proceedings, reincarcerated in the parish prison, which is the property of the city of New Orleans. That during the evening and night of March 13, 1891, and immediately after the verdict of the jury had become known throughout said city of New Orleans, a conspiracy was formed by a certain body of men, whose names are now to your petitioner unknown, with the avowed purpose of setting at naught the findings of said jury and the legal and regular methods of criminal trial and justice, as established and recognized in civilized communities throughout the world, and which had heretofore prevailed in the present community, and with the sole purpose of taking the law unto their own hands, and of summarily, and without the formalities of trial and criminal justice, destroying, by wholesale slaughter, the lives of the said Antonio Abbagnato (Bagnetto) and the other twenty or more coaccused, then incarcerated with him in said parish prison. That, in pursuance of said conspiracy and plan of action, a mass meeting was called for the next day at 10 a. m., at Clay statue, on the main street of the town, at about three-quarters of a mile from the parish prison, which said assembly was extensively advertised in the morning papers of the city, as appears by a copy of the New Orleans Times-Democrat of said date, which is annexed hereto for reference. That, in accordance with said call, a crowd congregated at said place, where several inflammatory speeches were made, as appears from the issue of the New Orleans Daily States, a newspaper of said city, dated March 14, 1891, which is hereto annexed for reference. That, after their passions had been so aroused, the mob

moved in a body from the place of meeting to the parish prison, which they surrounded on all of its four sides, cutting off all avenues of escape therefrom. That some forty or fifty men out of said mob, whose names are now to your petitioner unknown, armed with Winchester rifles, shotguns, revolvers, axes, crowbars, and other weapons, and who preceded the main body of the rioters, secured admission inside the walls of the prison by breaking open a rear door of the building, meeting with little or no resistance from the police authorities and other persons who should have been charged with the duty of protecting the avenues to said parish jail. That the said armed body of men took absolute possession of the building, and during 15 or 20 minutes, with said Winchester rifles, shotguns, pistols, axes, and other deadly weapons, began an immediate search, hunt, and slaughter of their intended victims, who were unarmed, and were mercilessly shot down and killed, including the said Antonio Abbagnato (Bagnetto) and ten other prisoners, two of whom, viz. the said Antonio Abbagnato (Bagnetto) and Emanuele Polizzi (Manuel Polizzi), were taken out of the jail into the street, and were hanged by the neck to trees or lamp posts, fronting said prison, and then riddled with bullets until death; the names of all the victims and the particulars of their horrible deaths being fully detailed in the issue of the New Orleans Picayune of March 15, 1891, which is hereunto annexed for reference. Now, your petitioner avers that, throughout all of the stages of this bloody drama, no proper steps, means, or action were taken by the authorities having charge of the police, peace, and good order of the city to suppress and defeat said conspiracy, although the mayor of the city of New Orleans, the chief of police, and their employés, agents, deputies, and subordinates knew (as your petitioner is informed and verily believes), since the evening of March 13, 1891, or since early morning on March 14, 1891, that such a conspiracy existed, what its sanguinary programme was, and the time, place, and mode of executing the same. Your petitioner further avers that if the mayor of the city of New Orleans, Joseph A. Shakespeare, and if the acting chief of police, John Journee, on hearing the rumors circulating throughout the city, or on reading in the morning papers of the proposed mass meeting, and understanding its dreadful purpose, had taken the proper steps of police and protection of said parish prison, as well as of the persons and lives of the prisoners which the law of the state had confided to the honor and justice of the city, the said riotous assemblage would never have organized, or would not have proceeded down the streets, or taken possession of the prison building, and the wholesale slaughter would have been prevented. That said parish prison is a massive brick building, with iron doors and railings, easy to defend by a handful of disciplined policemen, for a time at least, and until the militia of the state or other police assistance from the outside could have been summoned. That from Clay statue to the parish prison, a distance of almost a mile, no police officers or other guardians of the peace were stationed, with instructions to arrest the march of the mob coming down the street towards the prison. That the police force at the prison proper, in front of the building itself, and in the interior thereof, was insufficient in number, was not armed, or imperfectly armed, was demoralized, was improperly led and commanded, and readily yielded to the fury of the mob. That the safety of the prisoners might have been provided for by the prompt removal to another prison, police jail, or other place of refuge. That the mayor of the city was not that morning at his office at the city hall, and could not be found, and that he gave no instructions to the police authorities to disperse the mob, and to prevent the consummation of its bloodthirsty designs. That the mayor of New Orleans is the chief magistrate and executive officer of the city; is at the head of the police force, by virtue of his office; and is charged with the duty of seeing the laws executed, and of preserving the peace and good order within its limits. That the chief of police, next in command to the mayor, was equally derelict in his duties, and was, together with the said mayor and all of the employés, agents, deputies, and subordinates, guilty of gross carelessness and culpable negligence. That, by reason of said gross carelessness and culpable negligence on the part of the said mayor of the city of New Orleans and the chief of police and the other subordinate officers of the police force, by reason of their inaction, supineness, and failure to perform the duties of their respective offices in regard to the

proper police of the city, as hereinabove fully recited, and by reason of other acts of omission and guilty indifference, to be shown at the trial of the case, the said city of New Orleans has become liable in damages to your petitioner in her hereinafter mentioned capacity, by reason of a right and cause of action which had accrued to the said Antonio Abbagnato (Bagnetto), and which has survived his death, and become vested in your petitioner, as aforesaid. Your petitioner further represents that the said damages consist of the following items, viz.:

(1) The well-grounded terror and anxiety of mind under which the victim labored prior to the onslaught, which are fully worth the sum of five thousand dollars.....	\$ 5,000
(2) The great mental and bodily pain, suffering, and agony which preceded or accompanied his death, which are fully worth the sum of five thousand dollars.....	5,000
(3) The earnings and savings which the said decedent, who was a healthy, strong, and able-bodied young man, might have realized during his natural life, had not the same been prematurely cut off, which are fully worth the sum of ten thousand dollars.....	10,000
(4) Exemplary and punitive damages for the failure of the city of New Orleans to secure and guaranty to said deceased the protection of life and person to which he was entitled under the federal and state constitutions and general laws of the country, as well as under the special provisions of the treaty entered into between the kingdom of Italy and the United States of America on February 26, 18—, and ratified at Washington on November 17, 1871, which are fully worth the sum of ten thousand dollars..	10,000
Total	\$30,000

"Your petitioner further represents that the said Antonio Abbagnato (Bagnetto) was her son, and that he was unmarried and had no children at the time of his death, and that, in default of such wife and children, your petitioner, as surviving mother, has acquired the right of action for the aforesaid damages which has survived the death of the said Antonio Abbagnato (Bagnetto). Wherefore your petitioner prays that the city of New Orleans, through Joseph A. Shakespeare, its mayor, be cited to appear and answer this petition, and that, after due proceedings had, there be judgment in favor of your petitioner in her aforesaid capacity, and against the said city of New Orleans, for the sum of thirty thousand (\$30,000) dollars, with legal interest from the date of the verdict of the jury and of the judgment of court, and for all costs of suit, and for all general and equitable relief needful herein."

Citation having issued, the city of New Orleans first appeared, and objected to the form of the citation, and, on that objection being overruled, filed a peremptory exception, as follows: "Now, into this honorable court comes the city of New Orleans, the defendant herein, who files this peremptory exception to the demand of the plaintiff herein, to wit: That municipal corporations of this state are not liable for any other damages done by mobs or riotous assemblages, except to damages done to property. Defendant prays that this exception be maintained, and the said plaintiff's petition dismissed." The exceptions being overruled, the city filed an answer, excepting to the jurisdiction of the court, alleging that the said Antonio Abbagnato was an American citizen of the state of Louisiana, legally naturalized, which exception was also overruled. Thereupon such proceedings were had that a jury was impaneled, the cause tried, and a verdict rendered against the city of New Orleans for the sum of \$5,000. Judgment was entered on the verdict, and the city of New Orleans brought the case to this court for review, assigning as error the one ground "that the court erred in overruling the exception herein filed, wherein defendant excepted to the plaintiff's petition, on the ground that municipal corporations of this state are not liable for any other damages done by mobs or riotous assemblages except for damages done to property."

E. A. O'Sullivan, for plaintiff in error.

Henry Chiappella, Sambola & Ducros, and A. H. Leonard, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge (after stating the facts). The treaty between the kingdom of Italy and the United States proclaimed November 23, 1871, guaranties to the citizens of either nation in the territory of the other "the most constant protection and security for their persons and property," and further provides that "they shall enjoy in this respect the same rights and privileges as are or shall be granted to the natives on their submitting themselves to the conditions imposed upon the natives." Treaty of 1871, art. 3 (17 Stat. 845). This treaty applies to this case only so far as to require that the rights of the plaintiff shall be adjudicated and determined exactly the same as if she were, and her deceased son had been, a native citizen of the United States.

The constitution of the state of Louisiana provides as follows:

"The citizens of the city of New Orleans or any political corporation which may be created within its limits shall have the right of appointing the several public officers necessary for the administration of the police of said city, and pursuant to the mode of election which shall be provided by the general assembly." Const. La. 1879, art. 253.

"The maintenance and support of persons confined in the parish of Orleans upon charges or conviction for criminal offenses shall be under the control of the city of New Orleans." Id. art. 147.

The charter of the city of New Orleans—

"Creates all the inhabitants of the parish of Orleans, as now bounded by * * *, as a body corporate, and establishes them as a political corporation by the name of the 'City of New Orleans,' with the following powers, and no more: It shall have a seal and may sue and be sued. * * * [Section 1.] The council shall have power, and it shall be their duty, to pass such ordinances, and to see to their faithful execution, as may be necessary and proper to preserve the peace and good order of the city; * * * to organize and provide an efficient police. * * * [Section 7.] The council shall also have power * * * to establish jails, houses of refuge and reformation and correction, and make regulations for their government, and to exercise a general police power in the city of New Orleans. [Section 8.] The mayor shall keep his office at the city hall; * * * shall see that the laws and ordinances within the limits of the city of New Orleans be properly executed; * * * shall be ex-officio justice and conservator of the peace. * * * [Section 19.]" Acts 1882, No. 20, p. 14.

The act of the legislature of Louisiana (passed in 1888) creating the police board of the city of New Orleans preserves to the mayor of the city of New Orleans the power, as the commander in chief of the police force, to issue such orders as may be necessary and proper for the preservation of the peace in the city of New Orleans, and in said act it was declared that:

"It is hereby made the duty of the police force at all times of the day and night, and the members of such force are thereunto empowered, to especially preserve the public peace, to prevent crimes, detect and arrest offenders, suppress riots, mobs and insurrections, disperse unlawful or dangerous assemblages which obstruct the free passage of public streets, sidewalks, squares and places, protect the rights of persons and property," etc. Acts 1888, No. 63, p. 64.

The city of New Orleans, by her pleadings, admits the gross negligence charged in the petition in the performance of the duties

devolving upon the municipality under the constitution and laws of the state above referred to, whereby Abbagnato lost his life at the hands of a mob while in the custody of the law; and the question presented in this case is whether, on such admission of facts, the city can be held liable in damages. It is well settled that at common law no civil action lies for injury to a person which results in his death. *Insurance Co. v. Brame*, 95 U. S. 754-756; *Dennick v. Railroad Co.*, 103 U. S. 11, 21; *The Harrisburg*, 119 U. S. 199-214, 7 Sup. Ct. 140. The rule is the same under the civil law, according to the decisions of the Louisiana supreme court. *Hubgh v. Railroad Co.*, 6 La. Ann. 495; *Hermann v. Railroad Co.*, 11 La. Ann. 5. In the absence of a statute giving a remedy, public or municipal corporations are under no liability to pay for the property of individuals destroyed by mobs or riotous assemblages. *Add. Torts*, 1305; *Dill. Mun. Corp.* § 959.

In the case of *State v. Mayor, etc., of New Orleans*, 109 U. S. 285, 3 Sup. Ct. 211, the supreme court of the United States held that the right to demand reimbursement from a municipal corporation for damages caused by a mob is not founded on contract. It is a statutory right, and may be given or taken away at pleasure. In the same case, Mr. Justice Bradley, concurring, said:

"I concur in the judgment of this case, on the special ground that remedies against municipal bodies for damages caused by mobs or other violators of law, unconnected with the municipal government, are purely matters of legislative policy, depending on positive law, which may at any time be repealed or modified, either before or after the damage has occurred, and the repeal of which causes the remedy to cease. In giving or withholding remedies of this kind, it is simply a question whether the public shall or shall not indemnify those who sustain losses from the unlawful acts or combinations of individuals; and whether it shall or shall not do so is a matter of legislative discretion, just as it is whether the public shall or shall not indemnify those who suffer losses at the hands of a public enemy, or from intestine commotions or rebellion."

If this be the rule with regard to the liability of municipal corporations for damages to property committed by mobs or riotous assemblages, a fortiori it must be the rule with regard to the liability of municipal corporations for damages resulting in the loss of life from the acts of mobs or riotous assemblages. The reason of the rule is obvious. Actions to recover from municipal corporations damages resulting from the acts of mobs and riotous assemblages are actions to hold such corporations liable in damages for a failure to preserve the public peace. The preservation of the public peace primarily devolves upon the sovereign. Under our system of government, the state is that sovereign. *U. S. v. Cruikshank*, 92 U. S. 542-553; *Western College v. City of Cleveland*, 12 Ohio St. 377. When, by the action of the state, a municipal corporation is charged with the preservation of the peace, and empowered to appoint police boards and other agencies to that end, the corporation pro tanto is charged with governmental functions in the public interest and for public purposes, and is entitled to the same immunity as the sovereign granting the power for negligence in preserving the public peace, unless such liability

is expressly declared by the sovereign. This proposition is so well recognized that not a well-considered, adjudicated case can be found in the books where, in the absence of an express statute, any municipality has been held liable for the neglect of its officers to preserve the peace. In the case of *Western College v. City of Cleveland*, supra, it was said:

"It is the duty of the state government to secure to the citizens of the state the peaceful enjoyment of their property and its protection from wrongful and violent acts. For the proper discharge of this duty, power is delegated in different modes. One of these is the establishment of municipal corporations. Powers and privileges are also conferred upon municipal corporations to be exercised for the benefit of the individuals of whom such corporations are composed, and, in connection with these powers and privileges, duties are sometimes specifically imposed. It is obvious that there is a distinction between those powers delegated to municipal corporations to preserve the peace and protect persons and property when they are to be exercised by legislation or the appointment of proper officers, and those powers and privileges which are to be exercised for the improvement of the property comprised within the limits of the corporation and its adaptation for the purposes of residence and business. As to the first, the municipal corporation represents the state; as to the second, the municipal corporation represents the pecuniary and proprietary interest of the individuals. As to the first, responsibility for acts done or omitted is governed by the same rule of responsibility which applies to like delegations of power; as to the second, the rules which govern the responsibility of individuals are properly applicable."

The exemption of municipalities from liability to suits for damages for the negligence of officers and agents in the execution of the governmental functions granted by the state, in the public interest, and in the absence of statutory liability, is recognized in Louisiana, as shown by the decisions of the supreme court of the state in *Egerton v. Third Municipality*, 1 La. Ann. 437; *Stewart v. City of New Orleans*, 9 La. Ann. 461; *Lewis v. New Orleans*, 12 La. Ann. 190; *Bennett v. New Orleans*, 14 La. Ann. 120; *Howe v. New Orleans*, 12 La. Ann. 482; *New Orleans, etc., R. Co. v. New Orleans*, 26 La. Ann. 478,—although *Johnson v. Municipality No. 1*, 5 La. Ann. 100, *Clague v. New Orleans*, 13 La. Ann. 275, and *Chase v. Mayor*, 9 La. 343, are apparently to the contrary. The Louisiana cases, as well as those of other states, are very ably reviewed, and the whole matter discussed, in a well-considered opinion of the learned judge of the eastern district of Louisiana in the case of *Gianfortone v. City of New Orleans* (recently decided) 61 Fed. 64. It follows, therefore, that in order to recover damages against the city of New Orleans for the taking of human life by a mob in said city, no matter what the negligence of the city officials may have been, there must be a statute of the state of Louisiana expressly or by necessary implication giving a remedy in such cases.

Section 2453 of the Revised Statutes of Louisiana reads as follows:

"The different municipal corporations in this state shall be liable for the damages done to property by mobs or riotous assemblages in their respective limits."

And article 2315, Rev. Civ. Code, as last amended, reads as follows:

"Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it. The right of this action shall survive in case of death in favor of the minor children and widow of the deceased or either of them, and in default of these in favor of the surviving father or mother, or either of them for the space of one year from the death. The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child or husband or wife as the case may be."

Article 2316, Id., reads as follows:

"Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill."

And article 2317:

"We are responsible not only for the damage caused by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody."

It is not seriously contended in this case that article 2453 of the Revised Statutes of the state warrants the maintenance of the present suit, or fixes any liability upon the city of New Orleans because of the death of Abbagnato at the hands of a mob, as recited in the petition. As we consider the statute and the fact of its existence on the statute book, it goes rather to deny the right to recover in this case than to support it, for it shows clearly that in the legislative mind the statute was necessary to fix liability upon municipal corporations for damages to property done by mobs; and the limitation of the right to recover damages to property only shows a clear legislative intent that beyond property, and for life or limb, municipal corporations should not be responsible. The entire right of the plaintiff in error to recover damages must then be based upon article 2315 and the subsequent articles of the Civil Code, above quoted. Article 2315, as originally adopted, was as follows:

"Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

It was under this article that the decision in *Hubgh v. Railroad Co.*, supra, was rendered, holding that an action for damages caused by the homicide of a free human being cannot be maintained. In regard to the article the court says:

"The provisions of this article, however general and comprehensive its terms may be, are found more than once recited in terms equally general and comprehensive in the laws of the 15th title of the 7th Partida. The article was inserted in the Code of 1809, at a time when the Spanish laws were in force. It was put and retained to this time in the Code, not for the purpose of making any change in the law, but because it was a principle which was in its proper place in a Code; a principle which would be equally recognized as a necessary conservative element of society, and equally obligatory, whether it was formally enacted in a Code or not. * * * Merlin, in giving his conclusions before the court of cassation, in the Case of Michel, Reynier et al., respecting the article 1382 of the Code Napoleon, which is identical with the article 2294 of our Code, says: 'The principle laid down in article 1382 is not new. It is drawn from the natural law; and, long before the Napoleon Code, the Roman laws had solemnly proclaimed it. Long before that Code, the French laws had recognized and assumed its existence.'"

We understand from this that the article of the Civil Code in question was not an innovation of the civil law, in force in the state, introducing new principles and establishing new duties and responsibilities which did not before exist. It is a part of a system of laws, and controlling only where, under general principles, it is applicable to the facts and liabilities of a particular case. We have shown that the article was not enforceable when the "act whatever of man" resulted in death, until the statute so declared, and this because of the intervention of other equally well-recognized principles of law. To make it applicable in case of death through negligence, the legislature of 1855 amended the article by adding thereto as follows:

"The right of this action shall survive in case of death in favor of the minor children and widow of the deceased or either of them, and in default of these in favor of the surviving father and mother or either of them for the space of one year from the death." Acts 1855, No. 223, p. 270.

As thus amended, the scope of the article was still too narrow to permit the recovery of other damages than such as the deceased himself would have had had he survived the injury (*Vredenburg v. Behan*, 33 La. Ann. 627); and therefore the article was again amended and re-enacted, adding thereto as follows:

"The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child or husband or wife as the case may be." Acts 1884, p. 94.

Neither the amendment of 1855 nor that of 1884 enlarges the scope of the article as to the persons who may be held liable for negligence. The amendments go no further than to provide for a limited survival of the action and an enlarged rule of damages. The article is applicable now to the same persons, and to no others, as before amendment; and if, before amendment, it could not be applied so as to hold a municipal corporation liable for damages resulting from the acts of mobs and riotous assemblages, it cannot be so applied now. Before this amendment, it declared well-known principles of the civil law, but not all of them, and it controlled in cases where the application of other well-known rules and principles did not deny the action or defeat recovery. As amended, it should have the same construction and be given the same force. Before the act of 1855, it was not contended, nor could it have been successfully contended, that the article was applicable as against a municipal corporation to recover damages to either person, life, or property resulting from the acts of mobs and riotous assemblages. For these reasons, we are clear that neither expressly nor by implication does it now give a remedy in damages against a municipal corporation for negligence in preserving the public peace resulting in the loss of life by the acts of a mob. As we find no law of the state of Louisiana giving a remedy in damages against a municipal corporation for the acts done by a mob resulting in the loss of human life, we are compelled to reverse the judgment of the court below.

In the exceedingly able and interesting brief, showing great in-

dustry and research, presented to this court by the learned counsel for the defendant in error, it is said:

"The question here presented is not a street fight or murder, without any premonition on the part of the city authorities, and without culpable neglect in the discharge of their duties; nor is it the case of a police force, in its attempt to quell an insurrection, being overpowered by a mob. But, on the contrary, we have the extraordinary spectacle of a mob organizing in a city of a quarter million inhabitants, to the knowledge of the authorities, and without any efforts to disperse them; marching down the streets for a distance of a mile, armed, and in broad daylight; taking possession of a city building, and killing its inmates, for an hour or more, and until their thirst for blood was satiated,—a deed unparalleled and unheard of in the history of the world."

Before entering judgment, we feel called to say that we exceedingly regret that the conclusions of the learned counsel on the law of the case as otherwise discussed in their brief are not as well founded as is their just indignation in considering the facts; and we think it proper, in view of the well-known facts attending the Italian lynching in the city of New Orleans in 1891, to reproduce part of what was so well said by the supreme court of the United States in *Ex parte Wall*, 107 U. S. 265-274, 2 Sup. Ct. 569, in regard to lynching:

"It is not a mere crime against the law; it is much more than that. It is the prostration of all law and government; a defiance of the laws; a resort to the methods of vengeance of those who recognize no law, no society, no government. Of all classes and professions, the lawyer is most sacredly bound to uphold the laws. He is their sworn servant; and for him, of all men in the world, to repudiate and override the laws, to trample them under foot, and to ignore the very bands of society, argues recreancy to his position and office, and sets a pernicious example to the insubordinate and dangerous elements of the body politic. It manifests a want of fidelity to the system of lawful government which he has sworn to uphold and preserve. Whatever excuse may ever exist for the execution of lynch law in savage or sparsely settled districts, in order to oppose the ruffian elements which the ordinary administration of law is powerless to control, it certainly has no excuse in a community where the laws are duly and regularly administered."

The judgment of the circuit court is reversed, and the case is remanded, with instructions to maintain the exception of non-liability, and dismiss the plaintiff's petition.

SUMMERFIELD v. NORTH BRITISH & MERCANTILE INS. CO.

(Circuit Court, W. D. Virginia. April 12, 1894.)

INSURANCE—CONDITIONS OF POLICY—APPRAISEMENT.

A policy of insurance against fire provided that, in the event of disagreement as to the amount of loss, it should be ascertained by appraisers stating separately sound value and damage, and that no action on the policy should be sustainable until after full compliance by the insured with all its requirements. *Held*, that on the company's refusal to submit to such appraisement except on terms imposing on the appraisers duties and powers not prescribed or provided for in the policy, such as the ascertainment of cost of excavations, value of walls, materials, or any portion saved of the building insured, as well as depreciation on account of age, use, neglect, and location, the insured could maintain an action for the loss.

In Assumpsit.

This was an action by Mrs. R. Summerfield against the North British & Mercantile Insurance Company on a policy of insurance against fire.

This is an action of assumpsit brought on a policy of fire insurance issued by the defendant company to the plaintiff. The contract of the defendant company is to insure the plaintiff against all direct loss or damage by fire, to an amount not exceeding \$2,500, on her certain property described in the policy. Of the amount of insurance covered by the policy, \$2,250 was on the plaintiff's brick and tin building, \$200 on steam, water, and gas fixtures, and electric bells, and \$50 on carpets, all contained in said building, which was situate in the city of Danville, Va. The plaintiff claims that the policy of insurance has accrued by reason of the burning of the insured building and the property contained therein. The policy contains a provision that in case of a loss by fire, in the event of disagreement as to the amount of loss, the same shall be ascertained by two competent and disinterested appraisers, the insured and the insurance company each selecting one, and that the two so chosen shall select a competent and disinterested umpire; that the appraisers shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and that the award in writing of any two of the three persons so chosen and selected shall determine the amount of such loss. The policy also further provides that no suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements. The parties to this suit have failed to agree as to the amount of damages to be paid to the plaintiff by the defendant company, and also have failed to agree as to the terms on which their disagreement shall be submitted to appraisers; and, by consent of the parties, the case is submitted to the court without a jury.

The defendant company has filed a special plea in bar, as follows: "And the said defendant company comes and says that the aforesaid plaintiff ought not to have and maintain this action against said defendant company because, it says, that in the policy and contract of insurance between the said plaintiff and said defendant company it was stipulated and agreed that, in the event of disagreement as to the amount of loss, in case of such loss, under said contract, the said loss should be ascertained, and the amount thereof determined and settled, by two competent and disinterested appraisers, the same to be selected by the said insured and the said company, each selecting one, and any difference between the two thus selected should be decided by a disinterested umpire; that said defendant did agree or require that such settlement should be made in accordance with its contract with the assured, but, in violation of its stipulation and agreement, the said insured refused to allow said appraisal and estimate to be made by said disinterested appraisers, which, under said contract, ought to have been done, and which was a legal condition precedent to the bringing of this suit, and this the said defendant company is ready to verify. Wherefore it prays judgment whether this court can or will take any further cognizance of the action aforesaid." This is the only plea filed in the case, and the case is submitted to the court on the pleadings and the written evidence comprised in the correspondence between the insured and the insurance company prior to the bringing of this suit, and the evidence of the plaintiff; the agreement between the parties by counsel being that "the defendant company defends this action on no other ground than that raised by the plea aforesaid."

The fire which caused the loss for the payment of which this action is brought occurred on March 7, 1893. Much of the correspondence dated soon after that date relates to proofs of loss, to required detailed statements of the cost of the property consumed by the fire, to inventories, schedules, etc. Some of the letters are addressed to, and were answered in the name of, the plaintiff; but she has testified that her husband attended to the business, and that she knew nothing of the correspondence personally. Later on, the correspondence was between the plaintiff's counsel and the resident secre-

tary, at Baltimore, of the defendant company, but still related to proofs of loss, etc., until June 14th, when the plaintiff's counsel addressed the following letter to the defendant company: "Danville, Va., June 14, 1893.

"Gentlemen: Insisting that Mrs. Summerfield has already furnished sufficient proofs of loss under her policy in your company, and that she is now entitled to have payment of her loss, and without waiving this position, and protesting against the delay and obstructions which are being interposed to an adjustment of her loss, but with the desire, as far as practicable, to meet every demand for information made upon her, we herewith inclose supplemental proofs of loss; also plans and specifications of the building burned. You already have the builder's estimate of the cost of construction. Also we inclose invoices of the steam heater and appurtenances, and invoices of carpets put on the floors, to the amount of \$1,352.83, in 1889. Mrs. Summerfield claims that she has sustained greater loss than her insurance on every item covered by your policy. If you dissent from this, we, as representing her, require that you at once make known to us your dissent, and that you at once arrange to settle the difference with her, and ascertain the amount of the loss by agreement with her, or by arbitration or appraisal."

This is the first suggestion or mention in the correspondence of an appraisal. In reply, the resident secretary of the insurance company, under date June 26th, says: "Your favor of the 14th and 19th inst., with inclosures, received. The papers purporting to be supplementary proofs are incomplete and unsatisfactory, as there is no appraisal to show what the other companies covered, except in the description of the other insurance, which accompanied this document. * * * Your suggestion regarding an appraisal of this loss will be acceptable to us under the terms and conditions of our policy, and we will hold ourselves in readiness to enter into the usual form of appraisal when the assured is prepared to carry out the conditions of our contract. I take for granted you will notify all the companies interested of your intention to appraise the loss and damages."

On the next day—June 27th—the plaintiff's counsel replied: "Your favor of June 26, 1893, to hand. We repudiate your objections to the proofs of loss in the case of Mrs. R. Summerfield. We do not desire any appraisal to determine the loss. It is manifestly double the amount of insurance, and we have furnished you ample proof to that effect."

The correspondence was further continued as follows:

June 30, 1893, from the defendant company's resident secretary to the plaintiff's counsel: "* * * In reply to yours of the 27th inst., beg to inform you that, whilst you may not desire an appraisal of the loss, we have the right, under our contract, to demand an appraisal, which we will certainly do should you hold the position you take, which I am led to believe by your letter of the 27th, in refusing to carry out the conditions of the policy. * * * You may as well understand now as later that we will insist upon the strict compliance of our contract, and I suggest that all negotiations be conducted in as pleasant a manner as possible under the circumstances."

July 1, 1893, from the plaintiff's counsel to the defendant company: "* * * Your favor to hand. By their contract of insurance the North British and Mercantile Insurance Company were required to adjust the amount of the loss in the matter of Mrs. R. Summerfield by agreement, and only in case of failure to agree (of course after honest endeavor to do so) had the company any right to demand appraisal. Four months since the fire have now elapsed, and you can judge whether any just effort has been made to settle this loss. Besides, no man needs to be told that this loss was largely in excess of the insurance. * * * So far as resorting to appraisal in this case to determine whether the loss exceeds the insurance, it would be as reasonable to call appraisal to determine whether or not a ten-dollar gold coin is worth five dollars."

July 5, 1893, defendant company's resident secretary to the plaintiff's counsel: "* * * In reply to yours of the 1st inst., I beg to state that, although it has been four months since the fire occurred, we were not in possession of any plans, specifications, or schedules of the equipment of the hotel, such as

was covered by our policy, until the middle of June, notwithstanding the assured had been requested to furnish the same more than two months ago, a short while after the receipt of the papers purporting to be proofs of the loss, bearing the date of March 27th, 1893. Objections were made to them very shortly afterwards. Not until the receipt of the papers purporting to be supplementary proofs of loss, together with the plans and specifications, were we in possession of any information whereby even an approximate estimate of loss could be made. You have no right to charge us with delaying action on this loss when it can be proven by letters that have passed between the assured, yourselves, and the company that the delay was caused by the assured not complying with the demands made upon her. Not being able to agree with you, as the legal representatives of the assured, as to the amount of loss and damage to the property covered by our policy, No. 1,406,305, I hereby demand that the loss and damage be appraised in accordance with the terms and conditions of said policy. I take this opportunity of notifying you that we have selected Mr. E. G. Porter, of Goldsboro, N. C., to act as appraiser for this company, and I will hold myself in readiness to sign the appraisement agreement as soon as I am notified that the assured is ready to comply with the terms and conditions of policy No. 1,406,305, North British and Mercantile Insurance Company of London and Edinburgh, issued at its Danville, Va., agency, to Mrs. R. Summerfield."

July 6, 1893, from the plaintiff's counsel to the defendant company's resident secretary: " * * * Insisting upon every position heretofore taken for Mrs. Summerfield, and denying that you are entitled to an appraisement, and without waiving any right or cause of complaint, or otherwise, to which she is entitled as regards her claim against the company you represent, by reason of what has been done in the matter, Mrs. Summerfield, if you desire it, will unite with you in appraisal. She and her representative are here, and in waiting for you and your referee."

July 10, 1893, from the defendant company's resident secretary to the plaintiff's counsel: " * * * Yours of 6th reached here during my absence; hence delay in answering. I have this day placed myself in communication with the appraiser named by me, to know when he could meet me in Danville. I will shortly advise you when to have your appraiser meet us."

The next letter, in chronological order, in the correspondence submitted to the court, is from the plaintiff's counsel, addressed to Messrs. P. Turner and W. O. Selden, at Baltimore, under date of August 4, 1893, and is as follows: "Gentlemen: We have prepared and inclose you herewith agreements for appraisal in the matter of Mrs. R. Summerfield, which we think meet the conditions of the companies you represent. We have signed them for Mrs. Summerfield, and will thank you to sign them and return one to us, and then arrange for your men to meet ours and advise us of the time. We can have our men here on any day."

Inclosed in this letter were two agreements for appraisal, the first of which was as follows:

"Appraisal Agreement.

"It is agreed by and between Mrs. R. Summerfield, of the first part, and the North British and Mercantile Insurance Company of London and Edinburgh, Sun Fire Office, London, and Royal Insurance Company of Liverpool, England, of the second part, that E. G. Porter, selected by said companies, and T. C. Oakley, selected by Mrs. R. Summerfield, shall make a careful appraisement, pursuant to the terms and conditions of policy No. 1,406,305 in the first-mentioned company, No. 4,518,160 in the second-mentioned company, and No. 4,756,231 in the company last mentioned, of the actual cash value, with proper deductions for depreciation, however caused, which actual cash value shall in no event exceed what it would cost the insured to replace the same with materials of like kind and quality, of the property of Mrs. R. Summerfield on the 7th day of March, 1893, which is more particularly described below; also, the actual loss or damage to said property by a fire which occurred on that day. Before entering on the duties assigned them, said Porter and Oakley shall appoint a third party, who shall act as umpire in matters of difference between them only, and the appraisement, when so made by them, or any two of them, shall determine the amount of loss or

damage to said property by said fire. But the companies entering into this appraisal shall not be held to have waived thereby any provision or condition of their respective policies, or any forfeiture thereof, nor shall the said Mrs. R. Summerfield be held to have waived or forfeited or lost any right or remedy that has accrued, or shall accrue, to her by reason of anything connected with said insurance, or done or omitted with reference thereto. The property to be appraised as aforesaid is her five-story brick and tin building described in said policies, and destroyed as aforesaid."

The second of these agreements for appraisal was the same as the first, except as to the names of the appraisers and as to the last paragraph, which was as follows: "The property to be appraised is the steam, water, and gas fixtures and electric bells described in said policies; and the assured shall do what the appraisers may require for exhibiting the same to them for appraisal." August 8, 1893, from P. Turner to plaintiff's counsel: "Gentlemen: Your favors of the 3d and 4th inst., addressed to Mr. Selden and myself, at hand. In the first place, let me say that we are perfectly willing to have a separate appraisal on the heating apparatus, fixtures, and electric bells, and hereby name Richard Swormstedt as our appraiser. In reference to the form of agreement you inclose, I beg to say that it does not bind any one to abide by the result of the appraisal, and is therefore valueless as far as attaining the end for which it is intended goes. There is, moreover, considerable wording which we see no use in, and which, therefore, we would not care to have in any blank signed by us. I have taken the trouble to purchase a blank which does not belong to any company in particular, and which usage has made common with us, and I herewith inclose it for your perusal. This blank clearly shows what wording applies to the building, and what to the personal property, and I think you will not longer delay the appraisal by refusing to sign it when you have read it over. We are perfectly willing to sign this form of blank, which meets all requirements, and await your advices."

The agreement for appraisal inclosed in this letter was as follows:

"Appraisal Agreement.

"It is hereby stipulated and agreed by and between Mrs. R. Summerfield, of the first part, and the North British and Mercantile Insurance Company of London and Edinburgh, Sun Fire Office of London, and Royal Insurance Company of Liverpool, England, of the second part, that E. G. Porter and T. C. Oakley shall make a careful appraisal, pursuant to the terms and conditions of policies Nos. 4,756,231, 1,406,305, issued by the said company, of the sound cash value of the property of Mrs. R. Summerfield on the 7th day of March, 1893, which is more particularly described below, as well as of the actual loss or damage thereto by a fire which occurred on that day; that, before entering upon the duties hereby assigned them, they shall appoint a third party, who shall act as umpire upon matters of difference only; and that said appraisal, when so made by them (or any two of them), in writing, shall be binding and conclusive upon both parties in interest as to the cash value of said property, as well as of the amount of loss and damage thereto, but that such appraisal does not in any respect waive any of the conditions of, or the proof of such loss and damage required by, the said policy of insurance. The property on which loss or damage is to be appraised is on her five-story brick and tin building, steam, water, and gas fixtures, and electric bells, all contained in the above-described building, situate on the north side of Main street, Danville, Virginia. And it is expressly understood and agreed, by and between the parties hereto, that said appraisers shall determine and decide the actual cost, at the present price of materials and labor, of a new building of same size, style, materials, and finish as the one so destroyed, or for repairing the building damaged by said fire; a proper deduction to be made by them for the cost of excavations, the value of the walls, materials, or any portion of said building saved, as well as for depreciation on account of age, use, neglect, and location, and for the difference (if any) between the value of a new or repaired building and the one insured and referred to in this submission. And it is furthermore expressly understood and agreed that, in appraising the damage to stock, machinery, or other property, the said ap-

praisers are to take into consideration the age, condition, and location, and also the cash value, of said property, or any portion thereof, previous to the fire, which may have been saved in a damaged condition, and, after appraising the cost of repairing or replacing said property, a proper deduction shall be made by them for the difference (if any) between the value of the said property when repaired or replaced, new, and the property so insured, and upon which this claim is made. And it is furthermore expressly understood and agreed that the assured must at once place the damaged property in as good condition as possible, assorting and arranging the same according to their kinds, respectively, separating the damaged from the undamaged, and fill out the schedule blank with a list of the articles upon which damage is claimed, showing the kind and quality of each, so that the appraisers may perform their duty with greater facility. The appraisers will then determine the actual cash value of each article, and place the damage on each at a definite sum per yard, pound, bushel, or gallon, etc., as the case may require, in their proper columns. Articles without apparent or known damage are to be considered uninjured, and not to be included in this schedule; and, if any such are entered herein, the appraisers will mark them 'Not damaged.' Goods damaged by removal should be specified separately."

August 9, 1893, from plaintiff's counsel to P. Turner: "Dear Sir: Your favor to hand. The agreements for submission sent you by us provide that the award of the appraisers, etc., shall fix the amount of the loss, and, moreover, the policies themselves, under which the agreements are made, and which are referred to and become a part of the agreements for submission, provide that the award fixing the loss shall be binding on the parties. These facts, either one without the concurrence of the other, made it unnecessary to state that the award should be binding on the parties, though, if you prefer, you can insert that provision in the form we sent you. We suppose the words you refer to as being unnecessary are those by which Mrs. Summerfield reserves to herself rights acquired and growing out of what has been heretofore done and omitted touching this insurance and loss. Of course, we must preserve those to her, and can't waive them, and that is all that the words referred to do. We think the forms we sent are strictly in accordance with the provisions of the policies, and fully protect all parties, and hope you will, if you still desire appraisal, sign them, and return a copy of each to us. Insert your man's name in the one for appraisal of the steam fixtures, etc."

August 15, 1893, from plaintiff's counsel to defendant company's resident secretary: "Dear Sir: Please advise us whether the North British and Mercantile Insurance Company will settle the claim of Mrs. R. Summerfield without suit or not?"

August 16, 1893, from defendant company's resident secretary to plaintiff's counsel: "Dear Sirs: Yours of the 15th to hand. In reply, beg to state that I submitted the usual form of appraisal agreement for your client's signature, which you objected to, and you in turn submitted one that did not, in my opinion, conform to the contract. Mr. Turner gave me the letter, addressed to us jointly, to read, as well as your form of agreement. He stated that he would send you another form of appraisal agreement, commonly used by insurance companies, which was worded to conform to the standard form of policy, as that submitted by you did not. Since that time I have not heard from him, nor from you, until the receipt of your letter dated August 15th. The direct question put by you, regarding payment of loss, as claimed of us, and suit, I cannot now answer, as demand has been made by us for appraisal of the loss in order to establish what the loss and damage was, which has not been satisfactorily proven; and not until I am notified that the assured declines to carry out the conditions of the policy of this company will I state what action this company will take. If Mr. Turner did not mail you the form of appraisal agreement referred to, I will as soon as your reply is received."

August 17, 1893, from plaintiff's counsel to the defendant company's resident secretary: "Dear Sir: Your favor to hand. It is needless to review the history of this case with the company you represent. Mrs. Summerfield has not, and does not, refuse to carry out any condition of the policy.

She has met them all to the letter, or tried to do so, and when it was objected that what she had done was not satisfactory, and the reasons indicated therefor, she has met that, even though she did not think the objections warranted. The conduct and delay of the company has greatly wronged her. She is now entitled to enforce her claim against the company, and will proceed to do so, unless she is advised that the company will not put her to that necessity. We will therefore be obliged to you to advise us frankly what to expect. Mr. Turner's letter making objections to the agreement we sent him was promptly replied to."

August 21, 1893, from the defendant company's resident secretary to the plaintiff's counsel: "Dear Sirs: Yours of the 17th inst. is to hand. In reply we beg to say that we have demanded an appraisal of the loss and damage to the property of Mrs. R. Summerfield which we insured, and submitted for signature of the assured the customary blank used in such cases, and the only one we use which conforms to our contract, and we are not willing to accept any modified form. When the said appraisal agreements are signed, and returned to either Mr. Turner or myself, the company's appraiser will be notified to proceed with said appraisal. It will be necessary for the assured to put the properties damaged in condition for appraisal."

August 23, 1893, from the plaintiff's counsel to the defendant company's resident secretary: "Dear Sir: Your favor of August 21 to hand late yesterday afternoon. You have been repeatedly assured, and are now again assured, that Mrs. Summerfield is, and will continue, willing and ready to unite with the company you represent in an appraisal of her property that was burned, according to the terms of the policy, reserving all rights that she has. The agreement we sent you signed for her provides for this, and, if in any point it fails, she is ready and desires to amend it so as to accomplish this. We now ask you to say frankly whether it is your purpose for the company you represent to deny liability for this loss, and resist its payment."

August 24, 1893, from the defendant company's resident secretary to the plaintiff's counsel: "Dear Sir: Yours of the 17th inst. is to hand. In reply beg to refer you to my letter of the 21st inst."

August 25, 1893, from the plaintiff's counsel to the defendant company's resident secretary: "Dear Sir: Your favor to hand, dated 24th August. You are again advised that Mrs. Summerfield is ready and willing to accord you appraisal, and enter into it with you upon the terms of the policy, reserving the rights accrued to her. If you will do this without requiring any modification of the terms of the policy, or any waiver by her of her rights now accrued, you are requested to produce your appraiser here at once, and she will be ready to proceed. You did not answer, as you were requested to do, if it was not the formed purpose of and for your company finally to deny all liability for this loss. If this be not so, we will thank you to deny it. The company has no legal or moral right to entertain such a purpose, and not avow it, and occasion the insured loss, expense, and delay by failure and refusal to do so."

August 25, 1893, from the same to the same: "Dear Sir: Replying further to your letter of yesterday, we ask that you will indicate what you mean to imply must be done by Mrs. Summerfield to put the property you wish appraised in position to be appraised? What do you think and mean to imply should be done to it? She will, of course, do anything in this regard that may be proper and necessary for her to do, but she thinks nothing is necessary, and hopes not to be asked to incur any unnecessary expense."

August 25, 1893, from plaintiff's counsel to P. Turner: "Dear Sir: Referring further to your favor of yesterday, but without entering into specifications, we say the form of agreement you wish us to sign is partisan. It adds to the requirements of the policy touching appraisal, and does not follow its language, which it ought to do to be impartial. It undertakes to define the duties, and shape what course the arbitrators must follow, when, as the judges selected for this duty, they ought to be left free to act under the terms of the policy, which is the contract for appraisal agreed on. We wish to be entirely reasonable and fair with you, and wish the same from you to us, and think the way to accomplish this is to meet on the terms of

the policy. It fully protects all parties, and is the contract between them. We desire to accord you fully what it provides for, reserving, of course, what it secures to us, and only that. We see no reason why you should hesitate to sign the agreement we sent you. It is free from the objections you named, but you were authorized to amend it in the particulars you thought objectionable; not, however, in that in which Mrs. Summerfield's rights were saved to her. The agreement you sent makes her waive these if signed by her without amendment. As to putting the property in condition to be appraised, what do you think needs to be done to it to accomplish this? Mrs. Summerfield will do whatever is necessary and proper to be done to it for that purpose. She thinks, however, that it needs nothing, and does not wish to be put to needless cost and expense."

August 26, 1893, from the defendant company's resident secretary to the plaintiff's counsel: "Dear Sirs: Yours of the 25th inst. to hand. Inclosed please find appraisal agreement to be signed by the assured, Mrs. R. Summerfield, and returned to us. Upon its receipt I will notify the company's appraiser to proceed with the appraisement." (The appraisal agreements inclosed in this letter were, in totidem verbis, the same as that sent inclosed in letter from P. Turner to plaintiff's counsel dated August 8th, and copied supra.)

August 29, 1893, from the same to the same: "Dear Sirs: In reply to your favor of the 25th inst., you request me to indicate what would be necessary for the assured to do to put the property in condition to be appraised. I would state that, in order that the appraisers may see the condition of the heating apparatus, water, and gas fixtures, it would be necessary for the assured to clear away the debris which covers them, in order that they may be properly examined, and the loss and damage ascertained. Until this is done, it would be impossible for any appraisers to pass upon the loss intelligently."

August 28, 1893, from the plaintiff's counsel to the defendant company's resident secretary: "Dear Sir: Your favor, with form of agreement for appraisal in the matter of Mrs. R. Summerfield, to hand. We are sorry you make it your ultimatum, and refuse to have appraisal in accordance with the terms of the policy. We must reject the terms it proposes. Wherein do you differ with the assured in her claim that her loss exceeds her insurance?"

August 29, 1893, from the defendant company's resident secretary to the plaintiff's counsel: "Dear Sirs: Yours of the 28th to hand and noted. In reply beg to state that the appraisal papers submitted for appraisement of the loss are in accordance with the terms and conditions of our contract. We have not refused to appraise the loss, nor do we refuse to appraise it in accordance with the terms and conditions of our policy. We contend that the appraisal blanks submitted are in accordance with the contract we issued Mrs. Summerfield, and we are not willing to accept any form of appraisal agreement that does not conform to its conditions, and will hold ourselves in readiness to appraise said loss under the conditions referred to. You ask wherein we differ with the assured in her claim. I will simply say that the loss as claimed of us, according to the papers submitted, is altogether an approximate one, there being no evidence given that the loss is what has been claimed, and, in order that the actual loss and damage may be ascertained, we have demanded an appraisement under the terms and conditions of our policy, and it is evident to us that you do not wish to carry out the conditions of the contract which you hold, by refusing to sign the customary form of appraisal agreement."

This is all of the correspondence, that is material to the issue, submitted to the court.

Peatross & Harriss, for plaintiff.

Berkley & Harrison, for defendant.

PAUL, District Judge (after stating the facts as above). The stipulation between the parties being that the defendant company defends the action on no other grounds than that raised by its

special plea, the sole question for the court to decide is that raised by said plea, namely, has the plaintiff the right to bring and maintain this action, there having been no appraisalment of the loss sustained by her for which she claims damages? This case resembles, in some of its features, the case of *Hamilton v. Liverpool, etc., Ins. Co.*, 136 U. S. 242, 10 Sup. Ct. 945, but there are material differences between the two. In the case mentioned, the supreme court held that "a condition in a policy of fire insurance that any difference arising between the parties as to the amount of loss or damage of the property insured shall be submitted, at the written request of either party, to the appraisal of competent and impartial persons, whose award shall be conclusive as to the amount of loss or damage only, and shall not determine the question of the liability of the insurance company; that the company shall have the right to take the whole, or any part, of the property at its appraised value; and that, until such appraisal and award, no loss shall be payable or action maintainable,—is valid; and if the company requests in writing that the loss or damage be submitted to appraisers in accordance with the conditions, and the assured refuses to do so unless the company will consent, in advance, to define the legal powers and duties of the appraisers, and, against the protest of the company, asserts and exercises the right to sell the property before the completion of an award, he can maintain no action upon the policy." In this case, unlike the one mentioned, there is no express condition in the policy of insurance that "until such appraisal and award no loss shall be payable or action maintainable," though there is a provision that "no suit or action on this policy, for the recovery of any claim, shall be maintainable in any court of law or equity, until after full compliance by the assured with all the foregoing requirements," one of which requirements is that, "in the event of disagreement as to the amount of loss, the same shall * * * be ascertained by two competent and disinterested appraisers;" and this, it is claimed by the defendant company, has the same effect as if there had been in the policy an express condition that, until an appraisal and award had been made, no action shall be maintainable for the recovery of any claim under the policy, or, in the language of the defendant company's special plea, that "said appraisal and estimate * * * under said contract * * * was a legal condition precedent to the bringing of this suit." Inasmuch as a stipulation in a contract making a condition precedent to the bringing of a suit upon such contract tends to oust the courts of their proper jurisdiction under our laws for deciding controversies between suitors, for which the courts are established, it may at least be a subject of grave inquiry whether such a condition is valid unless expressly stated in such contract, and not a mere inference to be drawn from the terms of the contract. As was said in *Hamilton v. Liverpool, etc., Ins. Co.*, *ubi supra*:

"Such a stipulation, not ousting the jurisdiction of the courts, but leaving the general liability to be judicially determined, and simply providing a reasonable method of estimating and ascertaining the amount of the loss, is

unquestionably valid according to the uniform current of authority in England and in this country."

But it cannot be contended that, in such a case as this, an appraisal of the loss is an absolute *sine qua non* to the bringing of a suit. If it were, all that an insurance company would have to do in order to avoid payment of a loss against which it had insured its patron would be to refuse to name an appraiser, or otherwise arbitrarily prevent an appraisal. A stipulation for an appraisal should probably have for its sole object the ascertainment of the amount of the loss in the event that the parties cannot agree between themselves as to the amount of the loss. Under such a stipulation, no appraisal becomes necessary, or is contemplated, until, after honest effort to do so, the parties cannot agree as to the amount of the loss. The correspondence in this case, which is the only evidence submitted to the court, discloses the following facts: Soon after the fire occurred which consumed the property for loss of which this suit is brought, the plaintiff notified the defendant company of said fire, and presented her claim for the loss she had sustained. The defendant company was not satisfied with the proofs of the loss, and demanded fuller proofs, inventories, schedules, and detailed statements. The plaintiff replied, and undertook to comply with these requirements, but still failed to satisfy the defendant company. Her letter in which she undertook to do this is dated April 25th, and on May 19th, after a delay of 24 days, the defendant company replied to it, requiring her to furnish information as to the value of the bricks, etc., which remained unconsumed after the fire. The plaintiff again undertook to comply with the requirements of the defendant company in a letter dated May 21st. Receiving no reply to this letter, she employed counsel, as is apparent from the correspondence, though not stated. Her counsel, it appears from the correspondence, commenced the correspondence with the defendant company by writing it a postal card, which appears to have been dated on the 29th of May, but this postal card is not among the correspondence submitted in evidence. On June 8th the defendant company, in reply to said postal card, wrote to the plaintiff's counsel, renewing the requirements for further proofs, etc. On June 14th the plaintiff's counsel replied to the defendant company, inclosing supplemental proofs, invoices, etc., and demanding that the defendant company at once arrange to settle the difference with the plaintiff, and ascertain the amount of the loss by agreement with her, or by arbitration or appraisal. As the matter of an appraisal of the loss is the most conspicuous feature in this case, it may be proper to note that this is the first suggestion or mention, anywhere in the correspondence, of an appraisal, and that it was made by the plaintiff, and not by the defendant company. The correspondence was continued at considerable length between the parties, both expressing a willingness and desire for an appraisal of the loss upon the terms of the policy. Each party proposed to the other an agreement for an appraisal, or, as it is called, a form of submission, between which there were material differences; and the contention between the parties in

regard to the forms of submission proposed by them, respectively, is the very root of the issue before the court. The form of submission proposed by the plaintiff provided that the appraisers "shall make a careful appraisalment, pursuant to the terms and conditions" of the policy, "of the actual cash value," etc., following the phraseology of the policy itself. The court is of opinion that the form of submission proposed by the defendant company was not in accordance with the provisions of the policy. It defines and imposes on the appraisers duties and powers not prescribed or provided for in the policy, such as the ascertainment of the cost of excavations, value of walls, materials, or any portion of said building saved, as well as depreciation on account of age, use, neglect, and location, and the difference in value, if any, between a new or repaired building and the one insured, and to deduct such values from the amount of the damage. And the defendant company refused to submit to an appraisalment except upon the terms of the form of submission proposed by it, whereby it placed itself in the attitude of the plaintiff Hamilton in the case of *Hamilton v. Liverpool, etc., Ins. Co.*, *ubi supra*; and under the authority of that decision, and the authorities therein cited, judgment must be entered in this case for the plaintiff. See, also, *Hamilton v. Home Ins. Co.*, 137 U. S. 370, 11 Sup. Ct. 133, and the authorities there cited.

FLEISCHMAN v. BOWSER et al.

(Circuit Court of Appeals, Fifth Circuit. May 15, 1894.)

No. 185.

1. ATTACHMENT—LEVY AND LIEN—RETURN.

In an action against copartners under the firm name of "Fee Bros. & Co.," a writ of attachment, obtained on the ground that defendants were about to dispose of their property with intent to defraud creditors, designated them by their individual names, but they were also described in the writ and the other proceedings by the firm name, and return was made of a levy upon "all the right, title, and interest of Fee Bros. & Co." in certain land. *Held* that, as the jurisdiction did not depend on the sufficiency of the return, and the firm name was not used as representing a distinct party, the attachment bound the title one of the copartners individually had in the land, and was not limited to the interest of the firm as a distinct entity.

2. SAME—FRAUDULENT CONVEYANCES—TRESPASS TO TRY TITLE.

In trespass to try title to land, brought by the purchaser thereof under an attachment, where defendants, claiming under a deed from the attachment debtor, acquired title pending the attachment, evidence that the deed was made to hinder, delay, and defraud creditors, such a deed being fraudulent and void under statutes of the state, raises a question for the jury as to its fraudulent character.

Error to the Circuit Court of the United States for the Northern District of Texas.

This case was instituted December 23, 1890, in the circuit court of the United States for the northern district of Texas, by Samuel Fleischman, plaintiff in error, against O. P. Bowser, Franklin Butler, and Byron Truell, defendants in error, to try title to a lot in the city of Dallas, state of Texas. Plaintiffs declared in the court below in the ordinary form of "trespass to try

title." Defendants pleaded not guilty, improvements in good faith, and in reconvention to establish title. The case was tried in the court below before the judge and jury, and resulted in a verdict and judgment for the defendants. The evidence adduced on the trial showed that Priscilla Fee, who died on the 1st day of December, 1886, had legal title to the lot in controversy at the time of her death; that Priscilla Fee left surviving her O. P. S. Fee, her husband, and C. E. Fee, George E. Fee, Frank P. Fee, and Flora A. Duffy, wife of William J. Duffy, her children, who were her only heirs at law; and that by various transfers and conveyances, duly recorded, among and between the heirs of Priscilla Fee, it resulted that on the 9th day of February, 1887, C. E. Fee, for the alleged consideration of \$4,000, paid by D. E. Fee, conveyed the said lot, by good and sufficient warranty deed, to D. E. Fee, which deed was duly filed for record on the 21st day of February, 1887. At the time of this conveyance to D. E. Fee, C. E. Fee was a member of the partnership of Fee Bros. & Co., composed of C. E. Fee, O. P. S. Fee, M. T. Fee, and George E. Fee, and the said firm of Fee Bros. & Co. was indebted in a large sum to the firm of Bohm Bros. & Co., a firm composed of Abraham Bohm, Joseph Bohm, and Samuel Fleischman. On May 6, 1887, the firm of Bohm Bros. & Co. instituted a suit in the district court of Dallas county, Tex., against Fee Bros. & Co., composed as above, to recover the sum of \$1,025, amount of certain promissory notes due and owing to the plaintiffs, and in said suit obtained an attachment, on the ground that the defendants were about to dispose of their property, in whole or in part, with intent to defraud their creditors. The attachment issued, and commanded the sheriff to attach forthwith so much of the property of C. E. Fee, O. P. S. Fee, M. T. Fee, and George E. Fee, composing the firm of Fee Bros. & Co., sufficient to make the sum of, etc. The sheriff made return of said attachment as follows:

"Came to hand May 6, 1887, at 2:10 p. m. Executed same day at 2:10 p. m., by levying upon all the right, title, and interest of Fee Bros. & Co. in and to the following described tract of land, to wit,"—describing the lot in controversy. On the 10th of October, 1887, the defendants, by attorneys, appeared in the state court, and for answer filed a general demurrer and a general denial.

D. E. Fee died in December, 1887, leaving surviving him Katie D. Fee, his wife, and Jessie D. Fee, Dart E. Fee, Fannie M. Fee, Kate D. Fee, and Annie S. Fee, minors, his children, who were his only heirs. On the 15th day of February, 1890, George E. Fee, attorney in fact for William J. Duffy and Flora A. Duffy, and Kate D. Fee, wife of D. E. Fee, deceased, for and in consideration of the sum of \$3,937.51, conveyed to Marie A. Flournoy all of the land in controversy, except seven-sixteenths, which seven-sixteenths belonged to the minor heirs of D. E. Fee, which deed was duly filed for record March 7, 1890. On the 7th day of May, 1890, Katie D. Fee, as guardian of the aforesaid minor children of D. E. Fee, conveyed the interest of said minors, to wit, seven-sixteenths in the property in controversy, to Mrs. Marie A. Flournoy, and, by admission in the record, it appears that Katie D. Fee had duly qualified as guardian of her said children, and that, by virtue of the orders and decrees of the county court of Dallas county, Tex., she had full authority, as guardian, to convey the interest of said minors in the property in controversy, and that her conveyance thereof to Mrs. Marie A. Flournoy was duly approved by an order of said county court of Dallas county, Tex. On the 15th of May, 1890, Mrs. Marie A. Flournoy, for the recited consideration of \$8,500, sold and conveyed the land in controversy to said O. P. Bowser, which deed was duly recorded on the 20th day of June, 1890. On the 29th of May, 1890, the district court of Dallas county, Tex., in the suit of Bohm Bros. & Co. v. Fee Bros. & Co., rendered judgment in favor of the plaintiffs, and against Fee Bros. & Co., C. E. Fee, O. P. S. Fee, and M. L. Fee, for the sum of \$1,541.47, with interest thereon from date at the rate of 8 per cent., and all costs of suit; and, in the same judgment, the court, after reciting the issuance of the attachment in the case, and that the same was levied upon certain lands of defendants described in the return, "ordered, adjudged, and decreed that the said attachment lien, as it existed on the 6th day of May, 1887, at 2:10 p. m. o'clock, upon the above-described tract of land, be, and the same is hereby, foreclosed, and that the clerk of the court do issue an order of sale, directed to the sheriff or any constable of Dallas coun-

ty, Tex., commanding him to sell the above-described tract of land under execution." On the 3d day of July, 1890, O. P. Bowser sold and conveyed one undivided half of said lot of ground, for the recited consideration of \$7,500, to Franklin Butler and Byron Truell, which deed was filed for record on the 20th day of October, 1890. On the 4th day of October, 1890, an order of sale was issued out of the district court of Dallas county on the judgment foreclosing the attachment lien. It was executed on the same day, by levying upon the property specified in the order, and thereafter, after due advertisement, the property in controversy was struck off and sold to Samuel Fleischman, plaintiff herein, to whom, on the 9th day of December, 1890, the sheriff executed proper conveyance. It thus appears that both the plaintiffs in error and the defendants in error trace their title to C. E. Fee, and that, with the exception of the conveyance from C. E. Fee to D. E. Fee, all the conveyances were executed pendente lite. Other conveyances and matters were shown on the trial, which it is not necessary to refer to, except that plaintiff introduced evidence tending to show that the deed from C. E. Fee to D. E. Fee, dated February 9, 1887, was made for the purpose of hindering, delaying, and defrauding the creditors of C. E. Fee.

On the close of the testimony, the plaintiff requested the trial judge to instruct the jury as follows: "If you find that, at the time the deed from C. E. Fee to D. E. Fee was executed, Bohm Bros. & Co. were existing creditors of C. E. Fee, or the firm of which he, the said C. E. Fee, was a member and partner, and you further find that the hindrance of creditors formed any part of the actual intent of said C. E. Fee in execution of said deed to D. E. Fee, then, it being admitted that said D. E. Fee paid no valuable consideration for said deed, but, if any consideration existed in the transaction, it was part payment of a pre-existing debt, you will consider said deed as fraudulent and void as to plaintiff." "You are instructed that, if you find from the testimony that the deed from C. E. Fee to D. E. Fee was without consideration, and you further find that Bohm Bros. & Co. were creditors of C. E. Fee, or of the firm of which C. E. Fee was a partner, at the time said deed was executed, then you will find that said deed is void as to the plaintiff, and did not pass any title to D. E. Fee, as against plaintiff."

The court refused to give either of the foregoing charges, but charged the jury as follows:

"In this case, the jury are instructed that the plaintiff's title to the land in controversy had its inception on May 6, 1887, by the levy of an attachment, in the case of Bohm Bros. & Co. v. Fee Bros. & Co., on all the right, title, and interest of Fee Bros. & Co. to said land.

"(2) In order for plaintiff to recover in this suit the land sued for, you must be satisfied from the evidence that the firm of Fee Bros. & Co. were the real and equitable owners thereof at the date of the levy of said attachment, on May 6, 1887, and that D. E. Fee, who took the deed to the land sued for from C. E. Fee in February, 1887, and O. P. Bowser, who took deed to the land sued for from Mrs. M. A. Flournoy on May 15, 1890, were neither of them innocent purchasers, for a valuable consideration, of said land. To constitute an innocent purchaser, they must have bought in ignorance of the fact that the land equitably belonged to Fee Bros. & Co. (if such was the fact), and have paid a valuable consideration for the land. The attachment in the case of Bohm Bros. & Co. v. Fee Bros. & Co., having been levied on May 6, 1887, on the property now sued for, at a time when the legal title was in D. E. Fee, did not operate as constructive notice of the title of said Fee Bros. & Co. (if any) to said property to defendants, or those under whom they claim. The attachment in said case was levied only on the property of Fee Bros. & Co., and was foreclosed as levied.

"(3) If the jury find from the evidence that the firm of Fee Bros. & Co. were on the 6th day of May, 1887, the real and equitable owners of the property sued for in this case, and that the defendants and D. E. Fee, at the date of their respective purchases, were aware of that fact, then you will find for plaintiff the land in controversy.

"(4) If, however, you are satisfied from the evidence that the firm of Fee Bros. & Co. were not the equitable owners of the land sued for when it was attached May 6, 1887, as aforesaid, then you will find for the defendants.

"(5) Defendants deraign title under D. E. Fee, in whom the legal title to the

land in controversy was when the attachment above referred to was levied, on May 6, 1887. Said Fee was not a party to the suit of Bohm Bros. & Co. v. Fee Bros. & Co., out of which said attachment issued. If you find under the testimony that he, D. E. Fee, or O. P. Bowser, or the other defendants, purchased the land from their immediate vendor under the belief that such vendor was the legal and equitable owner thereof, and were ignorant of the equitable title (if any) of Fee Bros. & Co. and of plaintiff to said land at the date of such purchase, and that he had a fair and full consideration for said land, by crediting a pre-existing indebtedness, or in money and negotiable note, or money, then you will find for O. P. Bowser, if he is thus protected, and, if not, then for the other defendants, if they are so protected."

The plaintiff duly excepted to the refusals of the judge to charge as requested, and also to the charge as given, particularly the second and fifth paragraphs thereof.

J. C. Kearly and McCormick & Spence, for plaintiff in error.

Coombes & Gano and Harris & Knight, for defendants in error.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge (after stating the facts). There are many adjudged cases which hold that it is essential to the validity of a levy upon an attachment, and of the title derived through it, that the return should state the property attached to be the property of the defendant. These cases either go upon the principle that it is the return of the officer, and not the actual attachment of property belonging to the defendant, which gives the court jurisdiction and constitutes the foundation of the subsequent proceedings, or upon the ground that a proceeding by attachment is a statutory proceeding in derogation of the common law, summary in character and harsh in its operation, and therefore to be strictly construed. There are also many adjudged cases to the effect that the validity of the levy upon an attachment, and of the title derived through it, are unaffected by the failure of the returning officer to state the property attached to be the property of the defendant. The reason given for some of these decisions is that the return is made by an officer placed under great responsibility by the law which defines his duties, and he pledges to the public, under the solemnity of an oath, his integrity and diligence, and consequently every reasonable intendment must be made in favor of the regularity of his official acts. There are still other cases to the effect that, where the sheriff returns an attachment levied on certain lands in the possession of a person not a party to the writ, it will be intended, in order to sustain the proceeding, that they were the property of the defendant, and levied on as such. It may still further be noticed that in some of the adjudged cases a distinction is made between attachments which are original, and auxiliary attachments, or those in aid of a suit already begun. In the former, the jurisdiction of the court depending upon the validity of the execution of the writ, presumptions are not admissible in favor of a levy or return. Wade, Attachment, § 145.

Robertson v. Kinkhead, 26 Wis. 560, shows a case where the writ of attachment, in the usual form, commanded the sheriff to attach so much of the lands, etc., of the defendants, William Sturgis and

Rowland Ellis, late copartners, etc. Upon this writ, the officer made return that, by virtue of the writ, he attached certain lands, describing them as the property of Rowland Ellis. The lands attached were, in fact and in truth, the property of William Sturgis, and not the property of Rowland Ellis, and the question presented to the supreme court of Wisconsin was whether the mistake of the officer, in respect of the true ownership of the lands, invalidated the attachment, so that it did not become a lien even upon the interest of Sturgis, the real owner. The court held:

"That the attachment was sufficient to bind the interest of Sturgis in the real estate, notwithstanding the mistake. He was one of the defendants in the attachment, and his property was seized by virtue of the process of the court against him. And, although the officer made a mistake in stating in the return that the property belonged to Ellis, yet this should not have destroyed the effect of the attachment in respect to Sturgis. Whatever interest he had in the lands was seized upon the writ. And the statement that the property was that of Rowland Ellis may be rejected as a mistake of the officer, or as being repugnant to the levy and more general description in the return, as was done in *Fullam v. Stearns*, 30 Vt. 444-457, and *Bacon v. Leonard*, 4 Pick. 277."

The supreme court of the United States holds that—

"The policy of the law does not require courts to scrutinize the proceedings of a judicial sale, with a view to defeat them. On the contrary, every reasonable intendment will be made in their favor, so as to secure, if it can be done consistently with the legal rules, the object they were intended to accomplish." *White v. Luning*, 93 U. S. 514-523; *Cox v. Hart*, 145 U. S. 376-387, 12 Sup. Ct. 962.

The return of the sheriff to the writ of attachment in the case entitled *Bohm Bros. & Co. v. Fee Bros. & Co.*, in the district court of Dallas county, Tex., is, "Came to hand May 6th, 1887, at 2:10 p. m. Executed the same day at 2:10 p. m., by levying upon all the right, title, and interest of Fee Bros. & Co. in and to,"—describing certain lands. The force and effect to be given this return presents the main and controlling issue in this case. The trial judge, in instructing the jury, proceeded on the theory that the levy of the attachment was upon the right, title, and interest of Fee Bros. & Co., and not upon any right, title, or interest that the individual Fees, defendants, or any of them, particularly C. E. Fee, had in the land attached. The plaintiff in error contends that the return, to wit, "Executed by levying upon all the right, title, and interest of Fee Bros. & Co. in and to," etc., is equivalent to, and should be held to mean, "executed by levying upon all the right, title, and interest of C. E. Fee, O. P. S. Fee, M. T. Fee, and George E. Fee, individually and collectively, in and to," etc., and therefore the trial judge erred in the first and fifth paragraphs of the charge given to the jury.

In the record and briefs in this case there appears to be some confusion as to who were the actual parties defendant in the attachment suit entitled *Bohm Bros. & Co. v. Fee Bros. & Co.*, in the district court of Dallas county, Tex. This confusion apparently arises from considering the partnership of Fee Bros. & Co. as a distinct person, capable of suing and being sued, and as the real defendant in the case mentioned; the names of the members of the partnership being given as a matter of description, merely, of the

party actually sued. In fact, the suit was brought and carried on against C. E. Fee, O. P. S. Fee, M. T. Fee, and George E. Fee, and all that is said or recited in the petition, affidavit, and attachment process in this suit, as to the partnership of Fee Bros. & Co., is either descriptive of the actual defendants, or of the cause of action, or is surplusage. The writ of attachment issued in the said case cannot be misconstrued as to the actual defendants therein mentioned. It runs: "We command you that you attach forthwith so much of the property of C. E. Fee, O. P. S. Fee, M. T. Fee, and Geo. E. Fee, composing," etc. The petition in the case of Bohm Bros. & Co. v. Fee Bros. & Co., in the district court of Dallas county, and the answer therein filed, as they appear in the record, show that the jurisdiction of the court did not depend upon the attachment proceedings, or in any wise upon the absence or nonresidence of the defendants; the grounds for the attachment being that the defendants were about to dispose of their property, in whole or in part, with intent to defraud their creditors. Considering that the jurisdiction of the district court of Dallas county, Tex., was not dependent on the sufficiency of the return in question, and that the words "Fee Bros. & Co.," "composing the firm of Fee Bros. & Co.," are used in the suit and attachment proceedings as descriptive of the actual defendants, taken collectively, and not in any wise as representing a distinct party, and, further, considering the natural import and meaning of the words of the return, and the trend of the authorities as given above, we are of the opinion that the return in question should be taken and construed as meaning that the attachment was levied upon all the right, title, and interest of the persons composing the firm of Fee Bros. & Co., to wit, C. E. Fee, O. P. S. Fee, M. T. Fee, and George E. Fee, the defendants in the suit. If the attachment was levied upon all the right, title, and interest of the individual Fees, composing the firm of Fee Bros. & Co., in and to the land in controversy, there can be no doubt that the attachment proceedings in the suit attached and impounded any title that C. E. Fee had in the land at the date of the levy. As we understand the charge of the court, the jury were instructed that in the attachment proceedings in the district court of Dallas county, under the return in question, only the interest of Fee Bros. & Co., as a distinct entity, apart from the individual members composing the firm, was attached and impounded, and that any title or interest that C. E. Fee individually had in and to the land in controversy was not attached. In this we cannot concur, and therefore we are constrained to hold that the first, second, and third assignments of error are well taken.

The fourth assignment of error is that the court erred in that part of the charge to the jury which is as follows: "The defendants deraign title under D. E. Fee, in whom the legal title to the land in controversy was when the attachment above referred to was levied, on May 6, 1887,"—because the plaintiff attacked said deed to D. E. Fee for fraud, and had introduced evidence tending to show that said deed was fraudulent and void as to creditors, and the question whether or not said deed was effective to convey any title

from C. E. Fee to D. E. Fee was a question for the jury. A part of the seventh assignment of error complains of the refusal of the judge to give the following instruction, to wit:

"You are further instructed that if you find from the testimony that the deed from C. E. Fee to D. E. Fee was without consideration, and you further find that Bohm Bros. & Co. were creditors of C. E. Fee, or of the firm of which C. E. Fee was a partner, at the time that said deed was executed, then you will find that the said deed is void as to plaintiff, and did not pass any title to D. E. Fee as against the plaintiff."

In *Thompson v. Baker*, 141 U. S. 648, 12 Sup. Ct. 89, the supreme court held that a conveyance by a debtor in Texas of his real estate there, made with intent to delay, hinder, or defraud his creditors, being void as to the latter, under the statutes of that state, a judgment sale and transfer of said property, in an action commenced by the levy of an attachment upon it as the property of the debtor, made after the fraudulent sale, should be upheld as against a bona fide purchaser from the fraudulent grantee, taking title after the levy of the attachment. As we have concluded that the attachment proceedings in the district court of Dallas county attached and impounded the title of C. E. Fee in the land in controversy, and as, on the trial in the court below, the conveyance of C. E. Fee to D. E. Fee on May 6, 1887, was attacked as null and void, because made to hinder, delay, and defraud creditors, and evidence tending to show that the said deed was fraudulent and void was adduced before the jury, and as all the defendants acquired title pending the attachment proceedings in the district court of Dallas county, it follows that the question as to the fraudulent character of the deed from C. E. Fee to D. E. Fee should have been submitted to the jury, with the particular instruction asked for by the plaintiff, referred to in the second clause of the seventh assignment of error.

The other questions raised by the assignments of error do not appear to be insisted upon, and need not be considered. The judgment of the circuit court is reversed, and the cause is remanded, with instructions to grant a new trial.

DUVAL et al. v. PULLMAN PALACE-CAR CO.¹

(Circuit Court of Appeals, Fifth Circuit. May 29, 1894.)

No. 180.

I. CARRIERS—PALACE-CAR COMPANIES—LIABILITIES TO PASSENGERS.

Plaintiffs, having tickets for passage over a railroad, purchased from a palace-car company a ticket for the drawing-room of one of its cars, part of a railroad train going to their destination. Before arriving there the train was turned back by the railroad officials, because of a washout on the road, and plaintiffs were ejected from the car by order of the conductor of the train. By contract between the palace-car company and the railroad company, the drawing-room car was operated and controlled by the railroad company. *Held*, that plaintiffs could not recover damages from the palace-car company as for breach of a contract to convey them to their destination, that company not being a common carrier of passengers for hire, and having made no contract to carry; its obligation being only

¹ Rehearing pending.

to accommodate them with the drawing-room in its car so long as the carrier would convey it.

2. SAME—EVIDENCE.

In an action for such damages, evidence as to the relations existing between defendant and the railroad company respecting the car, and that the railroad officials ordered it to be turned back and plaintiffs to be put out, was admissible, as it did not vary the written contract between plaintiffs and defendant.

In Error to the Circuit Court of the United States for the Western District of Texas.

These were two actions, one by Laura P. Duval, the other by Mary D. Maddox and her husband, against the Pullman Palace-Car Company, brought in a court of the state of Texas, and removed therefrom by defendant to the circuit court of the United States, and there consolidated. At the trial the court instructed the jury to find for defendant. Judgment for defendant was entered on the verdict. Plaintiffs brought error.

West & Cochran and John W. Maddox (Robert G. West, of counsel), for plaintiffs in error.

Percy Roberts, for defendant in error.

Before PARDEE, Circuit Judge, and TOULMIN, District Judge.

TOULMIN, District Judge. Laura P. Duval and Mary D. Maddox, joined by her husband, John W. Maddox, brought their separate suits against the Pullman Palace-Car Company in the district court of Travis county, Tex., and upon petition of defendant in error the cases were removed to the United States circuit court for the fifth circuit and western district of Texas, at Austin, where they were consolidated by agreement; and at the trial, upon a peremptory instruction from the court, the jury found for the defendant company, and judgment was entered accordingly. The two cases arose out of the same state of facts, which, briefly stated, are as follows:

Plaintiff Duval, on September 27, 1891, was in Denver, in a crippled and helpless condition, unable to walk, and suffering from an accident, and was then 75 years of age. Plaintiff Mary D. Maddox was her daughter, and was with her mother on the day named, and also had with her a little daughter just recovering from a spell of fever. The parties desired to return to their home, in Austin, Tex., but would not attempt the journey unless they could procure the drawing-room of one of defendant's sleeping cars, because of their suffering and helpless condition, and so informed defendant's agent at Denver, when and from whom they bought their ticket. On the day named the plaintiffs, together, bought a ticket from defendant's agent at Denver, paying \$20 therefor, which entitled them to the exclusive use of the drawing-room of defendant's car Ysadora, then attached to a train of the Union Pacific Railway Company en route to Ft. Worth, Tex., upon which train plaintiffs had purchased and held first-class tickets, entitling them to transportation by the railroad company from Denver, Colo., to Ft. Worth, Tex. On the ticket procured from the de-

fendant's agent were the following words: "Good for this date and car only when accompanied by first-class railroad ticket from Denver to Ft. Worth in the drawing-room of the car Ysadora,"—which ticket was stamped on the back with the date of September 27, 1891. The plaintiffs entered and were given possession of the drawing-room of said car by the defendant's conductor and porter in charge, and rode therein to Texline, when, at about 12 o'clock on the night of September 27th, they were required by defendant's said conductor and porter to get up and dress, and leave the said car, and find accommodation at a small hotel in Texline,—a small station in a sparsely-settled region of country. At this hotel they were unable to get a comfortable bed or food, and were unable to sleep during the night or the day following, during which time plaintiff Duval suffered much pain from her injuries. It was shown that the train was turned back at Texline by command of the Union Pacific Railroad officials, because of a washout at the Canadian river, about 100 miles further down the road, and that, in turning plaintiffs out of the drawing room, defendant's conductor and porter were acting under orders from the train conductor. On the night following, at about 12 o'clock, the next train from Denver arrived, and the passengers of the previous train were permitted to get on board; and as plaintiffs held a transfer check issued to them by defendant's conductor in charge of the car Ysadora, showing their right to complete their journey in the drawing-room of the defendant's car attached to the next train, they applied to defendant's conductor in charge of the car attached, and were told by him that his car had no drawing-room, and that he had but one berth unoccupied, which was an upper berth. In this car there was the gentlemen's smoking-room, with accommodations for a bed for one, and a comfortable double seat, unoccupied, save by the conductor and porter. This compartment was not tendered plaintiffs after notice to the conductor of their condition and claim, and they were compelled to enter the ordinary day coaches of the train, and ride therein from 12 o'clock of the night of September 28th until they reached the Canadian river, at 7 o'clock next morning. The defendant proved that in carrying on its business it had no motive power to haul its cars, but made contracts with the railroad companies, by which it attached its cars to the railroad trains, and having read in evidence the written contract between it and the different railroad companies owning the line of road extending from Denver via Texline to Ft. Worth, under and by virtue of which its cars were attached to the Union Pacific trains en route from Denver to Ft. Worth, proved that the defendant's sleeping or drawing-room car Ysadora was attached to the train of the said Union Pacific Railroad Company en route from Denver to Ft. Worth on the 27th of September, 1891, and that the car was turned back from Texline by order of the railroad officers, given to the train conductor, and by him to the conductor of the sleeping car. The defendant also proved by its district superintendent that under its contract with the railroad companies the latter controlled the defendant's cars, and its agents and servants in charge of them,

and that the railroad companies decided and directed how many and what sleeping cars should be attached to their trains.

This suit claims damages for a breach of contract. The complaint avers that the defendant was engaged 'in the business of carrying passengers, as a common carrier for hire, by means of railroad cars running between the cities of Denver, in the state of Colorado, and Ft. Worth, in the state of Texas; that the plaintiffs, on the 27th of September, 1891, engaged passage and purchased tickets over the line of railway traversed by defendant's cars, from Denver to Ft. Worth; that defendant entered into a contract to convey them over said line of road comfortably and securely. That defendant, in violation of its contract with plaintiffs, and in violation of their rights and privileges in the premises, refused to convey them beyond the town of Texline on said line of railroad between Denver and Ft. Worth, and did so under such circumstances as to entitle the plaintiffs not only to actual, but exemplary, damages. The proof shows that plaintiffs did not make any contract with the defendant to convey them from Denver to Ft. Worth, and it shows that the defendant was not engaged in the business of carrying passengers, as a common carrier for hire, between said cities. But it shows that plaintiffs, on the day named, purchased and held first-class tickets entitling them to transportation by the Union Pacific Railroad Company from Denver, Colo., to Ft. Worth, Tex., and that on the same day they procured from defendant a ticket good for that date and car in the drawing-room of defendant's car Ysadora, which was a part of the Union Pacific Railroad train going from Denver to Ft. Worth, on which plaintiffs were to be transported. It shows that the train was turned back at Texline, by command of the Union Pacific Railroad officials, because of a washout further down the road, and that it was under the orders of the train conductor that the plaintiffs were turned out of the car Ysadora, and against the objection or protest of the conductor of the car. The proof also shows that the defendant's said drawing-room or sleeping car was operated by, and was under the direction and control of, the Union Pacific Railroad Company. The plaintiffs objected to the evidence introduced to show that the defendant's drawing-room or sleeping cars used by the said railroad company were operated and controlled by the railroad company, and subject exclusively to its direction, and that this particular car was so operated and controlled, and also objected to the evidence that the railroad officials ordered the said car to be turned back, and the plaintiffs to be put out, at Texline. The trial court overruled plaintiffs' said objections, to which they excepted, and now, among other things, assign the same as error.

As we understand it, the purpose of the evidence objected to was to show the character and extent of the control of the movements and management of the defendant's car attached to the Union Pacific Railroad train, and operated by the railroad company. It did not in any way alter or vary the written contract in evidence, but, in substance and effect, was that the car Ysadora was controlled by the railroad company, in its operation and movements,

under the said contract. In other words, it was to show what were the true relations existing between the defendant and the railroad company respecting said car. We do not think the court erred in admitting this evidence.

The only other assignment of error we consider it necessary to notice is that presented on the court's peremptory instruction to the jury to return a verdict for the defendant. The allegations of the complaint were not sustained by the evidence. The defendant company is not liable as a carrier. It made no contract to carry. The plaintiffs had paid their fare to the railroad company, and were provided with first-class tickets entitling them to be carried from Denver to Ft. Worth by it. It was the duty of the railroad company to convey them over its line, and they were being carried by it. The defendant's sleeping car constituted a part of the carrier's train. The plaintiffs secured the privilege of riding in this car by paying an additional sum to the defendant. The obligation of the defendant, under its contract with the plaintiffs, was to accommodate them with the drawing-room in its car, constituting a part of the carrier's train, as long as the carrier would convey it. If the carrier refused to convey it beyond Texline, and turned the car back to Denver, these were not the acts of the defendant company, and they would form no basis for the complaint against it in this suit. *Railroad Co. v. Roy*, 102 U. S. 451.

Our opinion is that there was no error in the instruction given, and therefore none in the refusal to charge the jury as requested by the plaintiffs. Judgment is affirmed.

OAKES et al. v. GURNEY.

(Circuit Court, D. Massachusetts. May 29, 1894.)

No. 2,866.

1. PATENTS FOR INVENTIONS—INFRINGEMENT—CARRIAGE—TOP FORMS.

The Oakes patent, No. 378,457, for adjustable forms for setting and building carriage tops, claimed a form consisting of movable bases longitudinally adjustable on parallel sliding bars, and secured thereto by bolts passing through slots in the free ends of said bars, upwardly projecting standards, secured to said bases, and connected at their upper ends by connecting bars having angularly disposed grooves on their outer faces, and means for securing the carriage top rails to the base of the form. *Held* that, as this was the first form on which a carriage top could be constructed complete, and removed therefrom ready to be attached to the carriage body, the patent covers all devices attaining the same result in a substantially similar way; and hence this claim is infringed by the device described in the Quimby patent, No. 458,252, though in the latter the size of the machine is adjusted by different means, the grooves are on the inner faces of the connecting bars, and the carriage top sockets are secured to the form directly, instead of by means of the carriage rail, as in the Oakes patent.

2. SAME.

The same patent also claimed a combination of adjustable connecting bars and adjustable blocks, permitting adjustment of the form to receive different sorts of carriage top sockets, by changing the upper points of support; this being done as a consequence of supporting the sockets through the intermediary of the carriage top rail. *Held*, that this claim

also is infringed by the Quimby patent, No. 458,252, in which, the carriage top rail being abandoned as part of the supporting device, the necessary adjustment is secured by moving both the upper and lower points of support, although the connecting bars are fixed, the blocks being adjustable.

This was a suit by Judson E. Oakes and others against James W. Gurney for infringement of a patent.

William H. Clifford, for complainants.

James E. Maynadier, for defendant.

CARPENTER, District Judge. This is a bill to restrain an alleged infringement of the first and third claims of letters patent No. 378,457, issued February 28, 1888, to Cummins C. Oakes, for adjustable forms of setting and building carriage tops. The claims alleged to be infringed are as follows:

(1) An adjustable form for setting and building carriage tops, consisting of the movable bases longitudinally adjustable on parallel sliding bars, and secured thereto by bolts passing through slots in the free ends of said bars, upwardly projecting standards secured to said bases and connected at their upper ends by connecting bars having angularly disposed grooves on their outer faces, and means for securing the carriage top rails to the base of the form, substantially as shown and described.

(3) The adjustable connecting bars, each having a longitudinal slot running through its center, and adjustable blocks provided with a transverse groove across the outer face of each for receiving the carriage top sockets, secured to the connecting bars by bolts having thumb nuts passing through said slots, fastening the socket blocks at any desired angle and distance on the bars, substantially as shown, and for the purpose described.

The alleged infringing device is shown and described in letters patent No. 458,252, issued August 25, 1891, to Wilmot B. Quimby, for machine for trimming carriage tops. The defense is that the respondent does not infringe.

The device described in the patent is, so far as appears, the first form or machine on which a carriage top could be constructed substantially in every part, and removed therefrom ready to be attached to the body of the carriage. The patent must therefore be held to cover all devices which have the new function,—that is, all devices which reach the same result in a substantially similar way.

The respondent argues that the first claim is, by the terms of the patent, limited as follows:

First. The bases must be secured each to the bar of the other, after they are adjusted to the proper distance apart, "by bolts passing through slots in the free ends of said bars," or by some equivalent or known substitute. There is nothing at all resembling this in defendant's machine; for, even if the clutches, *a*, of one base, *B*, of defendant's machine, be taken as the equivalent of bar, *P*, *P*, or bar, *Q*, of the first claim, it is certain that neither base of defendant's machine is ever secured in any way to the bar of the other base.

Second. The angularly disposed grooves must be on the "outer faces" of the connecting bars of the first claim; but they are on the inner faces of these bars in defendant's machine.

Third. "Means for securing the carriage top rails" are essential in the first claim; but there is nothing at all resembling anything of the sort in defendant's machine.

On this point, I observe that, as it seems to me—First. The adjustment of the size of the machine, by causing the end frames to be

nearer or further apart, is the same in both devices, and is accomplished by similar and equivalent means. The process is simple, and is the same in both; the means are specifically different, but identical in operation. Secondly. The position of the grooves on the outer faces of the connecting bars does not enter into their function, and grooves on the inner faces are equivalent; the respondent does not even change the machine of the patent,—he simply reverses it. Thirdly. The carriage rail is secured in the patent solely in order to hold in place the carriage top sockets, which are attached to the rail in the device shown in the patent. In function, therefore, the rail is only an extension of the securing device of the patent. The means "for securing the carriage top rails" are really means for securing the carriage top sockets.

The interpretation for which the respondent contends, as to the third claim, is stated by him as follows:

The third claim of complainant's patent is for a combination of two elements: (1) Adjustable connecting bars; (2) adjustable blocks. The defendant's machine contains no adjustable connecting bar, but fixed connecting bars. The defendant's machine does contain adjustable blocks. It is clear, upon general principles, that the word "adjustable," as used in the first line of the third claim of the patent in suit, means that the bar itself is adjustable or movable in relation to other parts, for the fact that other parts are adjustable upon the bar would not make the bar itself adjustable. * * * The same principle of law and the same authority relied upon in discussing the first claim is therefore applicable to the third. Furthermore, the claim is void for lack of invention. Adjustment by means of a slot and screw bolt in the slot is old,—and such adjustment must be in the direction of the slot; and the court will take judicial notice of this. The double adjustment of the blocks is simply the use of well-known devices common in all workshops and familiar to all mechanics. The adjustment of the connecting bars is essential in complainant's machine solely because he uses the carriage top rail. But such adjustment is not desirable, and defendant's plan is far better; namely, to adjust the clamping block, *a*, towards and from the bars, instead of adjusting both ends of each bar towards and from the carriage top rails, as in complainant's machine.

This statement appears to me to furnish its own answer. The function of the combination, set out in the third claim, is the adjusting of the form so as to receive different sorts of carriage top sockets. This is effected in both devices by changing the relative situation of the points of attachment or support. The patentee changes the position of the upper points of support, and this he does as a consequence of the particular form of his machine, wherein the sockets are supported through the intermediary of the carriage top rail. The respondent, having abandoned the carriage top rail as part of the supporting device, is free to bring about the same change of relative position by moving both the upper and lower points of support. This seems to me to be, in substance, identical with the device of the patent.

There will be a decree in accordance with the prayer of the bill, and based on the first and third claims of the patent.

MARTIN & HILL CASH-CARRIER CO. v. MARTIN.

(Circuit Court, D. Massachusetts. May 28, 1894.)

No. 2,644.

1. PATENTS—ASSIGNMENT—ESTOPPEL.

The assignor of a patent is not estopped by his assignment from limiting its scope by reference to the prior state of the art; nor is he so estopped by having marked on articles made by him for the market the dates of the patent, and of all patents controlled by him for such devices, even if such marking amounts to a representation that the articles are covered by all the patents.

2. SAME—LIMITATION BY PRIOR STATE OF ART—INFRINGEMENT.

The Martin patent, No. 255,525, claiming, in an automatic cash-box system, the track, endless cord, cash box, and appliances described for attaching and automatically detaching said box, and a suitable motor, when construed with reference to prior structures, particularly that described in the English patent No. 377 of 1878, to Wirth, does not cover all machines having a box carried on a track, an endless cord operated by a motor, and devices for attaching and automatically detaching the box, but covers only the combination of track, car, cord, and motor, and the device for attaching and automatically detaching the car, and is therefore not infringed by the apparatus described in the Martin patent No. 399,150, which has a different device for making the attachment and automatic detachment.

This was a suit by the Martin & Hill Cash-Carrier Company against Joseph C. Martin for infringement of a patent.

M. B. Philipp, E. C. Gilman, and J. S. Rusk, for complainant.

Fish, Richardson & Storror and Herbert L. Harding, for defendant.

CARPENTER, District Judge. This is a bill in equity to restrain an alleged infringement of the first claim of letters patent No. 255,525, issued March 28, 1882, to the respondent, Joseph C. Martin, for automatic cash-box system. The respondent has assigned the patent to the complainant, and is thus estopped to deny the validity of the patent. The complainant here contends that he is also estopped from limiting the scope of the patent by reference to the prior state of the art. I shall not discuss this question further than to say that I cannot agree with the argument of the complainant, because it seems to me that the representation, implied by the law in a sale is only a representation that the thing sold is an existing and valid right as the letters purport to grant, and that the nature and extent of the thing granted may be ascertained by reference to existing structures which are presumed to be equally well known to both parties, and so to have entered equally into the consideration of both, as they looked at the subject-matter of their contract, and estimated its value for purposes of sale and purchase respectively.

The complainant also argues that the respondent is estopped from citing the prior state of the art; because, on apparatus made by him or under his direction for the market, he has caused to be marked the date of the patent here in suit, such apparatus differing from that shown in the patent in particulars of the same sort and rank of importance as those in which the alleged infrin-

ging device differs from the device shown in the drawings and specification of the patent. To this argument the sufficient answer seems to me to be that he marked on the apparatus the dates also of several subsequent patents issued to him for improvements, and in fact of all the patents which he controlled on devices of this sort. I do not think that this proceeding amounts to a representation that the apparatus on which the marks are put would be, if made by an unauthorized person, an infringement on all the patents so indicated, still less on all the claims of all those patents, but only to a representation that such an apparatus might be an infringement on some part of any or all such patents. The dates are put on to protect against any possible claim that the patented article had been sold unmarked, and not to set up a claim as to the extent of the protection afforded by the patents; and, even if it were otherwise, the assertion that all the claims of all the patents cover the device so marked could be taken to be nothing more than a statement of the opinion that, on the facts known to the world, the claims must as a matter of law be so construed. I take it to be still the rule, in general, that a representation incorrect in point of law may not be the basis of an estoppel.

The defense is put on the ground that the respondent does not infringe—First, if the patent be read without reference to the state of the art; and, secondly and more especially, if it be properly construed by reference to pre-existing structures and descriptions. On the first point, I am not clear, and therefore do not announce any conclusion. It is difficult to say what would be the construction put on the patent by one who is ignorant of the facts disclosed by the history of the art of constructing cash carriers.

The claim under which the bill is drawn is as follows:

(1) In an automatic cash-box system, the track, b, the endless cord, o, the cash box, v, and appliances, substantially as described, for attaching said box to said endless cord, and for automatically detaching said box therefrom, and a suitable motor to give a motion to said cord, all combined and operating substantially as set forth.

The complainant argues that this claim covers all machines which have a box carried on a track, an endless cord operated by a motor, a device for attaching the box to the cord, and a device for automatically detaching the same. In this view it is undoubtedly infringed by the device used by the respondent, which is that represented in letters patent No. 399,150, issued March 5, 1889, to the respondent. The box, the track, the cord, and the motor are the same. The attachment in the patent in suit is made by lifting the spring cover by hand, and in the respondent's device by turning the rock shaft by hand, or by pushing the box forward by hand, so that the rock shaft will be engaged with a cam, and so be turned as before; and the automatic detachment is effected in the patent by two curved guides, between which the cord-clamp lever and the thumb piece run, and are thus made to approach each other, and in the respondent's device by a cam which engages the end of the rock shaft.

But, when the prior structures are examined, it seems to me that the claim cannot be construed so broadly as is above indicated. Not to refer particularly to other earlier devices which seem to me to throw much light on the question, I speak only of one reference, concerning which the parties were fully heard at the argument. The English patent to Frank Wirth, 1878, 29th January, No. 377, seems to me clearly to anticipate this claim if it be construed so broadly as the complainant desires. There is the track, the car or box, the endless cord and motor, the means for attaching, by hand, the car to the moving cord, and the device—as in the other cases, a cam or wedge—for automatically detaching the car from the cord. The differences are as follows: In the first place, the car is suspended below the track, and not carried above the track as in the patent. But in both cases it is carried and supported by the track. The load is not readily removed from the car of Wirth, except by tipping the car, or by a gate in the bottom or sides; and the car is not easily carried up an inclined track, because the car might by its weight raise one carrying wheel from the track, and so disorganize the mechanism. To adapt the Wirth mechanism to the modified function thus suggested would not, as it seems to me, require the formation of a new system or class or subclass of apparatus. It calls only for an apparatus containing the Wirth principle and performing the Wirth function with certain added functions, which perhaps themselves may be the basis of a valid claim for an invention. To illustrate this, if it were desired to obtain those results which can be reached only with the car above the track, there must be added another track, or, what is the same thing, the track must be widened, and a slot made in the middle for the grip apparatus, and the grip apparatus must be reversed in position so as to reach the cord below. These are, I think, only consequential changes, made necessary by and involved in the removal of the car from a position below to a position above the track. To look at the question in the other aspect, it seems to me that, if the complainant's construction be allowed, he who should construct an apparatus after the drawings of Wirth could not escape the charge of infringement by showing that his car is suspended below rather than placed on the track.

The second difference between the patent in suit and the patent to Wirth is in the attaching and detaching mechanism. In neither is the attaching mechanism strictly automatic. In the patent the detaching mechanism stops the car at the point where the grip is detached, and, being removed by hand, the car is again attached, and proceeds on a new journey. In the Wirth device the car proceeds by inertia after it is detached, and the detaching device performs no further function. In this particular, the apparatus of the respondent follows the Wirth device, rather than the device of the patent.

I think the patent must be construed to cover the combination of track, car, cord, and motor, and a device for attaching and automatically detaching the car. I make, therefore, four elements,—the first two being simple elements, the third having one subsidiary

element, and the fourth being a compound element. The device of the respondent, as I read the patent, does not contain the fourth element, and so does not infringe. The bill must therefore be dismissed, with costs.

SAMPSON v. DONALDSON et al.

(Circuit Court, D. Minnesota, Fourth Division. June 13, 1894.)

PATENTS—LIMITATION BY PRIOR STATE OF ART—VALVE-RESEATING TOOLS.

In the Wright patent, No. 400,989, for an improvement in valve-seat dressing tools, claim 1, for the combination, with a revoluble shaft, of a file connected to its lower end, of a size to cover at one time only part of the surface to be dressed, whereby the file is rendered self-clearing, must be limited, in view of the prior state of the art, to the oblong form of cutter or file shown and described, although the description covers a cutter of any form having a broken periphery, and states that the material point is that the file surfaces be not continuous; and hence the claim is not infringed by machines made under the Morse patents, Nos. 429,939 and 456,704, having cutters or files of different design.

This was a suit by Sampson against Donaldson and others for infringement of a patent.

P. H. Gunckel, for complainant.

Paul & Hawley (A. C. Paul, of counsel), for defendants.

NELSON, District Judge. Suit is brought against the defendants for an alleged infringement of letters patent No. 400,989, granted upon the application of Pliny J. Wright, dated April 9, 1889. It is admitted that the title of complainant is as alleged in the bill, and also that the defendants' machine is the Morse valve-reseating machine, manufactured by the Leavitt Machine Company, of Orange, Mass., under patents issued to Charles L. Morse, No. 429,939, dated June 10, 1890, and No. 456,704, dated July 28, 1891. The defenses relied upon are invalidity of patent, want of novelty, and noninfringement.

The invention relates to devices adapted to be used in a suitable machine for leveling and retrueing the seats of steam and other valves without removing the valve bodies from their positions, and in the specification it is stated:

"My invention relates to valve-seat dressing tools, and is in the nature of an improvement on the construction shown in the patent granted to myself and Samuel Rust of date May 29, 1883, under No. 278,478. In my former patent I used a disk-shaped cutter on the end of a revoluble tool shaft, and a guide below the tool, adapted to fit the opening in the valve seat for the purpose of centering the cutter. In practice, however, I found that this construction was imperfect. I found that the guide in the valve-seat opening could not be relied on to hold the tool shaft at right angles to the valve seat, and therefore a true surface could not be produced. I found that the disk cutter would not clear itself of the filings. I also found it impracticable to get sufficient pressure on the tool without throwing it off its center. My present invention was designed to overcome these defects, and it consists of the construction hereinafter described, and particularly pointed out in the claims.

"E is a cutter head or bearing disk on the lower end of said shaft, formed integral therewith. The lower end of the tool stem is provided with a screw-threaded hole in the line of its axis. F is the cutter, provided with a small

central hole, *f*. It is a headed retaining screw, whose stem passes through the hole in the cutter, and engages with a screw-threaded hole in the stem of the tool shaft, thus removably securing the cutter head. The cutter, *F*, is of a special construction. It is in shape like the frustum of an oblong pyramid. The lower surface, *f'*, has a file finish, with diagonal grooving, and its inclined surfaces, *f''*, are also files with diagonal grooves. This constitutes a flat and a conical file in one piece, both of which are self-clearing. The flat file face adapts the cutter to dress the horizontal valve-seats and the conical file face to the conical valve seats. In virtue of its oblong shape and the diagonal grooving of the file surfaces it is self-clearing. It does not clog with the filings.

"It will be understood that instead of making the cutter with both the flat and the inclined file surfaces separate cutters may be used for the two classes of seats,—cutters with oblong flat file surfaces for dressing flat valve seats, and oblong cutters with inclined file surfaces for the ball-valve seats. The material point is that the file surfaces on the cutter be not continuous. There must be clearing spaces between them. The cutter may take any form, having a broken periphery,—as, for example, a star or a cross,—but a continuous surface will not clear itself."

It is charged that the defendants are infringing the first claim of this patent, which is as follows:

"In a valve-reseating device, the combination, with a revoluble shaft, of a file connected to the lower end of said shaft at right angles to its axis, of a size to cover at any one time only a part of the surface to be dressed, whereby the file is rendered self-clearing, substantially as described."

Wright was not the first inventor of a valve-reseating tool. Patents for devices designed to accomplish this result had been previously issued. The general character of all patented tools of this class is the same, and the purpose is to repair valve seats and valve disks which have become, from long use, worn and "out of true." This controversy does not relate to the machine as a whole, but to the cutting tools used in connection with a revoluble shaft employed by both parties, and it is virtually admitted in the specification of the patent that there is no novelty in the combination with a revoluble shaft of a file connected to the lower end of said shaft at right angles to its axis. The novelty of the invention would appear to be, as expressed in the claim, that the file is of a size to cover at any one time only a part of the surface to be dressed, whereby the file is rendered self-clearing as described. The specification describes this file as follows:

"The cutter, *F*, is of a special construction. It is in shape like the frustum of an oblong pyramid. The lower surface, *f'*, has a file finish, with diagonal grooving, and its incline surfaces, *f''*, are also files with diagonal grooves. This constitutes a flat and a conical file in one piece, both of which are self-clearing. The flat file face adapts the cutter to dress the horizontal valve seats and the conical file face to the conical valve seats. In virtue of its oblong shape and the diagonal grooving of the file surfaces, it is self-clearing. It does not clog with the filings."

The novel features of these cutting tools, and their advantages over the previous patent and the prior art, are claimed by counsel for complainant to be: (1) That they may be made with little expense, from bars of steel; (2) that they may be entered into the cap openings of valves (by tilting them), where disk-shaped cutters of like cutting capacity could not enter; (3) that they have the capability of being self-clearing; (4) that they are easily operated

by hand power for truing valve seats. The only feature of novelty or the claim of novel result set forth in the specification of the first claim of the patent is that the file described in the invention is self-clearing. The complainant's expert Dayton, in his testimony, after stating that the cutter referred to in the first claim is adapted to work accurately and satisfactorily with the revoluble shaft of reseating machines of the general character shown in the patent, says:

"The cutter so formed is also adapted to clear itself of the cuttings. This is a matter of the utmost importance, * * * and this characteristic advantage is especially mentioned in the claim quoted and sued on."

The invention was designed to overcome the defects in the operation of the cutter used in patent No. 278,478, and the construction of the cutter was suggested in the specification, and particularly pointed out in the claim. It was old in various kinds of dressing devices to provide cutters, used in connection with revoluble shafts of a size to cover at any one time only a part of the surface to be dressed, whereby the cutter was rendered self-clearing. This is clearly shown in some of the patents offered in evidence by the defendants. The patentee, however, in his description of the cutter, states:

"It will be understood that, instead of making the cutter with both the flat and the inclined file surfaces, separate cutters may be used for the two classes of seats.—cutters with oblong flat file surfaces for dressing flat valve seats, and oblong cutters with inclined file surfaces for the ball-valve seats. The material point is that the file surfaces on the cutter be not continuous. There must be clearing spaces between them. The cutter may take any form having a broken periphery,—as, for example, a star or a cross,—but a continuous surface will not clear itself."

The complainant's expert, Dayton, while he admits that other cutters have been provided with clearing spaces, says that none have been provided with clearing spaces by giving them the oblong form shown and described in the patent in suit. He also says that in his opinion "claim No. 1 should be restricted to the form of the cutter shown in the drawings, or, in other words, to the oblong form thereof as distinguished from star or cross shaped, which are referred to in the specification as possible forms of the invention," and it is this form he thinks which constitutes the novelty of the invention; so that, according to his opinion, the peculiar shape of the cutter, which, being oblong, covers at one time only a part of the surface to be dressed, and gives clearing spaces, is the special novelty claimed, and makes this device a substantial advance over the prior art. The patentee states that in making the cutter "the material point is that the file surfaces on the cutter be not continuous," and he confines his invention only to a cutter of any form having a broken periphery. There is no such limitation in the form of the cutter as given by the expert Dayton, and, in my opinion, if the first claim of the patent can be sustained, it must be limited, in view of the state of the art, to a combination with a revoluble shaft of cutters or files of a design not used by the defendants. There is no infringement, and the bill of complainants is dismissed, with costs.

WINCHESTER REPEATING ARMS CO. v. AMERICAN BUCKLE & CARTRIDGE Co.

(Circuit Court, D. Connecticut. June 28, 1894.)

Nos. 676-678.

1. PATENTS—ACTION FOR INFRINGEMENT—ACCOUNTING FOR PROFITS.

Defendant sold certain patents, and agreed to build, deliver, and place two sets of the patented machinery in proper position, ready for working, at the factory of the purchaser, who agreed to pay \$10,000 for the patents and \$11,000 for the machinery; the contract being single, although evidenced by two written agreements. The machinery infringed patents owned by complainants. *Held*, that on an accounting of profits in an action for the infringement, even though \$10,000 was a very high price for the patents, no definite part thereof could be added to the profits on the building part of the contract, as the agreement to build and place in running order presumptively included the right to use.

2. SAME.

The manufacture of such machines was a single infringement, entirely outside of and detached from defendant's regular business. *Held* that, on an accounting of profits, the addition to cost of labor and material of 26 1-5 per cent. for superintendence and general expenses was excessive. It was proper to allow the usual and reasonable salaries of managing officers having concern with the infringing business, and for the use of tools, machinery, power, and other facilities employed, but not for taxes, insurance, and use of real estate owned by defendant.

Exceptions to Master's Report.

This was a suit by the Winchester Repeating Arms Company against the American Buckle & Cartridge Company for infringement of patents. A decree was rendered for complainant, directing an accounting. 54 Fed. 704. Both parties filed exceptions to the master's report on the accounting.

Charles R. Ingersoll and Geo. D. Seymour, for complainant.

Henry G. Newton, for defendant.

SHIPMAN, Circuit Judge: The questions solely arise upon the exceptions of the complainant and the defendant to the master's report. The substantial facts which relate to the infringement are given in the opinion upon final hearing (54 Fed. 704), except that the defendant's contract with the Peters Cartridge Company for the sale of its patents and the manufacture of two complete sets of machinery and tools for making paper cartridge shells, for \$21,000, was a single one, but was evidenced in two separate written agreements, by which the Peters Company agreed to pay \$10,000 for the patents and \$11,000 for the machinery. In return for this \$11,000 the defendant agreed "to build," deliver, and place the machinery in the proper position, ready for working, at the factory of the Peters Company in Ohio, and to deliver to it all the patterns and working drawings of the machinery for making paper shells which the defendant owned. The machinery comprised, in addition to the two sets of wad winders, assembling machines, and primers which infringed the Salisbury patents, 15 auxiliary, unpatented machines, and the necessary tools. The master found that the automatic machines were the desiderata which sold all

the auxiliary machines; that they were made to use with the two automatic patented systems covered by the complainant's patents, and were practically worthless without them; and that, if the Peters Company could not have had these patented devices, they would not have purchased the auxiliary machines. The master further found that the complainant was entitled to recover the net profits made upon the manufacture of the entire machinery. No exceptions were taken to the foregoing findings. The complainant did not contend that it could recover the profits made upon the sale of the patents as well as the profits upon the infringing machinery, but it contended that the agreement to pay \$11,000 was simply for the building or the manufacture and the erection in place of the machinery, and that \$10,000 was paid for the right to use the infringing machinery, and, therefore, that it was entitled to the profits upon the entire \$21,000. The master reported that the contract was a single one, that \$6,350, the cost of the patents, should be deducted from this nominal price of \$10,000, and allowed \$3,650, in addition to the profits, above the cost of the machinery. The complainant's first exception related to the deduction of \$6,350, and the defendant excepted in its sixth exception to the recovery of \$3,650 in addition to the profits upon the construction of the machinery.

The history of the transaction was, in my opinion, as follows: The defendant, in April, 1889, when it was manufacturing paper-shell cartridges, solicited an order, or an arrangement of some kind, for the purchase of shells, from the Peters Company. In May, 1889, it was sued by the complainant for the infringement of the wad-winding patent, and in the same month it sold to the complainant all its machinery, tools, partially made shells, and stock of paper, and went out of the business of manufacturing cartridges. It owned eight patents, six of which were issued to Amos Dickerman. One had been issued to, and one had been allowed but not issued to, William B. Place. Its patented machines were made under the supervision of Mr. Place, and it knew that the complainant claimed that the Place machines infringed one of its patents. As the defendant was going out of the cartridge business, and as the complainant had refused to buy its patents in the purchase of May, 1889, the defendant desired to find some other purchaser, and accordingly made overtures by letter of June 14, 1889, to the Peters Company to buy them, and also probably offered to manufacture for them an entire set of machinery. This letter was not in evidence, but knowledge of its contents is derived by inference from the reply of the Peters Company. That company was a competitor of the complainant, but did not own economical and successful automatic machinery. It kindly received and promptly embraced the opportunity to purchase patents for this class of mechanism, and as it was not a manufacturer of machinery, and as the defendant owned patterns and working drawings, and promised to make sets of machinery therefrom, it promptly accepted, on June 28th, the propositions for patents and sets of machinery. The purchase of the patents by the Peters Company was not simply

to get the right to use two sets of patented machinery. It wanted the entire patented right to make and use, for the unexpired term of the patents, any required quantity of machinery, and it was willing to pay \$10,000 to gain this result. Presumptively, a contract by the owner of a patent to build patented machines, and place them in running order, ready for use in a factory, includes also the right to use the machines. The testimony does not show that this was not the actual contract, and no definite part of the \$10,000 can be added to the profit upon the building part of the contract, upon the theory that the entire price of the machinery and of the right to use it was more than \$11,000, or that a part of the supposed or theoretical price of the patents was or should be added to the \$11,000 in order to ascertain the defendant's true profit upon the infringement. The defendant probably received a very high price for its patents, but this was due to the high anticipations which the Peters Company had of their value.

The master found that the actual cost of the whole machinery was \$7,334.43, to which he added, for general expenses and superintendence, 26 1-5 per cent., being \$1,921.62, making the total cost \$9,256.05, and the profit \$1,743.95. The complainant excepts to the allowance of \$1,921.62.

For the purpose of showing that such a percentage for superintendence and general expenses was a fair one, the defendant gave its estimate of the annual general expenses in its buckle business, and from which it inferred that 25 per cent. for this class of expenses should be added to labor and material in ascertaining the cost of its goods. The items consist of officers' salaries, engineer's salary, teamsters' salaries, coal, oil, water, and gas, hay, feed, and barn expenses, waste, emery, and other supplies, insurance, taxes, and an excessive sum for the use of real estate and machinery. In estimating the profits of an infringer's business, where his business consists, in whole or in part, in the manufacture of infringing articles, general expenses which the conduct of the business necessarily requires are to be estimated in the ascertainment of the profits. "Such expenses as general clerk hire, rent of store, salary of bookkeeper, if any, and the like, concern the entire business, and in any estimate of gains and profits are properly apportionable to the several kinds of business done or kinds of goods sold when the profits of either are to be separately stated." *Hitchcock v. Tremaine*, 9 Blatchf. 385, Fed. Cas. No. 6,539. In such case, where the manufacture of the infringing article constitutes a department of the infringer's business, the expenses of the business are to be apportioned according to the amount of sales. Rob. Pat. § 1139. This case does not exactly fall within the class of cases of which *Hitchcock v. Tremaine* is an example. The defendant is a buckle manufacturer, and, for the purpose of inducing the Peters Company to buy its patents, undertook to make paper cartridge shell machinery. It purchased the bodies of the machines, hired a foreman and six machinists, and set them to work upon its patterns and drawings. The buckle business was the one upon which the officers were engaged, and for which they built their factory, bought

their machinery, and in which they occupied themselves, and for which they were paid salaries, and an allowance of 26 1-5 per cent. for the superintendence and general expenses of this single infringement, which was entirely outside of and detached from its regular business, is excessive. While the usual and reasonable salaries of such portion of the managing officers as have concern with the infringing business are to be allowed, the items of taxes, insurance, and use of real estate owned by the infringer are not a part of general expenses. It is proper to allow "for the use of tools, machinery, power, and other facilities employed in the manufacture." *Manufacturing Co. v. Cowing*, 105 U. S. 253. It is impossible to estimate with accuracy, for the defendant's testimony is not very helpful in this regard, how much ought to be allowed for this class of expenses in this case. I have concluded, rather than refer the question again to the master, to allow 10 per cent., which I consider a high estimate, upon the cost of the machines, which makes the whole cost \$8,067.87, and the profit upon the entire sets of machinery \$2,932.13. In the final decree, interest should be allowed upon the sum adjudged to be due as profits from November 17, 1893, the day when the master's report was submitted. *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894.

The defendant took sundry exceptions to the master's findings in regard to the cost of the entire sets of machines, and also to his finding of the cost of the patented machines. I am of opinion that his findings were correct, except that 10 per cent. for general expenses, instead of 26 1-5 per cent., should be added to the particular items of cost of labor and material and of expenditures. As the questions relate exclusively to profits, and not to damages, I have not examined the subject of the willfulness of the defendant's infringement.

The second exception of the complainant and the sixth exception of the defendant are sustained. The residue of the report of the master, so far as it relates to pecuniary profits, is confirmed.

PACIFIC CONTRACTING CO. v. BINGHAM.

(Circuit Court, N. D. California. May 28, 1894.)

PATENTS—NOVELTY AND INVENTION—ASPHALT PAVING.

The Thurber patent, No. 319,125, claiming a process of working bituminous rock by softening it by application of hot water or steam, and pressing it under heated rollers or other heated irons, although these features of the process were old, covers a patentable invention, consisting in the immediate use and compression of the softened material without the expulsion of moisture; all previous processes having involved either rigid exclusion or evaporation of moisture. *Pacific Contracting Co. v. Southern California, etc., Co.*, 48 Fed. 300, followed.

This was a suit by the Pacific Contracting Company against Bingham for infringement of patents.

Wheaton, Kallock & Kierce, for complainant.

Page, Eells & Wheeler and J. P. Langhorne, for defendant.

GILBERT, Circuit Judge. This is a suit in equity to enjoin the infringement of letters patent No. 319,125, issued June 2, 1885, to Rice, Steiger & Thurber, and letters patent No. 342,852, issued June 1, 1886, to Austin Walrath. Both patents are for processes in the preparation of material for asphalt pavements, and laying and rolling the same. In both the material so to be prepared and laid is the natural bituminous rock of California, a substance composed of sandstone and bitumen or asphaltum, commingled in such proportions as to require the addition of no other material for pavement purposes. So far as this suit is concerned, there is no discernible difference in the processes described in the two patents. The earlier, or, as it is called, the Thurber, patent is clearly an anticipation of the Walrath patent, and it will be unnecessary to make further reference to the latter, as it conferred upon the complainant no right not acquired under the earlier patent. The claim of the Thurber patent is as follows:

"The process of preparing roofing and paving material, consisting in the following steps: First, softening pure native asphaltum by the application of hot water or steam thereto; and, secondly, pressing it under heated rollers or other heated irons, substantially as and for the purpose set forth."

It is admitted that the defendant has laid pavements under the process above described, and that he has infringed the same if the patent is held valid. The defenses relied upon are that the patent is void for want of novelty and invention, that the invention was made by only one of the three joint patentees, and that the description of the invention in the specification is not in such full, clear, concise, and exact terms as to enable any person skilled in the art to use the same.

It will be observed that there are two distinct steps in the process as described—First, softening the material by hot water or steam; second, rolling it with heated irons while still hot and permeated with moisture from the steam. It is in the immediate use of the material so softened and moistened that the invention which is involved in the process is said to consist. The other features of the process—the application of the steam and the use of the heated rollers—are undoubtedly old. The bituminous sandstone of California, which is the subject of this process, is a hard substance when quarried, and is required to be made soft and pliable before it is available for pavements. Prior to the experiments of Thurber and his associates with hot water and steam, it had been the practice to soften the rock either by dry-heating the same in caldrons, or by cooking it with the addition of coal tar. The result was unsatisfactory, as the material was either burnt in the process, and thereby rendered porous and brittle, or, through the addition of the coal tar, was left sticky and difficult to handle. The patentees of the Thurber process discovered that the use of hot water or steam directly applied to the bituminous rock, and without the addition of coal tar or any other substance, produced a better result, left the material in condition for immediate use for paving, and greatly simplified the preparation of the same. The Thurber patent has been twice sustained in this court,—in *Rock Co. v. Walrath*, 41 Fed. 883,

and Pacific Contracting Co. v. Southern California, etc., Co., 48 Fed. 300. In the latter case the same defenses were made that are presented in the case now before the court. It was there held that, although the idea of the application of hot water or steam to a substance for the purpose of rendering it soft and pliable was undoubtedly old, yet that the idea of such application to bituminous rock in the course of preparation for roofing or paving purposes involved an element of invention from the fact that it was opposed to the generally accepted theory of the treatment of that substance, and the universal belief of those engaged in using the same, which was that the material must be kept waterproof, and must only be heated by dry heat, to the rigid exclusion of moisture, and that the presence of water or steam tended to its disintegration and destruction. That decision will be decisive of this case unless the evidence now offered presents the defenses in a new or different light.

The defendant insists that he has furnished new evidence of the want of invention in the Thurber patent in the fact that the same process was described and given to the public in the book of E. Dietrich entitled "Die Asphalt Strassen," published in Berlin, in Germany, in the year 1882. Reference was made to the contents of that volume in the answer to the bill, and it is now produced in evidence. It treats of the construction of asphalt streets and roads. On page 23 is described the process of preparing the bituminous rock of Lobsann for transportation from the quarry and for use in street-making. The Lobsann bituminous rock is described as consisting of limestone unevenly impregnated with bitumen, with portions of the limestone wholly unimpregnated. One of the objects of the process is the elimination of the unimpregnated rock. This is done by placing the crude rock in iron vessels, into which steam is forced. The steam causes the rock to fall to pieces, and the non-impregnated portions are thrown out, while the remainder is ground between rollers. The author proceeds to say:

"But since the material, in consequence of this steaming process, is so completely penetrated with moisture (which afterwards it does not lose in the immediately following process of crushing and grinding), and since the removal of this moisture is of great importance as well in the manufacture of mastic as in the production of compressed asphalt, it might perhaps be preferable to conduct hot air into the vessel of about 100 deg. celsius."

On page 108 the exclusion of the moisture is further insisted upon:

"The expulsion of the natural moisture from the asphalt stone is absolutely necessary, because the powder cannot be pressed into a solid body by roller or press unless it be in a perfectly dry condition. Therefore bring up the temperature to the highest degree possible without running any danger of driving the bitumen out with the water."

In short, the process described by Dietrich consists in first steaming the rock, for the double purpose of separating the unimpregnated portions of the rock from the remainder, and softening the latter for grinding, and, second, evaporating the moisture from the ground product to render it fit for compression into pavement. The Thurber process consists in first softening the rock by steam, and, second, in compressing it into pavement while still hot, and permeated with moisture.

The question whether or not there is invention in the Thurber process is not perceived to be affected by any fact disclosed in the book of Mr. Dietrich. If the process described in that volume has any bearing upon the questions involved in this case, it is rather to emphasize the fact that the Thurber process ran counter to all the accepted ideas of the treatment of bituminous rock for pavement purposes, for Dietrich adheres to the view that all moisture must be excluded. Through the publication of his volume there was constructively brought to the knowledge of all the world the fact that bituminous rock could be and had been softened by the application of steam, and that such application was not deemed injurious provided the moisture so introduced was expelled before compressing and using the material. This was the state of the art prior to the invention of Thurber and his associates. What they added was the idea of the immediate use and compression of the steam-softened material into pavement without the expulsion of the moisture, or perhaps it would be more accurate to say they omitted from the Dietrich process a step which Dietrich and all others considered essential, namely, the evaporation of the moisture which had been introduced in the steaming process. Therein is the essence of the Thurber invention. It was not the discovery of the fact that bituminous rock may be softened by steam. That fact may be presumed to have been known from time immemorial. It was the discovery that the presence of the moisture in the substance thus treated did not tend to destroy and disintegrate the finished product,—the pavement. The complainant is entitled to a decree as prayed for.

ZAN et al. v. McKENZIE.

(Circuit Court, N. D. California. May 28, 1894.)

PATENTS—EXTENT OF CLAIM—BROOMS.

The Flynn patent, No. 218,251, for an improvement relating to the manner of securing caps on wisp brooms concealing the fastening wire, and the construction of the handle, describes the cap as of velvet or similar material, and the handle as a paper tube, covered with such material, fitting over a wooden stock, and the description refers solely to its use in wisp brooms. *Held*, that claim 1, for the cap so secured, in combination with the wisp and such cylindrical handle, does not cover large brooms having a cap so secured, but using a metallic ferule, instead of the cylindrical handle, notwithstanding a statement in the specification that the manner of fastening the cap might also be applied to large brooms as a finish; as the only new feature in the combination was the cylindrical handle, and there was no intimation that it could be used on large brooms.

This was a suit by Zan Bros. & Co. against George F. McKenzie for infringement of a patent.

John L. Boone, for complainants.

Estee, Fitzgerald & Miller, for defendant.

GILBERT, Circuit Judge. This is a suit in equity brought by Zan Bros. & Co. against George F. McKenzie for the infringement of letters patent No. 218,251, issued August 5, 1879, to James H.

Flynn, for an improvement in wisp brooms. That portion of the improvement which is involved in this case relates to the manner of securing caps on wisp brooms, and its object is to enable a cap of velvet or other similar material to be fastened in a neat and secure manner without exposing the fastening wire which binds the ends of the broom straw to the broom handle, and to economize the construction of the handle without hurting its appearance. The invention consists in fastening the under edge of the cap to the wisp by wrapping it with wire, and then drawing the cap up over the wire, and fastening its upper edge by wrapped wire, which is thereafter concealed in the lower end of the handle; secondly, it consists of a handle made of a paper tube wrapped or covered with velvet or other fabricated material, adapted to fit over the wooden stock to which it is secured by glue or tacks. The claim which is said to be infringed reads as follows:

"Claim 1. As an improvement to wisp brooms, the cap, C, having its lower end, A, secured to neck, a, by a wire, c, while its body is drawn up over said wire, and its upper end, b, secured to the stock, B, by a wire, c, in combination with wisp, A, and a cylindrical handle, D, adapted to slip down over the stock, and rest upon the upper edge of cap, C, so as to conceal the wire, c, fastening the upper end of the cap to the stock, whereby a cap is furnished, made of velvet or other similar material, wherein the mode of its fastening is entirely concealed, substantially as described."

While the cylindrical covering for the upper edge of the binding wire above the cap is described as the handle of a wisp broom, and the claim just quoted refers expressly to an improvement in wisp brooms, and the invention of the patent is so denominated by the inventor, there is nevertheless in the specification the following reference to the adaptability of a portion of the combination to use in large brooms: "The manner of fastening the cap over the butts of the straw may also be applied to large brooms as a finish."

By virtue of rights which they claim to have acquired under the patent, the complainants have manufactured and sold large brooms or house brooms with the velvet cap secured in the manner described in claim 1, and have concealed the upper binding wire from view by means of a brass ferule of about an inch in width, which slips down over the broom handle, and is of such size as to fit snugly to the handle, while the lower half is widened or flared so as to rest neatly against the velvet cap, and cover the wires which, in the wisp broom, are covered by the cylindrical handle. The defendant has constructed large brooms in the same manner, but he defends against the charge of infringement upon the ground that the complainants' patent is applicable only to wisp brooms, and to the covering of the upper wire by means of a cylindrical handle of the form and material described in the specifications, and that it does not cover the use of a ferule upon large brooms, such as that used both by the complainants and defendant.

In deciding what is the invention covered by the complainants' patent, the court must be controlled by the language of the claim, and the description of the improvement as set forth in the specifications, and not by the construction which the patentee or his as-

signs may have placed upon or claimed for the patent subsequent to its issue. If the language of the claim is broader than the description of the invention, the claim must be so interpreted as to limit it to the improvement previously described. *Mitchell v. Tilghman*, 19 Wall. 287. The combination embraced in the patent added but one feature to the previously existing and known devices. The velvet cap had been used before, and it had been secured about the straw butts in the manner described in the patent. The new feature in the combination was the cylindrical handle, which was to perform the double function of covering the upper wire and affording a neat and economical handle to the broom. The description which the inventor gives of his improvement refers solely to its use in wisp brooms, and describes the cylindrical handle as a paper tube covered with velvet or other fabricated material. No allusion is made to its application to large brooms, except that above quoted, and that allusion refers solely to the manner of fastening the cap over the straw butts, and amounts to a statement that the velvet cap may be used upon large brooms. There is in his reference no intimation that in the mind of the inventor the cylindrical handle could be used with the cap, or as a part of the method of fastening the same, upon large brooms. The allusions to the possible use of the cap with large brooms does not in any way enlarge the right which the patentee would otherwise have by virtue of the specifications and claims of the patent. He has not described as his invention the combination of the cap in a broom with a cylindrical covering for the upper wire, but the combination in the wisp broom of the cap and a cylindrical handle of a certain form and material. It is true that the ferule, by covering the upper wire, performs a portion of the function which is accomplished by the velvet-covered handle of the patent, and performs all that that device could be made to do when applied to a large broom, for it is obvious that in a large broom the cylindrical covering could not be used as a handle; but the patentee has seen fit to confine all that is new of his combination to wisp brooms, and to the use of a cylinder of a certain form and a certain material. By so limiting his invention he left the public free to use upon large brooms a metallic ferule, which is a covering of different form and wholly different material from that described in the patent. *Manufacturing Co. v. Rosenstock*, 30 Fed. 67. The complainants have not acquired the sole right to cover the upper wires of a broom by a cylindrical covering in combination with the cap. They have only the sole right to the use of that which is substantially described in their patent. The bill must therefore be dismissed.

COSTA et al. v. DROBAZ.

(Circuit Court, N. D. California. May 28, 1894.)

PATENTS—PRIOR PUBLIC USE—FISHING-BOAT ATTACHMENTS.

To a suit for infringement of the Costa patent, No. 456,720, for attachments for fishing boats by which a net may be towed astern of a single vessel, consisting in part of stanchions on each side of the vessel, provided with metallic bands fitting their upper ends and having staples or eyes, booms having hooks on their inner ends fitting the eyes, stays by which the booms are held, and lines from the outer ends of the booms connecting with the net, prior public use of the attachment described with the exception of the stanchions, the booms being hooked into eyed plates bolted against the bulwarks, is not a defense; it appearing that the use of the stanchions resulted in greater safety and ease of navigation, and increased facility in handling the booms, and that this feature was new and original.

This was a suit by Pedro Costa and others against Mateo Drobaz for infringement of patents.

John L. Boone, for complainants.

E. S. Heller, for defendant.

GILBERT, Circuit Judge. Pedro Costa and others bring a suit in equity against Mateo Drobaz for the infringement of letters patent No. 456,720, issued July 28, 1891, to Pedro Costa, for an improvement in fishing-boat attachments. The invention is described as follows:

"The fishing boat has a mast, B, and upon each side of the boat near the rail is fixed a short vertical post, C, having an iron band, D, fitted around its upper end. Upon the side of the band nearest the rail is fixed a staple or eye, E. To the staple a boom, F, fifty feet in length, is attached by the hook, G. Near the outer end of each boom is fixed a band and an eye, H, and from these eyes the suspending stays, I, extend up to the mast where they pass over blocks, J, and lead down to the deck, so that, by means thereof, the outer ends of the booms may be raised and lowered at will. From the outer ends of the booms the stays, K, extend to the bow of the vessel. Upon the outer ends of the booms are also fixed the eyes, L, to which are attached the lines from the ends of the fishing net, the lines being about one hundred and twenty-five fathoms in length. By means of these attachments, a net, having a width equal to the length of the two booms and the intervening hull of the vessel, may be towed astern by means of a single vessel, and lowered for deep sea fishing, and raised and drawn upon the stern of the vessel, as occasion may require,—accomplishing a result that formerly required the use of two vessels, pursuing a parallel course and maintaining a uniform intervening space."

The claim of the patent is as follows:

"A vessel having the vertical stanchions, C, upon each side, provided with metallic bands fitting their upper ends, and having staples or eyes, E, booms having hooks on their inner ends adapted to fit said eyes, stays by which the booms are held in a horizontal position, projecting from the sides of the vessel, ropes extending from the outer ends of the booms, and connecting with a net adapted to be towed behind the vessel, the lines, O, having rings adapted to clasp the tow lines, the guiding sheaves or checks, P, at the stern of the vessel, and the winding drums forward of the sheaves, substantially as herein described."

The defendant has constructed and used a vessel with fishing attachments identical with those described in the patent, but he makes defense to the suit upon the grounds—First, that the im-

provement described in the letters patent was known and publicly used on fishing boats in the waters of the Mediterranean sea for many years prior to the application for the patent; and, second, that the patentee publicly and continuously used the said invention in and about the waters of the Pacific ocean, and within this district, from 1884 until the time of filing application for the patent on December 1, 1890, and that thereby the invention was abandoned to the public.

So far as the second defense is concerned, the evidence is that the complainants built in the year 1884, and continuously thereafter operated, a fishing boat with the fishing attachment described in the patent, with the single exception that in the vessel so used there were no stanchions for the support and attachment of the inner ends of the boom, but instead thereof the booms were hooked into eyed plates, which were bolted directly against the bulwarks of the vessel upon the outer side. There is no doubt that, by the public use of that vessel from the year 1884, the right to claim the combination so used was relinquished to the public. But, in his application for a patent, Costa added to the combination a new feature,—the stanchion rising above the vessel's deck upon either side, with its band and eye for the point of support of the boom. The advantage of this element is shown to be twofold: First, the greater safety and ease of navigation resulting from attaching the booms at a higher elevation upon the vessel; and, second, the increased facility of attaching and securing, as well as detaching and otherwise handling, the booms, upon the part of the crew. It is not disputed that this feature of the combination is distinctly new and original with Costa, the patentee. It is therefore unnecessary to consider the evidence concerning the fishing attachments which, according to the testimony of some of the witnesses, were in use upon the Mediterranean sea, since confessedly none of said vessels had stanchions for the support of the booms. The complainants are entitled to a decree protecting them in the use of the combination described in the claim of the patent.

PACIFIC CABLE RY. CO. v. CONSOLIDATED PIEDMONT CABLE CO.

(Circuit Court of Appeals, Ninth Circuit. May 28, 1894.)

No. 130.

PATENTS—LIMITATION BY PRIOR STATE OF ART—TRAMWAY FOR CURVES AND CABLE GRIPS.

The Hallidie reissue patent, No. 10,681, for a tramway for curves and cable grips, the object of which was to prevent the grip striking the horizontal sheaves carrying the cable around curves, claiming the main curve of the track and slot, in combination with a guide rail beneath the sheaves, and the grip, even if valid, must be limited to the combination described, the only new element in which is the separate guide rail, and is not infringed by a device using, instead of a guide rail, the lower flange of the slot iron widened to furnish a bearing surface for the grip shank, the contact of which is direct, without the interposition of the friction rollers described in the patent.

This was a suit brought by the Pacific Cable Railway Company against the Consolidated Piedmont Cable Company for infringement of a patent.

William F. Booth, for appellant.

Wheaton, Kalloch & Kierce, for appellee.

Before GILBERT, Circuit Judge, and ROSS and HANFORD, District Judges.

GILBERT, Circuit Judge. This appeal is taken from the final decree of the circuit court dismissing the bill in a suit brought by the appellant as complainant, alleging infringement by the defendant of reissue letters patent No. 10,681, of date February 2, 1886, granted to Andrew S. Hallidie, for "tramway for curves and cable grips." The patent under consideration relates to improvements in cable railways. In such railways the traveling cable is carried in an underground tube between the tracks. The car carries a grip, the shank of which extends downward through a continuous, narrow slot in the top of the tube. At the end of the shank a gripping device grasps and holds the cable, thereby propelling the car. The slot in the tube is bounded by slot irons, which are parallel with the tracks, and lie midway between the same. In passing around a curve of the track, the cable is carried against horizontal sheaves lying upon the inner side of the curve, within the tube. When the grip, holding fast to the cable, reaches a curve in the road, the tendency of the cable, in passing around the curve, is to draw the grip towards the inner wall of the curve, and to strike the horizontal sheaves. To prevent such striking of the sheaves is the object of the Hallidie invention. In the Hallidie device a guide rail is placed within the tube, against the inner wall of the same, at the curve, and between the horizontal cable-carrying sheaves and the slot iron. The guide rail, as described in the patent, may be either smooth, or furnished with horizontal rollers set at intervals along its entire length. If the smooth rail is used, the grip shank is furnished with a horizontal friction roller, so placed as to revolve against the rail. If the guide rail, with rollers, is used, the grip shank carries a pivoted, skate-shaped shoe, which comes in contact with, and passes over, the rollers. Letters patent for the Hallidie invention were first granted in England, December 13, 1879. On February 12, 1884, the application for the American patent was filed. The claim of the patent, as finally allowed, reads as follows:

"In a cable railway, the main curve of the track and slot, in combination with the guide rail beneath, and the cable-carrying sheaves for carrying the cable around the curves, and a grip as set forth."

It is to be noted that in this claim, as formulated, no reference is made to the device or mechanism to be used to bring the grip shank into bearing upon the guide rail, but in the specifications and drawings the roller and pivoted shoe are plainly indicated and described. The defendant has no separate guide rail upon its cable railway curves, but uses for the purpose of a guide rail

the lower flange of the slot iron, which is widened upon the inner wall of the curve to furnish a smooth bearing surface for the grip shank, the contact of which is direct, and without the interposition of a roller. It is contended by the appellant that the relationship of these parts, their functions and objects, are the same in the two structures, and that the mode of operation of each combination is the same, accomplishing the same result by the same means, and that, therefore, the defendant has infringed the Hallidie patent.

In considering the question of infringement, it is necessary, first, to determine what is the Hallidie invention. Between the year 1864 and the year 1876, several patents were granted for improvements in cable tramways, and the various devices used in connection therewith. In some of these patents, distinct reference was made to the passage of curves in the cable railways. In the patent to A. E. Beach (No. 42,039), of March 22, 1864, the statement is made that "the rails which pass around sharp curves are intended to be interiorly enlarged so as to receive stationary friction wheels within them, for the cable to press against, and thus reduce friction." On April 18, 1876, a patent was granted to A. E. Hovey for an improvement in rope-gripping devices for propelling vehicles (letters patent No. 176,136); and on September 18, 1877, a patent was granted to the same patentee for an improvement in endless-rope traction railways (letters patent No. 195,372). In his gripping device, Hovey placed two horizontal friction rollers, 1, 1, and described them as "secured horizontally so as to prevent the shank of the grip from coming in contact with the sides of the slot as it moves through the tube." In his second patent, he described his slot iron as "formed of angle iron, for greater strength, to resist the weight and strain from vehicles passing over them, and as affording a plane bearing surface within and beneath the groove for the grinding rollers in the grip." The operation of this combination described in the Hovey patents is precisely the same as that of Hallidie; and although Hovey has made no specific claim for, or reference to, the adaptability of his combination of rollers and guide rail to curves in the track, such adaptation is plainly discernible from a simple inspection of its construction. When the Hallidie American patent was applied for, the examiner at first rejected the application upon the ground that the Hovey patent of September 18, 1877, described substantially the same device. Hallidie thereupon distinguished his device from that of Hovey in two respects: First, that in the Hovey device the slot rails were at too great an elevation above the grip and cable to successfully resist the pressure upon a curve, whereas the Hallidie guide rails were placed lower, and in the horizontal plane of the grip; and, second, that the slot irons, as usually made, were not of strength sufficient to resist the pressure, and would be liable to be separated or displaced. Upon these considerations the Hallidie claim was allowed, and the patent was granted. The Hallidie combination, as patented, therefore takes the cable-carrying sheaves, which were old, and the grip, which was old, and introduces the new element of a separate guide rail, and applies the combination to a curve

in the road, which was also old. Without pausing to discuss the merit of his patent, or to decide whether invention is displayed in his combination, or whether his combination, as described in his claim, is inoperative for want of some device or mechanism to bring the grip shank into bearing against the guide rail, it is sufficient for the purposes of this appeal to confine ourselves to the consideration that, in view of the prior patents, Hallidie must be limited to his combination as described, one of the elements of which—and the only new element—is the separate guide rail. This the defendant has not used. On the contrary, it has used for the bearing surface of its grip shank a rail which was old, and had been described and used for the same purpose in the Hovey patents of 1876 and 1877. This difference is sufficient to establish the defense of noninfringement. But if we are to regard as part of the Hallidie combination the horizontal friction roller, by which the bearing of the grip shank against the smooth guide rail is effected, then it will become apparent that the defendant has made still further deviation from the Hallidie device, by dispensing with the friction roller, and bringing the grip shank into direct bearing upon the guide rail, by means of a projection of the grip shank, or a shoe firmly fixed thereon. It is true that, in the application for his American patent, Hallidie inserts the following clause, which does not appear in his application for the English patent: "In practice, I prefer to employ a shoe which will travel upon the smooth guide rail, as this will produce a smoother and more even movement." But no claim is made for the shoe, in that connection; and it is not intimated that Hallidie, then or at any time, has claimed to be the inventor of the combination with the shoe, or the discoverer of the fact that a smoother or more even movement is thereby produced. The evidence, on the contrary, makes it probable that the idea of the shoe in conjunction with the smooth guide rail was taken by Hallidie from its use by Hovey in a cable railway constructed by the latter for the Chicago City Railway Company nearly two years before the application for Hallidie's American patent was filed.

In either view of the complainant's patent, it is evident that the defendant is not justly chargeable with its infringement; and the decree of the circuit court, dismissing the bill, is affirmed, with costs to the appellee.

MORLEY SEWING-MACH. CO. et al. v. SHUTE.

(Circuit Court, D. Massachusetts. July 12, 1894.)

No. 2,671.

1. PATENTS—INFRINGEMENT—BUTTON SEWING MACHINE.

The Morley patent, No. 236,350, for a machine for automatically sewing shank-eyed buttons to a fabric, containing three groups of mechanisms,—the button-feeding mechanism, the sewing mechanism, and the fabric-feeding mechanism,—in view of its construction in the case of *Machine Co. v. Lancaster*, 9 Sup. Ct. 299, 129 U. S. 263, is infringed by a machine the same as that held in said case to infringe, except that the fabric-feed-

ing mechanism is omitted; two claims of the patent not covering that mechanism, even by implication.

2. SAME—ANTICIPATION.

The patent was not anticipated by the previous Keith patent, as the Keith machines were not automatic, in the sense of the Morley patent, and seem not to have possessed much practical utility, their use having been abandoned.

This was a suit by the Morley Sewing-Machine Company and others against Benjamin A. Shute for infringement of a patent.

Fish, Richardson & Storrow and Ambrose Eastman, for complainants.

John L. S. Roberts and Charles Levi Woodbury, for defendant.

COLT, Circuit Judge. In the case of *Machine Co. v. Lancaster*, 129 U. S. 263, 9 Sup. Ct. 299, the supreme court considered the Morley patent, and held that it was entitled to a broad construction, as embodying a pioneer invention, for the reason that Morley was the first person to devise a machine for automatically sewing shank-eyed buttons to a fabric; and, although the specific mechanism in the Lancaster machine was different, it was held to infringe the 1st, 2d, 8th, and 13th claims of the Morley patent. The Morley machine contains three groups of mechanisms, namely, the button-feeding mechanism, which separates each button from a mass, and delivers it to the sewing devices; the sewing mechanism; and the fabric-feeding mechanism, which spaces the buttons. The defendant in the present suit has left out of his machine the fabric-feeding mechanism. In other respects, his machine is the same as the Lancaster machine. The contention of the defendant is that the Morley machine is made up of a combination of three groups of instrumentalities, and that by the omission of one of these groups his machine must be held to be outside of the Morley patent. Upon this point, however, it is important to bear in mind that the second and thirteenth claims of the Morley patent do not cover, even by implication, the fabric-feeding mechanism, and that the supreme court sustained these claims, and held that the Lancaster machine infringed them. For this reason, I cannot agree with the defendant that a machine which leaves out the fabric-feeding mechanism is not within the Morley patent.

In the present suit there have been offered in defense some prior patents which were not in the Lancaster Case; but, in my opinion, none of these patents, if they had been before the supreme court in that case, would have affected the decision, in the view which that court took of the character and scope of the Morley invention. Stress is laid by the defendant upon the old Keith patent as an anticipation of the second and thirteenth claims of the Morley patent. The Keith patent was before the supreme court in the Lancaster Case, and the Keith machine was described (although erroneously, in some particulars, it is said) in the deposition of Samuel F. Crosman. The difficulty with the Keith machine is that it is not automatic, in the sense of the Morley patent. In the machine, as described in the Keith patent, buttons were placed by

hand in a position to be operated upon by the sewing mechanism. In the machine, as actually constructed, a raceway was sometimes added; but such raceway was moved forward to and back from the stitching mechanism by means of a treadle controlled by the operator. This is not the feeding and sewing mechanism of the Morley machine, where the buttons are automatically selected, one after another, from a mass, and presented in succession to the needle of the sewing mechanism, and then sewed upon the fabric. Further, although four of these Keith machines were built and were in use more or less between 1872 and 1874, they do not seem to have possessed much practical utility, because their use was subsequently discontinued.

I have not considered the question whether the defendant in this case is estopped from attacking the validity of the Morley patent by reason of privity with the defendant in the Lancaster Case, because, independently of this question, and looking at this case as if it were between different parties, I think the decision must be in favor of the plaintiffs, in the light of the construction given to the Morley patent by the supreme court. In other words, I do not find anything in the present record which, if it had been before the supreme court, would have, in my opinion, changed or modified the views of that court with respect to the construction or scope of any of the claims of the Morley patent which were sustained.

Decree for complainants.

THE WILLAMETTE VALLEY.

GLEESON v. THE WILLAMETTE VALLEY et al. (No. 10,777.) LEVI et al. v. SAME (GARIBALDI, Intervener. No. 10,861). CHANDLER v. SAME. (No. 10,862.) ALLISON et al. v. SAME. (No. 10,866.)

(District Court, N. D. California. June 22, 1894.)

COURTS—CONFLICTING STATE AND FEDERAL JURISDICTION—MARITIME LIENS AGAINST VESSEL IN POSSESSION OF RECEIVER APPOINTED BY STATE COURT.

A steamship, owned by an insolvent corporation, and in possession of a receiver of its property appointed by a state court, was employed by him, under authority of the court, in transporting merchandise and passengers, in connection with the usual business of the corporation, between a port in the state and a port in another state. *Held*, that the vessel was not exempt, by the rule of comity, as in custodia legis, from maritime liens for liabilities incurred in such other state in the course of such employment, nor from seizure for enforcement of such liens upon libels in a United States district court in that state, without leave of the court appointing the receiver; she having been engaged, when the liens were incurred, as a common carrier in trade and commerce, and the state and federal courts not having co-ordinate or concurrent territorial jurisdiction.

Libels for damages to a passenger, and for supplies, etc. Exceptions to libels, on the ground that the court has no jurisdiction, the vessel being operated by a receiver appointed by the circuit court of the state of Oregon. Exceptions overruled.

John A. McKenna, for libelant P. G. Gleeson.
Wal. J. Tuska, for libelants Jacob Levi, Sr., and others.
W. C. Graves, for intervener, J. Garibaldi.
Andros & Frank, for libelant R. D. Chandler.
W. H. Mahony, for libelants D. E. Allison and J. M. Gray.
Page, Eells & Wheeler, for claimant.

MORROW, District Judge. The libelant Patrick G. Gleeson filed his libel against the steamship Willamette Valley, October 6, 1893, alleging that in the month of August, 1893, the vessel was at the port of Yaquina, in the state of Oregon, destined on a voyage to the port of San Francisco; that the libelant, holding a ticket entitling him to a first-class cabin passage in said vessel from the port of Yaquina to the port of San Francisco, embarked on said vessel, and, upon the exhibition of the said ticket to the master of the vessel and his agents, the libelant was accepted and received as a first-class cabin passenger on board the vessel; that on the following day, after the vessel had sailed from Yaquina, and while she was on the high seas, the master, by himself and his agents, disputed the right of the libelant to be a passenger on board of said vessel, and thereupon excluded him from the cabin of the vessel; that libelant offered to pay the master for a full steerage passage from the port of Yaquina to San Francisco, but the master refused to accept such payment, and excluded him from the cabin and steerage of the vessel, and confined him in the forward part of the vessel, and refused him lodgings, sleeping accommodations, and provisions, whereby he suffered great physical pain and mental distress, for which he claims damages in the sum of \$5,000. The usual process and monition of the court having been issued on this libel, the marshal took the vessel into custody, and thereupon she was claimed by the Oregon Pacific Railroad Company, E. W. Hadley, receiver, by D. R. Vaughn, general agent, and a bond given for her release in the sum of \$10,000, and the vessel was accordingly released. A plea to the jurisdiction was thereupon interposed by the receiver, in which it was alleged that he was the receiver of the Oregon Pacific Railroad Company and the Willamette Valley & Coast Railroad Company, appointed by the circuit court of the state of Oregon, a court of general jurisdiction, and that the steamship Willamette Valley was the property of said railroad companies, and had come into his possession as such receiver; that the vessel was being operated as part of the trust property turned over to him by the court at the time libelant commenced his action, and that the libelant never obtained permission to libel the vessel from the court having possession and control of the property. The plea was submitted on briefs, and, as the libel did not show that the contract sued upon originated in a jurisdiction foreign to that of the state of Oregon,—that is to say, in San Francisco,—as implied in the argument, the court intimated that the plea to the jurisdiction might be sustained on that ground, whereupon an amended libel was filed, setting forth that the ticket which libelant exhibited and offered to the master of the steamship Willamette

Valley, for the passage from Yaquina to San Francisco, was a round-trip ticket, issued and sold in San Francisco about July 27, 1893, to one Johnson, good for 30 days; that Johnson had been received and accepted on said vessel as a first-class cabin passenger on the voyage from San Francisco to Yaquina, and thereafter Johnson, for a valuable consideration, had sold and assigned the ticket to the libellant for the return voyage to San Francisco. Pending these proceedings in this court, several actions at law were commenced in the superior court of the city and county of San Francisco against the Oregon Pacific Railroad Company, wherein writs of attachment were issued, and, after the vessel had been released from the custody of the marshal, these writs were levied upon the vessel by the sheriff. While these actions were being prosecuted in the state court, other creditors, claiming maritime liens, came into this court, and filed libels for supplies, seamen's wages, etc., aggregating \$13,107.41. It is alleged in the libels that the supplies were furnished on the credit of the vessel, and were necessary in each case to enable the vessel to perform the succeeding voyage. Monitions were issued on these libels, and placed in the hands of the marshal; but as the vessel was at that time in the possession of the sheriff, under the writs of attachment issued out of the state court, his custody of the vessel was not disturbed, and the monitions remained in the hands of the marshal unexecuted until April 11, 1894, when the sheriff discharged the vessel from arrest under the attachments, and thereupon the marshal immediately seized the vessel, in obedience to the writs in his hands, and, in default of bond, has since retained her in his custody and possession. It appears that this seizure was made by the marshal after the vessel had been released by the sheriff, and before the receiver had an opportunity to regain possession of her.

The receiver of the Oregon Pacific Railroad Company has interposed exceptions and answers to three of these additional libels filed against the vessel. These exceptions show that the vessel is owned by the Oregon Pacific Railroad Company, a corporation organized under the laws of the state of Oregon; that the vessel is enrolled at Yaquina, in said state; that in consequence of a certain action instituted in the circuit court of the state of Oregon in and for Benton county, against the Oregon Pacific Railroad Company, to obtain a decree of foreclosure of a certain mortgage theretofore made and delivered by the Oregon Pacific Railroad Company to the Farmers' Loan & Trust Company, to secure the bonded indebtedness of said railroad company, a receiver was appointed on or about the 28th of October, 1890, by the above-named state court; that said receiver duly entered into possession of all of the properties of said railroad company, including the steamship Willamette Valley; that the said receiver, in pursuance of his trust and under the orders of said court, conducted the business of said railroad company, transporting merchandise and passengers on said steamship Willamette Valley from said Yaquina to said port of San Francisco, backward and forward; that this receiver was succeeded by another, and this latter by the present receiver, Charles Clark. The exceptions further

state that while the steamship Willamette Valley was in his possession as receiver, and was operated by him under the orders of the court, and subject to the jurisdiction thereof, and as its officer and custodian, the same was taken from his custody and that of his employes, against his will, by the sheriff of the city and county of San Francisco, in several actions at law initiated in the superior court of said city and county of San Francisco, wherein writs of attachment were issued against the Oregon Pacific Railroad Company and levied on said steamship; that thereafter the said steamship was, on motion of plaintiffs in said action, discharged from arrest; that immediately upon the release of said vessel by said sheriff, on or about the 11th day of April, 1894, and before the said Charles Clark could retake possession of said vessel, the said marshal of the United States, against the will of said Charles Clark, arrested the said steamship upon process issued out of this court, and now holds the same against the will of said Charles Clark. The exceptions further state that the libels were filed in the several cases, and the property arrested, while the said steamship was in the custody of the circuit court of the state of Oregon, and without the leave of that court having first been had and obtained, as required by law; that the vessel is now detained by said marshal under process in the said several cases, over which cases, in the absence of leave as aforesaid, this court had and has no jurisdiction; that the libels now under consideration were filed to recover a decree for the condemnation and sale of said vessel to pay for certain supplies furnished to said vessel while she was in charge of the receiver appointed in said cause, and while she was being operated by him as part of the said railroad company's property. Issue being joined upon these exceptions and answers, the receiver of the Oregon court contends that the seizure of the marshal was unlawful, because it was an invasion of the possession of the state court, and that this court should now order the vessel released from arrest.

It will be observed that the steamship Willamette Valley is enrolled in the state of Oregon; that, at the time the supplies were furnished for which maritime liens are claimed in the libels now under consideration, the vessel was owned by, and was a part of, the assets of an insolvent corporation, organized and doing business under the laws of the state of Oregon; that the vessel came into the possession of a receiver appointed by a court of that state, who, lawfully and for purposes connected with the discharge of his trust, employed the vessel in transporting merchandise between the port of Yaquina, Or., and the port of San Francisco, in the state of California; that, in the course of such employment, the master or agent of the ship contracted, in the state of California, with citizens of that state, for, and obtained, supplies necessary to such employment of the vessel. The libels are in rem to enforce liens over which a court of admiralty has exclusive and original jurisdiction. *The Moses Taylor*, 4 Wall. 411; *The Hine*, Id. 555; *The Belfast*, 7 Wall. 624; *The Lottawanna*, 21 Wall. 558, 580; *The J. E. Rumbell*, 148 U. S. 1, 12, 13 Sup. Ct. 498. The courts of the United States are bound to proceed to judgment, and to afford redress to suitors

before them, in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction. *Hyde v. Stone*, 20 How. 170, 175; citing *Suydam v. Broadnax*, 14 Pet. 67, and *Bank v. Jolly*, 18 How. 503. The jurisdiction of the federal courts cannot be ousted or impaired by any provision of a state law requiring creditors to appear before a state court and present their claims. *Chewett v. Moran*, 17 Fed. 820; *Payne v. Hook*, 7 Wall. 425; *Railway Co. v. Whitton*, 13 Wall. 270, 286; *Chicot Co. v. Sherwood*, 148 U. S. 529, 534, 13 Sup. Ct. 695; *Edwards v. Hill*, 8 C. C. A. 233, 59 Fed. 723; *The James Roy*, 59 Fed. 784.

It is contended, however, in favor of the right of the receiver to have possession of the vessel in this case, that the law of comity supplants these and other well-known principles of jurisdiction, and requires this court to recognize the fact that, in the hands of the receiver, this vessel was in the custody of the law at the time she was seized by the marshal, and therefore, of necessity, subject to the superior right of the state court of Oregon to manage, control, and dispose of the vessel for the purposes of the jurisdiction of that court. This is unquestionably the rule governing the relation of courts of co-ordinate or concurrent jurisdiction, constituted by the authority of distinct governments, as those of a state and of the United States, exercising jurisdiction over the same territory. *Taylor v. Carryl*, 20 How. 583; *Heidritter v. Oilcloth Co.*, 112 U. S. 294, 305, 5 Sup. Ct. 135; *In re Tyler*, 149 U. S. 164, 13 Sup. Ct. 785. It was, perhaps, in obedience to this rule, that, while the vessel was lately in the custody of the sheriff of the city and county of San Francisco, libelants did not seek to interfere with his possession, nor did the marshal attempt to disturb him in his custody of the vessel. It was probably conceded by all parties that the vessel was in the custody of the law in this jurisdiction, and could not, while in such custody, be seized by the marshal. The situation would have been the same had the vessel been in the possession of a receiver appointed by a court of this state. But, even in such a case, the creditor, holding a maritime lien, would not be denied his constitutional remedy to proceed against the vessel in rem in the admiralty court. In my judgment, the rule of comity does not require the court to absolutely withdraw its jurisdiction from such a claim. The procedure only is suspended, to avoid a conflict of jurisdiction, while all other legal rights remain. To hold otherwise would have the effect of depriving the citizen of rights guaranteed to him by the highest law in the land. It must be remembered that the state court cannot adjudicate the maritime lien without the creditor's assent, nor can it compel such a creditor to come before it, and, what is still more important, it cannot sell the vessel freed from the maritime lien. *The James Roy*, 59 Fed. 784.

It is contended, however, by counsel for the receiver, that these difficulties do not arise where the debt is contracted while the property is in custodia legis; that in such a case the creditor has only one remedy, and that is to present his claim to the court which has charge of the vessel, the possession of the receiver being that

of the court. This is to claim, in effect, that a maritime lien cannot be created while the vessel is in the custody of the court; but this is not the law, as was clearly shown by the court in the case of *The Witch Queen*, 3 Sawy. 17, Fed. Cas. No. 17,915. In that case, the libel was filed to recover compensation for services rendered by the libelant as ship keeper while the vessel was in the custody of the marshal, having been seized on a warrant out of the admiralty in various suits therein pending. It was objected that, inasmuch as the vessel was in the custody of the law at the time the alleged contract was made and the services rendered, the owner could not, by any contract which he might make, create any valid lien upon her. The court, commenting on this objection, said that the—

“Consequences of taking property into the custody of the court must be measured by the objects to be attained by it, and there would seem to be no reason to deprive the owner of any right, the exercise of which is consistent with the attainment of the objects of the seizure, and the enforcement, without hindrance or diminution, of the rights growing out of it.”

The court then proceeds to show the needless injury that might result to the owner of property denied the right to subject it to a lien while it is in the custody of the court:

“If the owner of property so situated is incapable of making a contract which will give rise to a lien or privilege, he would be equally incapable of making an express hypothecation or mortgage, or even, so far as is perceived, making a valid bill of sale of the vessel; and yet these contracts, subordinated, as they would necessarily be, to the authority of the court and the rights of the suitors before it, he might make without in the least degree interfering with the one or impairing the other. The consequences of the principle contended for might be pernicious in the extreme. The owner would be deprived of all power of disposing of his property, or, on the faith of it, obtaining the means to make necessary repairs, supplies for a new voyage, or funds to enable him to satisfy the very demands for which she had been seized.”

The further observations of the court on this point are particularly interesting, as applicable, by analogy, to what appears to be the facts of the case at bar:

“He [the owner] also might use this alleged incapacity as an instrument of fraud; for, by suffering the vessel to remain under attachment in the custody of the marshal's ship keeper (a circumstance which might easily escape observation), he might, while she so remained, cause extensive repairs to be made or supplies furnished, and, upon her release, deny all right of recourse against the vessel, on the pretense that she was in custodia legis when the repairs were made or the supplies furnished.”

It was accordingly held that the ship keeper had a lien, although founded on services rendered while the vessel was in the custody of the law, and this lien he could enforce in rem against the vessel after she had been restored to her owner. Manifestly, the doctrine here declared is in the interest of right and justice; and, while it avoids the difficulties of a conflict of jurisdiction, it tends to prevent deception and fraud in a direction where it may be safely and conveniently applied. In the case now before the court, the opportunity for defrauding creditors would be even greater than in the hypothetical case stated, where the supposed custody was that of the marshal. Here the vessel is employed in the business of a

common carrier, by a receiver appointed and operating in a foreign jurisdiction. The very nature of the business in which the vessel is engaged, the apparent authority of the master to contract for supplies, and the absence of the receiver in another jurisdiction, are all circumstances furnishing an opportunity for fraud that condemn, in the strongest terms, the claim of an exemption from a lien in such a case. In my opinion, a lien may be created, in a proper case, even though the property is in the possession of the court. Such a lien is admitted where the property is owned by, and in the possession of, the government. *The Siren*, 7 Wall. 162. The remedy for its enforcement is another question. Where the property is in the hands of a receiver, a creditor in the same jurisdiction may be sent to the court appointing the receiver for leave to proceed against the property. If leave is granted, the creditor proceeds in the admiralty court to establish his lien and recover his claim. If leave is refused, and the creditor still wishes to rely on his lien, he will be required to wait until the state court has disposed of the property, when he can proceed against it without regard to the proceedings in the state court. *The James Roy*, *supra*.

"A claim or lien existing and continuing will be enforced by the courts whenever the property upon which it lies becomes subject to their jurisdiction and control." *The Siren*, *supra*.

We come, now, to consider the exemption from seizure claimed on behalf of the possession asserted by a foreign receiver. Does the rule of comity require that application shall be made in such a case to the court appointing the receiver for leave to proceed against the vessel in the enforcement of a maritime lien?

In *Booth v. Clark*, 17 How. 322, 335, the supreme court of the United States, in speaking of the authority of a receiver in a foreign jurisdiction, said:

"We think that a receiver has never been recognized by a foreign tribunal as an actor in a suit. He is not within that comity which nations have permitted, after the manner of such nations as practice it, in respect to the judgments and decrees of foreign tribunals, for all of them do not permit it in the same manner and to the same extent, to make such comity international or a part of the law of nations."

Again, on page 337:

"The courts of the United States will not subject their citizens to the inconvenience of seeking their dividends abroad when they have the means to satisfy them under their own control. We think that it would prejudice the rights of the citizens of the states to admit a contrary rule."

That the receiver has no legal authority outside the jurisdiction of his appointment is stated with still further precision:

"He has no extraterritorial power of official action; none which the court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property; none which can give him, upon the principle of comity, a privilege to sue in a foreign court or another jurisdiction, as the judgment creditor himself might have done, where his debtor may be amenable to the tribunal which the creditor may seek. * * * If he seeks to be recognized in another jurisdiction, it is to take the fund there out of it, without such court having any control of his subsequent action in respect to it, and without his having even official power to give

security to the court, the aid of which he seeks, for his faithful conduct and official accountability."

In *Ableman v. Booth*, 21 How. 506, 524, the supreme court applied this same rule of limitation to the process of a court in the following strong language:

"No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued; and an attempt to enforce it beyond these boundaries is nothing less than lawless violence."

There appears to be abundant reason for applying this doctrine to the case at bar. The receiver was authorized by the circuit court of the state of Oregon to operate the steamship *Willamette Valley* in her usual employment of carrying passengers and merchandise in connection with the business of the insolvent corporation. Why should a vessel, thus operated, be exempt from the enforcement of maritime liens precisely as they may be enforced against any other vessel engaged in a like enterprise? Certainly, in good conscience and equity, such a vessel, participating in all the benefits derived from commercial pursuits on the high seas and navigable waters in interstate traffic, ought to be subject to the same legal responsibilities imposed on other vessels. A contrary rule would, in effect, constitute a discrimination which would be contrary to the spirit and policy of the admiralty law. Moreover, when the circuit court of the state of Oregon authorized the receiver to operate this vessel, it may be assumed to have been in contemplation of all the attendant and incidental powers, duties, and consequences usual and peculiar to the navigation of vessels, and subject to the principles of the admiralty and maritime law applicable thereto. But let us consider the possession of the receiver under other circumstances. Suppose the steamship *Willamette Valley*, operated, as she was, by a receiver, had been wrecked at sea or placed in a situation of great peril to herself, cargo, and passengers, and efficient and valuable salvage services had been rendered, and the vessel brought here, as being the nearest harbor of refuge; would the mere fact that the vessel was in the legal possession of a receiver diminish or impair the paramount lien which the admiralty law gives? Would the salvor be compelled to obtain the consent of the Oregon court to proceed in admiralty against the vessel in this jurisdiction? And, if refused, would he be required to present his claim to that court for adjudication, or wait until the affairs of the corporation were wound up and the vessel sold, and then proceed against her wherever found? The mere statement of such questions seems to be their own sufficient answer. To hold that the lien of the salvor would be subject to the doubtful contingencies involved in such a procedure would be to negative the most salutary principles of the admiralty law,—principles devised, not alone for the benefit of the creditor, but for the advantage of the vessel itself; that, in case of peril, she may be saved from destruction; that, owned by an insolvent person or corporation, she may still plow the sea, and not rot by the wall; that, in a foreign port, needing supplies,

she may obtain credit, and, proceeding on her voyage, be an advantage and profit to all concerned. Manifestly, the peculiar, but valuable, provisions of the admiralty law should not be surrendered to a rule of comity unless that rule is clear and unmistakable.

The jurisdiction of the circuit court of the state of Oregon is confined to its territorial limits; its process can extend no further. *Ableman v. Booth*, supra; *Pennoyer v. Neff*, 95 U. S. 714. It follows that the power and jurisdiction of its officers, ministerial or otherwise, must also be so limited. In the case at bar the vessel was voluntarily taken by the receiver out of the jurisdiction of the state of Oregon, and into that of another state. Had the vessel been taken out of that state by force or surreptitiously, and against the will of the receiver, a different question might arise; but when he does so voluntarily, and for the purpose of carrying on the business of the insolvent corporation, he loses control over the property, as a matter of official right, in the foreign jurisdiction, and the property, being without the jurisdiction of the court, can no longer be said to be in *custodia legis*. Such control as he does possess is by virtue of state comity only. Not that the mere fact of his departing from his jurisdiction and entering another operates as an *ipso facto* relinquishment of all authority and rights over the property. He still possesses the right to preserve, use, and protect the property in so far as may be consistent with the rights of domestic citizens; but the fact that he is a receiver of a foreign jurisdiction does not oust this court of its power to proceed against the property in the hands of such receiver within this jurisdiction. *Phelan v. Ganabin*, 5 Col. 14. However potent may be the reasons for refusing to disturb the possession of the court holding property in *custodia legis* in the state where the court is situate, by another court, in the same state, and covering the same territory, such reasons are inapplicable where the property is voluntarily taken from the custody of the court into another territorial jurisdiction. Were the court of the state of Oregon and this court tribunals of co-ordinate jurisdiction, entirely different reasons and principles would apply. But the jurisdiction of the circuit court of the state of Oregon does not extend into the state of California. Therefore nothing that that court can do within its jurisdiction can possibly conflict with this court, nor, vice versa, does anything done by this court, within its proper jurisdiction, conflict with the state court of Oregon. The territorial jurisdiction of each is well defined. The process of each is of no avail in the jurisdiction of the other. In short, they are in no legal sense courts of concurrent or co-ordinate jurisdiction.

The case of *Taylor v. Carryl*, supra, cited by counsel for claimant, to the point that courts of the United States will not interfere with the possession of the state courts respecting property taken under their process, goes no further than to decide that, where a vessel is in the custody of the sheriff by virtue of a writ of foreign attachment issued by the state court of Pennsylvania, the district court of the United States for the eastern district of Pennsylvania could not take the vessel from the custody of the sheriff, in a suit by a seaman for his wages. The case is not authority, either directly

or by implication, on the proposition that because a court of one state has taken the property in custodia legis, and, for the purpose of discharging its trust, sees fit to send the property into another territorial jurisdiction, the United States court, for such other jurisdiction, cannot entertain suits respecting such res, and, if seizure be the appropriate proceeding, to authorize its marshal to take the property into custody.

In *Peale v. Phipps*, 14 How. 368, the suit was against Peale, as trustee of the assets of a corporation which had been dissolved, and its charter declared forfeited. It was sought to compel the trustee to satisfy the claims of the plaintiffs out of the assets which he held as trustee. Phipps and others had recovered, in an action of ejectment against the Agricultural Bank of Mississippi, two undivided parts of a lot of land in the city of Natchez, state of Mississippi, and thereafter, under a *fi. fa.*, entered into possession of the property. Subsequently, under the laws of Mississippi, the charter of the bank became forfeited, and Peale was appointed trustee. In 1848, Phipps et al. brought an action against Peale, as trustee, in the eastern district of Louisiana, in the United States circuit court for that district, to recover rent for the property situated, as stated above, in Mississippi, and for damages. Peale, having been served with process in Louisiana, appeared, and interposed as a defense that, as trustee of the bank, he was not amenable to any other court than the one which appointed him. The supreme court, Chief Justice Taney delivering the opinion, held that the case fell within the principle decided by that court in *Vaughn v. Northup*, 15 Pet. 1, in which it was held "that an administrator could not be sued in another state for a debt due from his intestate, because he is bound to account for all the assets he receives to the proper tribunals of the government from which he derives his authority." It will be perceived that the decision of the supreme court in that case, however weighty and conclusive it may be on this court in a case involving an analogous state of facts, is not applicable to the present case. Here the proceedings are against the property,—the vessel,—and not against the receiver; and this property is within the jurisdiction of this court, and not in the jurisdiction, territorial or otherwise, of the circuit court of the state of Oregon. In the case just cited, the property—the real estate concerning which rents and damages were sought to be obtained from the trustee—was situated in a foreign jurisdiction, and the cause of action had arisen in such jurisdiction. In the cases at bar, the causes of action now under consideration arose within the jurisdiction of this court. They are held by citizens of this state, and are brought for supplies furnished in this state, and claimed to have been necessary to enable the vessel to be operated by the receiver, as authorized by the state court of Oregon. The cases are wholly dissimilar in the material facts.

The case of *Vaughn v. Northup*, 15 Pet. 1, referred to and followed in the case of *Peale v. Phipps*, *supra*, involved the right to sue an administrator appointed by the proper court of Jefferson county, Ky., in the District of Columbia. The supreme court denied

the jurisdiction of the circuit court of the District of Columbia to entertain such a suit, even though "the assets sought to be distributed were not collected in Kentucky, but were received as a debt due from the government, at the treasury department at Washington, and so constituted local assets within this district." Respecting the extraterritorial powers of an administrator, the court said, speaking through Mr. Justice Story:

"Under these circumstances, the question is broadly presented whether an administrator appointed and deriving his authority from another state is liable to be sued here, in his official character, for assets lawfully received by him, under and by virtue of his original letters of administration. We are of opinion, both upon principle and authority, that he is not. Every grant of administration is strictly confined in its authority and operation to the limits of the territory of the government which grants it, and does not, *de jure*, extend to other countries. It cannot confer, as a matter of right, any authority to collect assets of the deceased in any other state; and whatever operation is allowed to it beyond the original territory of the grant is a mere matter of comity, which every nation is at liberty to yield or to withhold, according to its own policy and pleasure, with reference to its own institutions and the interests of its own citizens. On the other hand, the administrator is exclusively bound to account for all the assets which he receives, under and in virtue of his administration, to the proper tribunals of the government from which he derives his authority; and the tribunals of other states have no right to interfere with or to control the application of those assets, according to the *lex loci*. Hence, it has become an established doctrine that the administrator appointed in one state cannot, in his official capacity, sue for any debts due to his intestate in the courts of another state; and that he is not liable to be sued in that capacity in the courts of the latter, by any creditor, for any debts due there by his intestate."

If this case can be deemed applicable to the peculiar equitable principles that appertain to receivers, it would seem to be authority also for the proposition, decisive in the cases at bar, that a receiver has no extraterritorial jurisdiction. But "receivers" and "administrators" are not convertible terms. Though their duties and incidental powers in some respects may be similar, yet they are officers having different functions to perform, and appointed for different purposes; and this is particularly true where, as appears in the case at bar, the receiver was empowered by the foreign court to carry on the business of the insolvent corporation, and, in doing this, to take the property—the vessel—out of the jurisdiction of the court, and contract debts and obligations respecting it, of which debts and obligations, from their maritime nature, this court, as a court of admiralty, has exclusive and original jurisdiction, and where to deny admission to such jurisdiction to citizens of this state in whose favor such debts and obligations have been incurred would be to seriously prejudice their rights by denying them their ordinary and proper remedies. Under any aspect of the *Vaughn v. Northup* case, it is not applicable to the facts of the cases at bar. Further, it must be remembered that these actions, and others of a similar character, against the vessel, are not brought against the receiver personally, but against the property itself; not against the receiver for some personal liability charged against him, but against the vessel for a liability created by the admiralty law.

The case of *Crapo v. Kelly*, 16 Wall. 610, involves a question of title solely,—as to whether the sheriff of New York, or the assignee of the owner in Massachusetts, had the superior right to a vessel, she being, at the time of the assignment, on the high seas, and without the jurisdiction of either the state of Massachusetts or the state of New York. The New York court held that the vessel was liable to the creditors in that state. A writ of error was taken to the supreme court of the United States, on the ground that the decision violated section 1, art. 4, of the constitution, which declares that “full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state.” It was decided by the supreme court that the ship, while at sea, was Massachusetts territory; that the act of the court in that state passed the title to the assignee; and that the vessel could not on her arrival in New York be attached as the insolvent’s property. The proceedings in the Oregon court, as to the title of the vessel, are not questioned here. Indeed, full faith and credit are given to all the proceedings of that court. It is only objected that an officer of that court cannot become an official actor in a court of another distinct territorial jurisdiction, and this distinction appears to be of substantial merit, in view of all the authorities defining and limiting the jurisdiction of courts.

In *Barton v. Barbour*, 104 U. S. 126, the defendant, Barbour, was the receiver of the Washington City, Virginia Midland & Great Southern Railroad Company, a corporation organized under a law of the state of Virginia. The plaintiff was a passenger in a sleeping car upon the railroad, while it was being operated by the defendant in error, and, to recover damages for an injury sustained while a passenger, she brought a suit in personam against the defendant in the District of Columbia. It was objected, by way of plea, that the receiver had been appointed by the circuit court for the city of Alexandria, in the state of Virginia, and that leave of that court had not been obtained to bring and maintain the suit. The objection was sustained in the lower court on a demurrer to the plea. The supreme court, in passing upon the sufficiency of the plea, said:

“Our decision upon this question will be limited to the facts of this case, which are that the receiver was appointed by a court of the state of Virginia, and the property in course of administration was in that state. The suit was brought in a court of the District of Columbia,—a foreign jurisdiction,—and the cause of action was an injury received by plaintiff in the state of Virginia, by reason of the negligence of the defendant while carrying on the business of a railroad, under the orders of the court by which he was appointed.”

The court, in concluding, specially limited its decision to the facts in that case, in the following guarded language:

“We therefore declare it as our opinion that when the court of one state has a railroad or other property in its possession for administration as trust assets, and has appointed a receiver to aid it in the performance of its duty, by carrying on the business to which the property is adapted, until such time as it can be sold, with due regard to the rights of all persons interested therein, a court of another state has not jurisdiction, without leave of the court by which the receiver was appointed, to entertain a suit against him for a cause of action arising in the state in which he was appointed, and

in which the property in his possession is situated, based on his negligence, or that of his servants, in the performance of their duty in respect of such property."

The remaining authorities cited by claimant, namely, the cases of *Wiswall v. Sampson*, 14 How. 52; *Thompson v. Scott*, 4 Dill. 508, Fed. Cas. No. 13,975; *Heidritter v. Oil Co.*, 112 U. S. 294, 5 Sup. Ct. 135; *In re Tyler*, 149 U. S. 164, 13 Sup. Ct. 785; *Hagan v. Lucas*, 10 Pet. 400; *In re Merchants' Ins. Co.*, 3 Biss. 162, Fed. Cas. No. 9,441,—are also inapplicable. They all center upon the proposition that, of two courts,—one a federal court, and the other a state court,—in the same state, or, more properly speaking, covering the same territorial jurisdiction with respect to the property in dispute, the court first acquiring custody of the property retains such custody undisturbed for its own purposes. As to this proposition there can be no question, and, as has been stated, *Taylor v. Carryl* is conclusive on this point. But, as has been heretofore observed, neither that case nor the others just referred to are authority for the proposition involved in the case at bar.

The argument by counsel for claimant that, because war ships are exempt from judicial process of courts of admiralty, the same immunity should be extended to vessels in custodia legis, is not, in my opinion, tenable. The considerations that exempt war ships from judicial process are based upon entirely different grounds than those applicable to receivers, or property in custodia legis. *Briggs v. Lightboat*, 11 Allen, 165; *The Exchange*, 7 Cranch, 117. But when a state becomes a trader, or enters into commerce, the property of the state may become subject to the adjudication of the tribunals. *Hen. Adm. Jur. & Proc.* 85, citing *Pennsylvania v. Wheeling & B. Bridge Co.*, 13 How. 519. See, also, *Taylor v. Best*, 14 C. B. 487; *Navigation Co. v. Martin*, 2 El. & El. 94; *U. S. v. Lee*, 106 U. S. 196, 1 Sup. Ct. 240; *U. S. v. Wilder*, 3 Sumn. 308, Fed. Cas. No. 16,694. A fortiori, a receiver of an insolvent corporation, employing a vessel as a common carrier, engaged in trade and commerce, should be subject to the laws of the foreign jurisdiction into which he may conduct such business.

No consideration has been given to the fact that, at the time the vessel was seized by the marshal the second time, it was not in the actual custody of the receiver. It seems to me that the rights of the libelants must rest upon a broader foundation than the mere accident of a want of personal custody during the short interval between the relinquishment of possession by the sheriff and the seizure by the marshal. It may be observed, however, that in the case of *The Davis*, 10 Wall. 15, a possession acquired by the marshal, as in this case, was held sufficient to justify the court in enforcing a lien against property owned by the government. This question, however, does not occur with respect to the seizure based upon the process issued on the first libel. In that case the vessel appears to have been in the possession of the receiver, through the agency of the master or some other officer, at the time she was seized by the marshal. This decision will therefore apply to the issues raised upon the first libel, as well as to those subsequently filed. In my

opinion, the admiralty law is paramount within its jurisdiction, and only considerations of comity will prevent the court from maintaining its supremacy. These principles of comity, as they appear to have been established, do not apply to the cases at bar for the following reasons: First, the causes of action under consideration arose in this jurisdiction; second, the vessel, at the time the liens were incurred, was engaged as a common carrier in trade and commerce; third, the proceedings are in rem; and fourth, the state and federal courts are not, in this instance, of co-ordinate or concurrent territorial jurisdiction. The exceptions to the libels will therefore be overruled.

THE ELMBANK.

PRICE v. THE ELMBANK et al.

(District Court, N. D. California. June 11, 1894.)

No. 10,639.

SALVAGE—COMPENSATION—EXTINGUISHING FIRE BY MEANS OF CHEMICALS.

A cargo of sulphur having taken fire while being discharged, and the city fire department, assisted by three steam tugs, having thrown water into the vessel for several hours without apparent effect on the fire, a skilled chemist, who had had experience in extinguishing a fire in another vessel by use of chemicals, at the request of the insurers, and with the assent of the master, took charge of the vessel, and, by generating and introducing into the hold carbonic acid gas, in a few hours brought the fire under control, and finally extinguished it. He was engaged in this work almost continuously during three days and nights, and thereafter rendered valuable services in supervising the unloading of the sulphur, his total attendance on the vessel covering the greater part of 19 days. The fire involved great danger of explosion, and of injury to the vessel from the combination of burning sulphur with the steel plates and other iron work. The value of the vessel was \$76,000; of the sulphur, \$21,000. *Held*, that \$10,000 was a reasonable salvage compensation.

This was a libel by Thomas Price against the ship Elmbank and her cargo for salvage services rendered in extinguishing a fire in the cargo of sulphur in the hold of vessel by the use of chemicals. Value of vessel, \$76,000; of sulphur, \$21,000; total, \$97,000. Award, \$10,000.

Walter G. Holmes and Howell A. Powell, for libellant.
Andros & Frank, for claimants.

MORROW, District Judge. This action is brought to recover for salvage services alleged to have been rendered in June, 1893, to the ship Elmbank and her cargo, consisting of about 2,000 tons of sulphur, by Thomas Price, a chemist, in extinguishing a fire which had started in the sulphur stowed in the hold of the vessel, and which had baffled the efforts of the fire department of this city, assisted by three steam tugs, to place it under control by the use of water. The salvage services claimed to have been rendered consisted of skillful labor and the scientific application of chemical compounds which, it is claimed, was the only practical and efficient method of arresting the fire and saving the vessel and cargo from total loss and destruc-

tion. The Elmbank is a British vessel constructed of iron, and of about 2,188 tons burden. She is 279 feet long; 41.9 feet beam; her depth of hold—that is, the cargo capacity—is 24.2 feet, comprising the lower hold, which has a depth of about 16 feet, and the between decks, of about 8 feet. She had a cargo consisting of about 2,000 tons of sulphur and 1,100 tons of coal. The coal was stowed in two sections,—one, of about 500 tons, was stowed in the forward part of the vessel, in front of what is known as the collision bulkhead, and the other section was stowed in the after part of the vessel,—while the sulphur, which comprised the principal part of the cargo, was stowed in the lower hold and between decks. The sulphur was contained in bags or mats, stowed in tiers from side to side of the vessel as high as the between decks, leaving a space of about seven or eight feet from the upper deck, except under the hatches, where the bags were piled up to the hatch, forming a sort of column. The discharging of the vessel had been going on for about a day and a half when the fire was discovered. All the coal had been taken out, and some 200 or 300 tons of sulphur had also been discharged from the between decks, out of hatch No. 2, and 10 or 12 tons of sulphur had been taken from the lower hold out of the same hatch. The vessel was lying at Union street wharf. The stevedore and his gang had ceased operations about noon of Saturday, June 10, 1893, to partake of their midday meal. The fire was discovered about 12:15, and the records of the city fire department show that the alarm was sounded at 12:17 p. m. The fire seems to have spread very rapidly, for, when the engines of the fire department arrived at the wharf, dense volumes of yellow smoke were issuing from the hatches and from such other avenues of escape as there were. Five engines answered the call,—Nos. 1, 2, 5, 9, and 12. The latter engine is the most powerful in the service of the department. The city's fire boat also attended, as well as tugs owned by private parties, equipped particularly for the purpose of rendering efficient service to shipping on fire. The officers of the fire department promptly proceeded to contend with the fire. They directed streams of water into the hold of the vessel through the hatches. An attempt was made to descend into the hold, but the firemen were driven back by the suffocating smoke. All the hatches were opened; hatch No. 1 only partially. It seems that the streams were introduced through three of the hatches. Altogether some eight or ten streams of water were flowing into the hold. The chief of the fire department concluded that the seat of the fire was in the neighborhood of the large hatch, designated as No. 3. Later developments proved that he was correct, although he may have been mistaken as to the exact locality of the most violent section of the combustion. Finding that, in spite of the large quantity of water that was being poured into the hold, the fire was gaining, two holes were cut by the fire department in the deck, for the purpose of getting more directly at the seat of the fire. This, it seems, was suggested some 20 minutes after the engines had arrived. As the decks were of steel, the work of cutting holes proved a laborious and slow under-

taking. The task occupied about three-fourths of an hour, and, after all, so far as discovering the center of the fire, seems to have been fruitless. One of these holes was cut between hatches Nos. 2 and 3, in the middle of the deck; the other, abaft the main or No. 3 hatch. Pipes were inserted in these apertures, and the fire department did all it could, with the appliances it had at command, to extinguish the fire, without avail. The fire was not even arrested, but appeared to be increasing.

The Firemen's Fund Insurance Company, it appears, holds the insurance on the cargo of sulphur. Mr. Dutton, the vice president and manager of this company, had been advised of the fire when the alarm was sounded. He arrived at the wharf, in company with another gentleman, Mr. Smith, between 1:30 and 2 o'clock in the afternoon, and found the fire department hard at work pouring in water, and then engaged, also, in cutting a hole in the deck just abaft of hatch No. 3. Upon ascertaining that the fire department had not made any progress in checking the fire, Mr. Dutton, after remaining for 10 or 15 minutes, determined to call upon Prof. Price for assistance. To use his own words:

"It did not seem to me that that was the most satisfactory [way] to extinguish a fire of that kind. My idea was that it would be far better than scuttling the ship to extinguish the fire with chemicals."

He recalled the fact that Prof. Price had officiated in a like capacity some years previously, and had succeeded in extinguishing a fire in a cargo of lime in the bark Whistler. Mr. Dutton repaired without further delay to the laboratory of Prof. Price. What passed between these two gentlemen is thus testified to: Mr. Price says:

"I was in my office, and Mr. Dutton, vice president of the Firemen's Fund Insurance Company, came there, and said that there was a ship lying off the wharf at Union street, having some 2,000 tons of sulphur on board, and it was on fire, and the fire department had been there since soon after the fire had been observed, something approximating three hours, and, instead of the fire being extinguished, it was gaining. They were also pumping water into her from three tugs,—the Fearless, the Governor Markham, and the Relief; still they did not seem to be doing any good. He said he wanted me to come down; that he remembered I had, several years ago, put out a fire on a vessel that came into this port in distress, being on fire. He thought if I came down there I would be of assistance to the ship. We both jumped into a carriage that he brought up with him. On the way down towards the wharf where the ship was lying we talked on several matters. About half way down, if I remember rightly, he asked me what I was going to charge for my services, if I had any to give. I told him I would not mention any price. I would charge for the work. I did not know. It was dangerous work. I did not know how long a time it would take me to put out the fire, and to what danger I might be exposed, but I would take my chance on salvage to get what I would be entitled to if I rendered any assistance of value, or nothing if I did not render any assistance."

It will be observed that the witness states that the conversation as to "salvage" took place on their way down to the fire. Mr. Dutton testifies as follows:

"I went in, in company with Mr. Smith. Saw the professor there, at work in his laboratory with his son. I said: 'Professor, there is a ship with a load of sulphur on fire down at the Union street wharf. The fire department are pouring water into her, and it does not seem to me that is the way to put it out.' Is it not a better way to extinguish that with chemicals?' He said: 'Of

course it is. It is the only way to do it.' I said: 'Can you come down and take hold as you did in case of the Whistler, and put the fire out?' He said: 'Certainly I can.' I asked him to hurry up and put on his coat and come down; that I had a wagon outside that would take him down. I told him that I had suggested to them down there that I was going up after him, and would bring him down. He started getting his matters at which he was at work in shape so that he could leave them. While he was washing his hands in a basin in the corner of the room, in his shirt sleeves, I said: 'Professor, what are you going to charge us for this,—to put out the fire?' He laughed and said: 'I will charge you— I will charge you what you gentlemen call salvage,' I kind of hesitated at that. He laughed and said: 'Oh, well, there will be no trouble about our coming to an arrangement, Mr. Dutton.' I said: 'No, professor; I guess there will be no trouble about that. We will come to an arrangement easy enough.' He said: 'Yes; it will depend on the amount of work I have to do how much I will charge.' We then got in the wagon, the three of us, drove over past my office, and there I got out to tell them I was going down with Prof. Price to the fire, and Mr. Smith got out and left us."

Mr. Smith, the gentleman who accompanied Mr. Dutton into the laboratory of Prof. Price, states:

"In his office Mr. Dutton spoke to him about the fire, and told him the ship was on fire,—a ship loaded with sulphur. Told him the general condition, and asked him if he could put it out. He said: 'Yes, I can put it out;' and he said he would charge him salvage. He spoke it in that sort of a careless, offhand way. He was washing his hands at the time. Q. Was that remark made in reply to any question which Mr. Dutton asked him in respect to his services? A. No, sir; I don't think the question was asked. The Court: Q. How did Prof. Price come to make the remark that he would charge him salvage? A. He asked him if he could put the fire out. He said: 'Yes; I can put it out, and I will charge you salvage for it.' It was in an offhand sort of way; not in the nature of any contract, but a casual remark. If I remember right, Mr. Dutton asked him if he could go down. He said, 'Yes.' He immediately left his work, and went to a basin, and began to wash his hands to go, and while he was doing that, as I recollect, this remark was made."

The inconsistency between these witnesses is that Mr. Price says that the conversation as to what he would charge took place while on their way down to the fire, while Mr. Dutton states that it occurred at the former's laboratory, and that no other conversation on the subject passed between them. Mr. Dutton is certainly corroborated by Mr. Smith as to a conversation respecting the question of compensation having taken place at Prof. Price's laboratory, but this witness also confirms the statement of Price that he would charge salvage. In view of this fact, and of the further fact that Mr. Dutton admits himself that Mr. Price said he would charge salvage, the inconsistency is immaterial. It must be so treated, unless the court rejects the testimony of these three witnesses on this matter. The testimony, then, amounts to this: Prof. Price swears that he said that he would charge nothing if he did not succeed, and take what his services were worth if successful. Mr. Dutton states that the professor said he would charge salvage. Mr. Smith also says that the professor stated that he would charge salvage. The fact is therefore established, not only by Prof. Price's own statement, but by the testimony of Mr. Dutton and Mr. Smith, that the libellant stated that he would charge salvage. Mr. Dutton says the remark, "I will charge you— I will charge you what

you gentlemen call salvage," was followed by laughter; meaning to imply, I assume, that the statement was not uttered in a serious mood, but simply by way of jest. Mr. Smith, while testifying that Prof. Price said two or three times that he would charge salvage, states that this was said in an offhand, careless way, although he was not paying particular attention. I am not convinced from the testimony offered that the statement of Prof. Price that he would charge salvage was uttered by way of jest, or that he did not seriously intend what he then stated. In view of the circumstances of the case, the occasion which called forth the statement about salvage, and other facts which will be referred to later on, I am compelled to hold that Prof. Price meant what the witnesses admit he did state.

Immediately upon the arrival of Prof. Price and Mr. Dutton at the fire, a consultation was held between the captain of the vessel, Prof. Price, Mr. Dutton, Mr. Metcalfe, who was one of Lloyds' surveyors, and others, as to what should be done. Prof. Price warned them that an explosion was imminent unless they prevented the access of large volumes of air which were entering the ship through the open hatches, and which, combining with the sulphur vapor or flowers of sulphur, promotes explosion. So much water had been poured into the vessel that she began to list. As matters were getting worse all the time, it was determined to put Prof. Price in full charge. This step was agreed to by the captain himself. The professor directed the fire department and the tugboats to stop their pumping and to withdraw their lines; he ordered the hatches and apertures and crevices to be tightly closed, so as to admit as little air as possible. He requested the fire department to send all the chemical engines they had. He caused about a dozen of empty barrels to be procured, and sent for a load of muriatic acid and marble dust. The latter materials were introduced into the barrels with water, and the barrels were connected with the holes in the deck, by means of pipes or tubes. The object of this operation was to generate carbonic acid gas, and to introduce this gas into the hold of the Elmbank, and thus neutralize and extinguish the sulphuric fumes and flames. Prof. Price testified that it is the only way of coping with sulphur on fire. The capacity of the eight barrels used in the operation was, for each 100 pounds of marble dust, 44 pounds of carbonic acid gas, and this quantity of gas, it is testified, would occupy a volume approximately of 350 cubic feet. Eight barrels, at the same rate, would make a total volume of 2,800 cubic feet. After the preliminary preparations of connecting the barrels by pipes with the hold of the vessel had been completed, the barrels were charged as above stated. They were violently agitated, so that the water and muriatic acid might the more quickly and thoroughly come in contact with the marble dust, and thus generate the gas, and this operation was continued at short intervals. These preparations to manufacture this gas and arrange and connect the barrels by pipes with the hold of the vessel took some time. Prof. Price, with Mr. Dutton, reached the scene of the fire about 3:15 o'clock. Prof. Price states that gas

was being transmitted into the hold about 5 or 5:30 o'clock. Although the fire alarm did not call for a chemical engine, Prof. Price insists that one was on the ground when he got there. But, however that may be, one chemical engine was insufficient to put out this fire, and, when the others arrived, they did not work very successfully, for want of material with which to generate gas. Four chemical engines were in use. They used, at first, bicarbonate of soda, but their supply of some 300 lbs., which was all that they had brought with them, was soon exhausted. They next tried soda ash, but this did not work. Prof. Price then procured some bicarbonate of soda from a wholesale store. This delayed the use of the chemical engines for some two hours. The barrels were recharged every three hours, and were agitated every half hour, so as to keep up a continual flow of gas into the hold. They were in operation all night. The carbonic acid gas from both the barrels and the chemical engines was transmitted through the holes in the deck cut by the fire department. The chemical engines worked until Sunday, about 2 o'clock, when they were sent away, with the exception of one, which was kept on hand for a while in case of an emergency. They all returned again on Monday night, when the fire broke out a second time. The combined effect of the gas generated in these barrels and by the chemical engines placed the fire under final control in the course of about 60 hours. Prof. Price remained on board the vessel all of Saturday night, and was up superintending and watching the fire until about 5 o'clock Sunday morning, when he took a rest of about an hour and a half, on board the tug Fearless, which was lying close by. He remained by the vessel until about 12 o'clock noon; then left, coming back between 5 and 6 o'clock; remained on board all night and all day Monday, until about 8 or 9 o'clock of that evening; then went up town, and returned about 9:30 or 10 o'clock of the same evening. About noon on Monday the tug Fearless began to pump out the water in the vessel, in accordance with Prof. Price's previous instructions to that effect, as he intended to go down into the hold on Tuesday to ascertain where the fire had really started, and to determine whether it was entirely extinguished. When he came back, about 9:30 or 10 o'clock of that evening, he found that the fire had broken out again. He attributed this to the fact that the pumping out of the water had been commenced too soon, thereby allowing large quantities of air to gain access to the hold, creating a draught, and thus starting the fire again, which was not then entirely extinguished. He directed the hatches to be tightly battened down, all openings to be kept closed, and to continue filling the vessel with carbonic acid gas. He again sent for the chemical engines, having made arrangements with Chief Sullivan that he could have them whenever it should prove necessary. By Tuesday morning the fire was again under control. The vessel was kept tightly closed, and carbonic acid gas was introduced without cessation until Thursday. On that day a diver went down to make a passage between hatches Nos. 2 and 3, so that the sulphur bags might the more easily be removed. The stevedores attempted to

go down on Thursday afternoon, but the gas was still too strong to permit of their doing so. Prof. Price then prepared an exhaust fan, to expel the carbonic gas. He worked all night Thursday. On Friday he explored with the divers the hold of the vessel. Then the fire was considered entirely out. The actual discharging of the vessel was resumed on Saturday, June 17th, a week after the fire had started. On Monday, June 19th, Prof. Price directed the tug Fearless to come back and pump out the water in the vessel. Thereafter he attended on board regularly, spending most of his time at the vessel, directing and superintending operations of unloading and pumping out the water. The cargo was fully discharged on Wednesday, June 28, 1893. He left the ship on June 29, 1893. His service, so far as time is concerned, covered a period of 19 or 20 days.

The question has been raised as to who first suggested the use of the chemical engines. Mr. Dutton says that he first mentioned the use of the chemical engines to Prof. Price after the latter had been placed in full charge of the fire, and when they were both returning to the vessel, having been to order some marble dust. This conversation he fixes at about three-quarters of an hour after Mr. Price had been to the vessel. The latter denies that Mr. Dutton mentioned to him the use of the chemical engines; and in this he is certainly corroborated by the circumstances related by Chief Sullivan and by a reporter, Frank Martin. But, assuming the fact to be otherwise, it does not appear to me to be very important. Price had been placed in full charge of the vessel, and was putting in operation his method of extinguishing the fire. Mr. Dutton does not claim to have understood the use of chemicals for this purpose, and the suggestion, if made, did not carry with it such a knowledge of the operation as to diminish the value of Prof. Price's services. The situation required the direction of a person possessed of the special knowledge and skill of a practical chemist, one who not only understood thoroughly the properties of the chemicals to be used in such an emergency, but also their speedy manipulation and competent supervision while imminent danger existed, and continual attention while any risk of the fire breaking out again remained. The very fact that the libellant had had a former similar experience made his services, by reason of that experience, the more valuable. It should not be forgotten, indeed it is a fact indicating the value and necessity of the services rendered, that five engines and three tugs poured in an immense volume of water for the period of two hours, more or less, and made no appreciable effect on the fire. The chief of the fire department admits that he was unable to arrest the fire, and several witnesses present confirm his statement.

The testimony indicates that the services of Prof. Price were rendered in the face of danger. He testifies as follows:

"All that was necessary to form an explosion there was that the flowers of sulphur—sulphur vapor—should be sufficiently mixed with the oxygen of the air to determine an explosion. As an illustration of that, I must refer to the well-known fact in which I had an experience, first, to the explosion in coal

mines, which is not the result of the explosion of gases alone, but from the explosion that results from the intimate mixture of the coal dust in a finely divided state with the oxygen of the air, and from the further well-known fact, on which I have myself experimented, that when flour is in a finely divided state, mixed with the air, it will produce an explosion, and has done so in some of the largest flour mills in the world. In this instance, the sulphur in a finely divided state of powder, mixed as it was with the air, and sulphur being such a substance, it ignites at a much lower temperature than any carbonaceous compound, such as coal and flour, and is in immediate danger of explosion should such a condition arise. Q. Just state what are flowers of sulphur, and how they are produced? A. By melting sulphur, bringing it up to its boiling point, which is between 750° and 800°, depending upon its purity. Then it commences to boil. After it commences to boil, it gives off brownish-yellow vapor, which, if conducted into a large close space, will form a flour-like or dust material. Q. Sulphur dust is the finest possible particles? A. Practically, that is what it is. Scientifically, we call it either sublimated sulphur, which is the most correct term, or flowers of sulphur. Q. When you reached the vessel the first time, did you see any flowers of sulphur? A. Yes, sir. Q. Where? A. Flowers of sulphur had settled all around hatch No. 2, hatch No. 3, and the ventilator was just simply lined with an incrustation of fine sulphur."

Again, he was asked:

"Q. The conditions to bring about an explosion would be flowers of sulphur, air, and light? A. Yes, they were all there. All the conditions for an explosion were there. Q. The flowers of sulphur mixed with the air which came in contact with the light,—fire? A. With the flame. Q. I will ask you now if those conditions existed there when you reached the vessel the first time? A. It was in such a condition that it was likely to have happened at any moment. Q. From the time you reached there until up to what time? A. Until I had all the battens, and the masthead, and all those places, closed, and for some time afterwards, until I had neutralized the air with a sufficient quantity of carbonic acid. Q. That covered a period of what time? A. About two hours. Q. During which an explosion was possible? A. Was very likely to occur at any moment. Q. Did those conditions exist subsequent to that at any time? A. Yes, sir; at the time that the fire broke out again on Monday afternoon,—Monday evening, I should have said, about 10 o'clock. Q. After or before the Fearless had arrived to pump out the water? A. Yes, sir. Q. After or before? A. After they commenced pumping the water. Q. How long did those conditions last at that time? A. There was no danger there over an hour afterwards, when I got everything closed down to prevent the mixture of the air."

Being asked the question: "What would be the effect of an explosion under those circumstances,—just as those circumstances were there at the vessel,—if you know?" the witness said:

"I think the effect of an explosion would have been to damage and strain the vessel to a very considerable extent, blow out the hatches, and extend the flame to the flowers of sulphur—sulphur dust—that had already settled in all parts of the vessel, especially in those empty spaces; and there would have been great danger to my life, and great danger to the cargo in general. If an explosion had occurred, it would have been impossible to put out that fire without some extraordinary means."

The witness is corroborated by several expert chemists as to the indications of danger where sulphur has been so heated as to be changed into so-called flowers of sulphur. Koebig says that, under the conditions described, there was danger of explosion. That gentleman has been a chemist since 1874. The fact, also, that there was sulphide of iron, the combination of sulphur and iron heated together, would indicate that there must have been great heat in the hold. Reynolds, proprietor of the California Chemical Works

in the city of San Francisco, and who has been in the business 50 years, testifies as to the explosive quality of sulphur when in a pulverized state. John Hewston, Jr., also a chemist for the past 40 years, says that sulphur is highly combustible, and that flowers of sulphur are more so than solid sulphur; that air will help to generate an explosion. The presence of flowers of sulphur would indicate that the sulphur had been volatilized by heat, and condensed. He also states that the presence of sulphide of iron would indicate that the iron of the vessel had become heated to a certain state. This last fact should not be overlooked in determining the pending danger to the vessel itself. On this point Prof. Price testifies as follows:

"Q. What is sulphide of iron? A. A mixture of sulphur and iron in the proportion of 32 parts of sulphur to 28 parts of iron. Q. Did this fire produce any sulphide of iron on the vessel? A. Yes, sir. Q. How was it produced? A. It produced a considerable portion of it on the steel deck, and on the ribs of the side of the vessel, as well as on the nuts that connected with the bolts that connected the steel deck to the wooden deck. Q. I will ask you if there was any danger of any union of sulphur and iron, producing sulphide of iron? A. Yes, sir; that I considered one of the great dangers connected with the ship. Q. Explain that. A. For the reason that the dunnage wood, as well as the bars that were fixed against the side of the vessel, being in close contact with the iron and steel sides of the ship, the combustion—the burning of the wood—would heat the plates of steel to a temperature of about 1,800, which is a red heat. The moment the sulphur comes in contact with iron at a red heat, the union of the iron and sulphur takes place, evolving at that same time a large amount of latent heat, intensifying the heat to a temperature known as white heat, thus compelling the sulphur to combine with the iron, forming sulphide of iron, which would melt away and utterly destroy that portion of the ship."

There is some conflict in the testimony as to the extent and character of the injuries to the iron plating and ironwork of the vessel resulting from the fire. It is admitted that some of the plates of the upper deck were warped and otherwise damaged, but, irrespective of the extent of such injuries to the vessel itself, the danger of a combination of sulphur and iron was present, and this is, in my opinion, an element to be considered in determining the value of the services.

The origin of the fire is a matter of conjecture. The captain of the vessel attributed it to the fact that, in discharging the cargo from hatch No. 2, the workmen had perhaps dropped a lighted match, or sparks from a pipe might have fallen, into the hold. But he is probably mistaken, for it is certain that the fire originated in or near hatch No. 3, which was closed, and spread athwartships, fore and aft, and upwards to the hatches. The melted sulphur had spread out some 15 to 20 feet athwartships and 20 to 25 feet fore and aft. The fire had reached the upper deck in several places, and had warped the platings of the upper deck, as above stated. It had charred the between-deck planks, and run out close to the dunnage battens. Prof. Price states that the fire was either the work of an incendiary or of spontaneous combustion; the latter would seem to be the more probable.

It is objected that the salvage services rendered were not of a high order of merit because they were not voluntary; that because

Mr. Dutton called upon and requested Prof. Price to take charge of the fire, and to render whatever assistance he could, the actual services rendered were of an inferior grade. The mere fact that a salvor is solicited to render service does not alter the character of the actual services rendered. Indeed, in some cases the request to render assistance would afford evidence of the necessity for such services. In this connection, the language of Judge Ware in *The Centurion*, 1 Ware, 495, Fed. Cas. No. 2,554, is applicable. He says:

"But the salvors in this case were volunteers, and were bound by no obligation to the *Centurion*. In all such cases, where services are rendered in saving property which is in danger of being lost on the high seas, or when wrecked, or stranded on the shore, it is, in the sense of the maritime law, a salvage service, and it is quite immaterial whether the salvors accidentally fall in with the wreck and volunteer their services, or are called upon by the owners, or persons interested in the wreck, to aid in saving it. It is the place where the property is situated, and the circumstances of exposure and peril in which it is found that determine the question whether it is a case of salvage or not."

In the case of *The Emulous*, 1 Sumn. 207, Fed. Cas. No. 4,480, the often-quoted language of Judge Story as to contracts to perform salvage services is as follows:

"The court has been asked upon this occasion to lay down some clear and definite rule as to what shall be deemed salvage service, and what shall be deemed a mere common contract for labor and services. I take it to be very clear that wherever the service has been rendered in saving property on the sea, or wrecked on the coast of the sea, the service is, in the sense of the maritime law, a salvage service. If it has been rendered under circumstances which establish that the parties have voluntarily, and without any controlling necessity on the side of the proprietors of the property saved or their agents, entered into a contract for a fixed compensation, or upon the ordinary terms of a compensation for labor and services quantum meruerunt, in either case it does not alter the nature of the service as a salvage service, but only fixes the rule by which the court is to be governed in awarding the compensation. It is still a salvage contract and a salvage compensation. It is true that contracts made for salvage services are not ordinarily held obligatory by the court of admiralty upon the persons whose property is saved unless the court can clearly see that no advantage is taken of the parties' situation, and that the rate of compensation is just and reasonable. The doctrine is founded upon principles of sound public policy, as well as upon just views of moral obligation. No system of jurisprudence purporting to be founded upon moral or religious or even rational principles could tolerate for a moment the doctrine that a salvor might avail himself of the calamities of others to force upon them a contract, unjust, oppressive, and exorbitant; that he might turn the price of safety into the price of ruin; that he might turn an act demanded by Christian and public duty into a traffic of profit, which would outrage human feelings and disgrace human justice."

In *The A. D. Patchin*, 1 Blatchf. 421, Fed. Cas. No. 87, Judge Conkling, referring to the opinion of Judge Story just cited, said:

"The just inference, therefore, appears to be that he considered all services which, if rendered voluntarily, would be salvage services, as not the less so because rendered in pursuance of an agreement for that purpose, and as entitling the salvor to the like remedies, whether rendered in the one form or the other. If the salvor, especially after the performance of the service, should take a bond or receive a bill of exchange or a negotiable promissory note in payment, it may be conceded that his remedy would be limited to a personal action on the security so taken. But there does not appear to be

any solid reason for denying to the salvor a lien on the property saved merely because the salvage service was performed at the request either of the master or the owner, and under a promise of remuneration, especially as a court of admiralty possesses an unquestionable power to shield the owners of property saved against extortionate exactions by reducing an exorbitant reward promised under the pressure of alarm or distress."

In *The Queen of the Pacific*, 21 Fed. 470, Judge Deady speaks in the same strain. He says:

"Another point is made by the claimant as bearing on the question of the amount of the salvage, and that is that the service of the salvors was not voluntary, but rendered in pursuance of a request or employment on the part of the claimant. The authority cited in this connection is the case of *The Undaunted*, Lush. 90, 92. But the ruling in this case is only to the effect that, when the services are rendered in pursuance of a request from a vessel in danger or distress, the party rendering them is entitled to recover salvage, according to the circumstances of the case, although such services prove to be of no benefit; while one who volunteers his services to a vessel under the same circumstances, if unsuccessful, is entitled to nothing. But in either case the law implies that the service is to be paid on the usual condition of the ultimate safety of the property in question (*The Versailles*, 1 Curt. 361, Fed. Cas. No. 16,924); and whether the fact of a request shall affect the amount of the compensation for a salvage service must therefore depend upon the degree of danger in which the vessel is placed. If she is in no danger of destruction or serious damage, but only some slight injury, she may be a reasonable security for a salvage service rendered her upon request, although it should prove of no benefit to her. In such a case, compensation not depending on success, the amount of salvage may very properly be diminished accordingly."

Applying this doctrine to the case at bar, the fact that Prof. Price was requested to take charge of the fire may be considered as an indication of the estimation in which his services were regarded. Mr. Dutton himself recommended Prof. Price very highly to the captain of the burning vessel, who was uncertain as to what was the right thing to do under the circumstances. Mr. Dutton testifies that he said to the captain of the vessel, Chief Sullivan, of the fire department, Capt. Metcalfe, who was one of Lloyds' surveyors, and others present:

"Now, gentlemen, I have brought Prof. Price here. He is the leading chemist of the coast, and he says that this is not the proper way to extinguish this fire, and that it can be easily extinguished by the use of chemicals; and I wish you would give him an opportunity to go to work and extinguish it."

And it seems that the fact that, a few years previous, Prof. Price had extinguished a fire on board of the bark *Whistler*, whose cargo of lime was on fire, and had done so by the use of carbonic acid gas, induced Mr. Dutton to seek Prof. Price's services in preference to those of other chemists. He very wisely concluded that Price's former experience would be serviceable in this case. That his services were much desired is very plain, and it is to be said, to his credit, that he responded to the call with alacrity, and did not attempt to bind Mr. Dutton, or, in fact, any one else, with promises of future compensation, or convert what might have proved to be a profitless undertaking, and certainly a dangerous one, into a certain reward.

As to the character of the services, the case at bar differs from most cases of salvage. The peculiar skill and ability of Prof. Price as a chemist is undoubtedly the prominent feature of this salvage service. His services were desired and were of value because of his well-known familiarity with and experience in his profession. He states that carbonic acid gas is the only efficient agent to extinguish burning sulphur. Certain it is that the fire department, with the use of some five engines and the assistance of three tugs, pouring in such a quantity of water as to cause the vessel to sink at one end, was not able, at the expiration of two full hours, to arrest the fire or to affect it to any appreciable degree. All the witnesses who testified on that point agree that the efforts of the fire department had not the slightest effect on the fire, at least so far as could be determined from the volume of smoke, the heat, and other indications. But, whatever may have been the reason, it was evident that water was not extinguishing this burning cargo of sulphur, nor did there seem any probability of its doing so. For at least three days and nights Prof. Price was almost continuously engaged in supervising the generation, and the introduction into the hold, of carbonic acid gas, keeping the vessel under close surveillance, watching the temperature, and attending to the fire in general. The work was certainly exacting, and required the exercise of care and skill, and the abandonment of all other employment. That there was, for a time, danger of explosion, and, therefore, the situation was one of some peril and hazardous to life, is established by the testimony of Prof. Price and by the statements of the expert witnesses. This testimony is borne out by that of F. G. Edwards, one of the fire commissioners, and who was present after the fire first broke out. He testifies that he became apprehensive of an explosion; that, although the fire department did good work, the situation became a dangerous one. Whether such danger was imminent is, of course, impossible to determine with certainty; but that there was danger is unquestionable. This danger is therefore an element in the case as presented to the court, and the success of Prof. Price in averting the threatened disaster is a matter for consideration in determining the value of his services. In the case of *The Suliote*, 5 Fed. 99, the fire was in cotton bales stowed in the ship. Three tugs assisted in putting out the fire, two of which pumped in water, while the third, the *Protector*, a powerful tug specially equipped to render service in the case of fire, pumped into the hold of the vessel, not only water, but also carbonic acid gas, which was regarded by the court as having been an effective agent in extinguishing the fire among the cotton bales. The award was made on a valuation of cargo, vessel, and freight, amounting in the aggregate to \$247,806.35. The salvage awarded by the district court was 15 per cent. Mr. Justice Bradley, in the circuit court, reduced the award to 8 per cent., making the allowance \$19,824.51. In the case of *The Cyclone*, 16 Fed. 486, an award of 15 per cent. on the vessel and of 25 per cent. on the cargo of naphtha was made, amounting in all to \$2,863.25. The vessel had been appraised at \$6,500, and the cargo of naphtha at \$7,553. The service

lasted for some four hours, and was rendered by two tugs. The meritorious character of the service is noticed by the judge in the following language:

"There are two circumstances in the present case which are well-recognized grounds for enhancing salvage reward: First, the extremity of the danger of the Cyclone, and the necessity of immediate relief; and, second, the personal hazard which attended the service, owing to the inflammable and explosive character of the cargo in her hold, and its exposed condition, the hatches being all open."

In *The Avoca*, 39 Fed. 567, Judge Benedict awarded \$5,000 on a vessel and cargo consisting of 10,000 barrels of oil. The vessel had caught fire from a wharf to which it was attached. The salvaging tug came up, towed it into the stream, which consumed about 20 minutes, and proceeded to extinguish the flames, which was accomplished in about an hour and three-quarters. The value of the bark was \$35,000; the value of the cargo, \$36,760. With regard to the service, the learned judge says:

"It is not to be doubted that the services rendered by the *Alice E. Crew* on this occasion were salvage services of an important character. Had it not been for the timely presence of the *Alice E. Crew*, the proofs render it certain that the bark and her cargo would have been wholly destroyed, as were other vessels, by the same fire. The services so rendered were promptly rendered to a vessel in great distress. They were voluntary, and they resulted in saving the vessel and her cargo from destruction. * * * The services, however, were of short duration, and involved no special skill or hazard to the salvors."

In *Spreckles v. The Brussels*, 38 Fed. 524, the salvage service was by a steam tug to a vessel on fire, which prevented the fire from spreading until a fire boat came up and extinguished the fire. Afterwards, the steam tug towed the vessel to the mud flats. It did not succeed in subduing the flames, but prevented them from extending to a quantity of mustard seed and oil constituting part of the cargo. The service lasted a few hours. The service rendered before the fire boat came up lasted about a half hour. The learned judge considered that the services of the tug in this respect were valuable; and, though he could not say that the tug certainly saved the ship from destruction, she contributed to it, very possibly, in an important degree. The value of the vessel in her damaged condition was stipulated to be \$15,000; the agreed value of the cargo was \$55,312.56,—total, \$70,312.56. The court allowed the sum of \$1,500. The case was appealed to the circuit court, where the award was increased to \$2,500. In the case of *The Kenilworth*, 41 Fed. 523, a fire started in a warehouse, and was communicated to a wooden vessel and a steel ship fastened to the wharf alongside the warehouse. The steel ship was the *Kenilworth*, valued at \$100,000. Three tugs and a river steamer rendered salvage services in separating the two burning vessels, and in extinguishing the fire on the *Kenilworth*. The court awarded the sum of \$14,500 to the salvors for the services rendered the *Kenilworth*. In the case of *The Connemara*, 108 U. S. 352, 2 Sup. Ct. 754, a vessel on a voyage from New Orleans to Liverpool, England, with a cargo consisting chiefly of pressed cotton, had been

towed down the river by a towboat and was anchored near the mouth of the Mississippi river. In the night, a passenger on board the ship was awakened by the smoke of burning cotton. He gave the alarm to the officers and crew of the ship and of the towboat. The fire was in the poop, above the main deck, and near the door, which could be opened by raising the latch; and the fire, when discovered, was confined to three bales of cotton, a spare sail, and two coils of tarred rope. There were 127 bales of cotton stowed in the poop. The towboat had on her deck a pump worked by steam, and hose long enough to reach the fire on the ship. As soon as the alarm was given, and by the exertions of the towboat's officers and crew, and of her three passengers, the hose was laid from the pump to the deck of the ship, and by their use of this pump and hose the fire was put out in 15 or 20 minutes without any damage to ship or cargo beyond the burning of the sail and the two coils of rope, the partial burning of the three bales of cotton, and the charring of a part of the upper deck or roof of the poop. In extinguishing the fire there was no serious risk of loss or damage to the towboat or of injury to life or limb of any of the salvors. No efficient effort was made by the officers or the crew of the ship to extinguish the fire. The ship had on her deck, within 15 feet of the fire, two tanks of water, holding 400 gallons each, one of which was full and other half full, with 6 buckets near the fire and 7 above, and a pump by which water could have been pumped upon the upper deck. At the time of the fire a steam tug was lying about a quarter of a mile off, and there was a telegraph station on a plantation near by from which a dispatch could have been sent to the city of New Orleans for aid to put out the fire, and efficient aid might have reached the ship from the city in two hours and a half after notice. The value of the ship and cargo was \$236,637. The district court awarded as salvage the sum of \$18,930.96, or 8 per cent. of the value. On appeal to the circuit court the award was reduced to \$14,198, or 6 per cent. on the value. The case was appealed to the supreme court, where the judgment of the circuit court was affirmed. The court, in commenting on this award, said:

"In the present case, a vessel and cargo of great value were rescued from imminent danger by the energetic efforts of the salvors, and the amount of salvage awarded is less than one-sixteenth of the value of the property saved. Although upon the circumstances of the case, so far as they can be brought before us by the summary of them in the findings of facts by the circuit court, we might have been better satisfied with an award of a smaller proportion, we cannot say that the amount awarded is so excessive as to violate any rule of law."

While these cases are somewhat analogous to the one at bar, they do not furnish any very definite standard to which the court can resort to determine the amount of compensation for salvage services in the present case. It is an admitted state of the law of salvage that judges may arrive at different conclusions upon substantially similar facts. As was said by Chief Justice Marshall in *The Sibyl*, 4 Wheat. 98:

"It is almost impossible that different minds, contemplating the same subject, should not form different conclusions as to the amount of salvage to be decreed, and the mode of distribution."

But, so far as it is possible to deduce any rule or guide from these precedents as to the amount of compensation for salvage services, they should be considered and followed. Further than this, the particular facts of each case must govern. In the case at bar, the salvaged property was valued by agreement at \$97,000. The services were of a peculiarly meritorious character. They did not consist in the use of the ordinary mechanical power, such as pumping in water, but they required and called into play the special skill and ability of Prof. Price as a chemist in the use of materials and appliances in extinguishing the fire. This is the important feature of the salvage service rendered by the libellant. It is not the only feature, but it is the important one. Furthermore, his efforts and system of extinguishing the fire were attended with success in saving both ship and cargo. The situation was a critical and dangerous one, which required prompt, intelligent, and effective measures to check the further progress of the fire and place it under control as speedily as possible. The only other way of putting out the fire that was considered feasible had signally failed, whereas Prof. Price's method checked its progress in a few hours, and placed it under absolute control in about 60 hours. While his attendance upon the vessel covered the greater part of 19 days, yet the period when the important salvage services proper were rendered may be said to cover a period of about 3 days. After that time it was considered more judicious and cautious by Prof. Price to closely watch the vessel, and supervise the unloading of the sulphur. While this part of the service cannot be regarded as salvage service, properly speaking, because, the danger of fire being past, there was no special need of his services in the capacity of salvor, yet, as he had been placed in full control by the captain of the vessel himself, until such supervision was revoked he was attending to duties pertaining to the safety of the vessel. Now, while this fact may not be considered as materially enhancing the salvage award, it is mentioned to indicate that the court is not unduly influenced by the mere length of time spent by the salvor in and about the vessel in superintending the discharge of the cargo after the actual period of danger had passed. But it may be observed, however, that his services in that connection seem to have been performed in a very satisfactory manner, and involved the suggestion that brought into operation the exhaust fan, by which the hold was cleared of the carbonic acid gas, rendering immediate work of unloading possible, and free from danger of suffocation. In view of all the circumstances mentioned, I am of the opinion that the sum of \$10,000 is a fair and reasonable salvage compensation in this case, and a decree will accordingly be entered in favor of the libellant for that amount.

STEVENS v. CLARK et al.

(Circuit Court of Appeals, Seventh Circuit. March 6, 1894.)

No. 113.

1. APPEAL—WHEN LIES—JUDGMENT AT LAW.

Appeal does not lie from a judgment in an action at law, a writ of error being the only mode of review.

2. WRIT OF ERROR—TIME OF ISSUING AND FILING WAIVER.

To give the appellate court jurisdiction of a writ of error, the writ must be issued and filed with the court below within the time prescribed by law, and this requirement cannot be waived by the parties.

Appeal from the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

This was an action of assumpsit by Nora G. Clark and William Diacon against W. H. Banks and W. G. Stevens. At the trial the jury found for plaintiffs. Judgment for plaintiffs was entered on the verdict. Defendant Stevens appealed.

H. S. Robbins, for appellant.

Lynden Evans and Frederick Arnd, for appellees.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

BUNN, District Judge. There is in this case a preliminary question of jurisdiction to be decided. The action was one at law, to recover damages upon a contract for the delivery of ice. The case was tried before a jury in January, 1893, and a verdict rendered for the plaintiff on January 13, 1893, for \$4,397.97. On February 20, 1893, a motion for a new trial was overruled, and judgment entered for the plaintiff upon the verdict. On April 19th an appeal was prayed for and allowed. The case was argued upon the merits on October 5, 1893, without any objection being raised as to the jurisdiction of this court to hear the case. It was afterwards discovered by the court that no writ of error had ever been prayed for or issued, and, the attention of counsel being called to the fact, argument was had and briefs were filed on the question whether or not this court could take jurisdiction of the case by consent, without a writ of error ever having been issued. If it could, then the objection on this ground must be considered as waived by the parties having argued and submitted the case upon the merits without objection.

We are of opinion that this court has not obtained jurisdiction of the case, and that the appeal must be dismissed. The appropriate and only mode of bringing cases of law for review before this court is a writ of error. An appeal is applicable only in chancery cases. The distinction is obvious, and has been steadily observed and maintained by the United States supreme court for a century. Equity cases must be brought up by appeal, which brings up the entire record upon the facts as well as the law. Cases at law can only be brought up by writ of error, which simply brings up the record for the correction of errors of law; that is to say, a writ of error carries up nothing but questions of

law, and these questions are to be determined according to the facts found in the record. An appeal carries up everything. It substitutes the higher court in place of the lower, and all questions, whether of fact or of law, depending upon evidence or law, may be re-examined by the appellate court, just as they were originally examined by the lower court having original jurisdiction. This was the practice in England at the time of the adoption of our constitution, and had been for a long time; but by some oversight or omission in the original judiciary act of September 24, 1789 (1 Stat. c. 20), this distinction was not preserved, and that statute (section 22) provided generally for the review of cases going up from the circuit court, whether legal or equitable, by writ of error; so that in all cases, whether at law or in equity or admiralty, a writ of error was the proper proceeding to obtain a review in the supreme court. After this law had remained in force about 14 years, from September, 1789, to March, 1803, this distinction, which had always existed in the English practice, was found so important that congress changed the law, by act of March 3, 1803 (2 Stat. c. 40), by providing that, in cases of equity and admiralty and maritime jurisdiction, and of prize and no prize, an appeal should be allowed to the supreme court. The effect of this provision was to repeal, by implication, the law of 1789, so far as that allowed a writ of error in a case in equity or admiralty, and to harmonize the system of appellate jurisdiction, and make it conform to the ancient and well-established principles of judicial proceedings. The writ of error, in cases at common law, remains in force, and submits to the revision of the supreme court only the law. The remedy by appeal is confined to equity and admiralty cases, and brings before the appellate court the facts as well as the law. These remedies could never in the United States courts be used interchangeably. *The San Pedro*, 2 Wheat. 132.

There can be no doubt that the law of 1891 (chapter 517, § 6), providing that the circuit court of appeals shall exercise appellate jurisdiction to review, by appeal or by writ of error, final decrees and judgments of the district and circuit courts in certain defined cases, preserves the same distinction which has hitherto so long existed, and that the proper proceeding in cases in equity is an appeal, and in cases at law a writ of error. If the language of this provision were to be construed literally, either an appeal or writ of error might be resorted to for the purpose of taking cases either at law or in equity to this court. But the provision should be construed with reference to the hitherto existing law and practice in these cases. There can be no presumption that congress intended to change the practice, unless that intention is plainly manifested by the language of the act.

The supreme court has uniformly held that it can obtain appellate jurisdiction in a case at law only by the issuing by the proper authority of a writ of error, and by filing the same in the court which rendered the judgment. *Brooks v. Norris*, 11 How. 204. Consent will not give jurisdiction; and if, at any time, the record does not show the necessary facts to give the court jurisdiction,

the court will dismiss the case. The jurisdiction of all the United States courts is special. The supreme court and the circuit court of appeals possess no appellate power in any case unless conferred upon them by act of congress; nor can such jurisdiction, when conferred, be exercised in any other form, or by any other mode of proceeding, than that which the law prescribes. *Barry v. Merrien*, 5 How. 103; *U. S. v. Curry*, 6 How. 106.

In *McCollum v. Eager*, 2 How. 61, it was decided by the supreme court that a decree in chancery cannot be brought up for review by a writ of error.

In *Sarchet v. U. S.*, 12 Pet. 143, which was an action at law upon a bond (opinion by Chief Justice Taney), it was held that the case could not be brought to the supreme court by an appeal, but must come up on writ of error, to give the court jurisdiction; and the court say in that case it had been so repeatedly held by that court.

In *Ballance v. Forsyth*, 21 How. 389 (opinion by Chief Justice Taney), the same doctrine was reaffirmed; and it was held, further, that where an appeal had been taken and dismissed, and a motion made to reinstate the case, and a stipulation to that effect signed and filed by the parties, that consent could not give jurisdiction where the law did not.

In *Kelsey v. Forsyth*, *Id.* 85, it was held that the agreement of parties cannot authorize the supreme court to revise a judgment of an inferior court in any other mode of proceeding than that which the law prescribes.

In *Walker v. Dreville*, 12 Wall. 440, the court, by Mr. Justice Miller, says:

"We have so often decided that, notwithstanding the peculiarities of the Civil Code of Louisiana, the distinction between law and equity must be preserved in the federal courts, and that equity causes from that circuit must come here by appeal, and common-law causes by writ of error, that we cannot now depart from that rule without overruling decisions and a well-established course of practice. The present case being a proceeding in equity brought here by writ of error, and not by appeal, the writ must be dismissed."

In *Bondurant v. Watson*, 103 U. S. 278, and *Ex parte Ralston*, 119 U. S. 613, 7 Sup. Ct. 317, the same doctrine is reaffirmed, Chief Justice Waite in each case delivering the opinion. In the first of these cases the writ of error was issued in the name and bore the teste of the chief justice of the supreme court of Louisiana. The court held it had no jurisdiction of the case, because no writ of error had been issued. No writ had been issued by the supreme court of the United States. As such a writ was necessary to the jurisdiction, the suit was dismissed.

Some stress was laid in the argument of this question upon the waiver of the writ of error by the appellee, by arguing and submitting the case upon the merits, without objection or making a motion to dismiss; and, if consent of parties, without the formality of a writ, could give jurisdiction, after the time had expired for issuing the writ, there can be no doubt that the submitting of the case on the merits would be a waiver. The law gives six months after the entry of the judgment in which to issue the writ of error or take an appeal. This provision as to time is absolute. The

right is strictly statutory. The time for suing out the writ or praying an appeal cannot be enlarged by stipulation of the parties, nor by the order of the court. The judgment was entered on February 20, 1893, and the time for issuing the writ expired on August 20, 1893. The case was argued October 5, 1893, a month and a half afterwards. There was nothing looking to a waiver until the right to the writ of error had been lost by lapse of time. If consent could give jurisdiction a month after the time for issuing the writ had elapsed, there is no reason why it might not ten years after. But it is quite clear from the authorities cited and others that there can be no waiver of the writ at any time. The issuing of the writ within the prescribed time is a jurisdictional fact, and neither consent nor anything else can take the place of it, at the option of the parties. If there can be no express waiver by stipulation, there can be no implied waiver.

The case of *Credit Co. v. Arkansas Cent. Ry. Co.*, 128 U. S. 258, 9 Sup. Ct. 107, is very instructive, and shows the great strictness with which these questions of the appellate jurisdiction of the United States supreme court have been treated. It was an appeal in a chancery case. The final decree in the circuit court was entered on January 22, 1883. The law allowed two years from final entry of the decree in which to appeal. On January 22, 1885, exactly two years after such entry, a petition for an appeal was presented by counsel for complainant to Mr. Justice Miller, and allowed. At the same time, Mr. Justice Miller signed a citation to the defendants to appear in the supreme court of the United States, at the next term, to answer the appeal. A bond for costs was also, at the same time, presented and approved by the same justice. These papers, if they had been filed in the court where the decree was entered on that day, would have perfected the appeal within the two years, and given the supreme court jurisdiction; but they were not presented to the circuit court, nor filed with the clerk thereof, until five days later, on January 27, 1885. The cause was argued at length in the supreme court when it was reached upon the docket, and submitted on the merits. The supreme court, nevertheless, dismissed the appeal for the want of jurisdiction, because not taken in time; that is to say, within the two years allowed by law. The doctrine declared in *Brooks v. Norris*, 11 How. 204, that the writ of error is not "brought," in the legal meaning of the term, until it is filed in the court which rendered the judgment, is reaffirmed, and the same doctrine applied to appeals. There an appeal had been prayed for and allowed within the time, and all the papers necessary to perfect it filed in the proper court, five days thereafter. The cause, when reached, was argued and submitted on the merits. So far as the little matter of the delay of five days in filing the appeal papers could be waived by the parties, it was waived; but the court refused to take jurisdiction, notwithstanding the waiver. The same doctrine is affirmed in subsequent cases. See *Small v. Railroad Co.*, 134 U. S. 515, 10 Sup. Ct. 614; *Farrar v. Churchill*, 135 U. S. 609, 10 Sup. Ct. 771.

We have examined all the cases cited by counsel for the appellant, and think that they do not conflict with or affect the authority of the cases already noticed in this opinion. The two cases decided by the United States supreme court most relied upon are *Gelston v. Hoyt*, 3 Wheat. 246, and *McDonogh v. Millaudon*, 3 How. 693. In the earlier case (opinion by Mr. Justice Story) the writ of error was regularly issued by the United States supreme court, and directed to the court of errors of the state of New York. The case had been taken from the supreme court of New York to the court of errors, and was there heard and decided; but according to the practice in that state the record, after hearing in court of errors, was returned to the supreme court. This having been done before the writ reached the court of errors, that court could not execute the writ. The writ was then presented to the supreme court, whence the record was sent; but, not being directed to that court, it could not regularly execute the writ. In this situation the parties consented to waive all objections to the direction of the writ, and to consider the record as properly brought up, if, in the opinion of the United States supreme court, the case could then be properly brought up by writ of error directed to the supreme court of New York, where the record was. The court held that this might be done, and took cognizance of the case. The law which provided for issuing writs of error to a state court did not prescribe the tribunal to which the writ should be directed. The court held it must be directed either to that tribunal which could execute it, to that in which the record and judgment to be examined are deposited, or to that whose judgment is to be examined, although, from its structure, it may have been rendered incapable of performing the act required by the writ. Since the law required a thing to be done, and gave the writ of error as the means by which it was to be done, without prescribing, in this particular, the manner in which the writ was to be used, it appeared to the court to be perfectly clear that the writ must be used so as to effect the object, which was to bring up the record. The writ having been regularly issued, and the purpose of issuing it having been fully accomplished, there was nothing lacking to give the court jurisdiction. What the parties waived was not the issuing of the writ, but the particular manner of sending up the record, which was not jurisdictional.

In *McDonogh v. Millaudon* the writ of error was issued by the clerk of the supreme court of Louisiana, and the citation was signed by one of the judges of that court. The record was sent up by that court to the supreme court of the United States. At the instance of the defendant in error, a writ of certiorari was afterwards sent down to the state court to complete the record. This was executed, and the cause had been pending in the supreme court of the United States for two years when a motion was made by the defendant in error to dismiss the case. The court refused to dismiss the case, without deciding whether or not the writ could regularly be issued by the clerk of the state court. In this case a writ and citation had been issued, and the defendant in error, after the record had gone up,

had himself obtained from the supreme court a writ of certiorari directed to the state court to complete the record. The purpose of the writ, whether regularly issued or not, had been accomplished; and, by the aid of a certiorari issued at the instance of the defendant in error, the record had been completed. This, clearly, is not the case of dispensing with the writ by waiver or consent of parties, which the supreme court has so often declared cannot be done.

The true line of distinction running through the cases is between facts which are jurisdictional and those which are not. The issuance of the writ and filing it with the court below within the time prescribed by law are jurisdictional, and cannot be waived. They are the only means known to the law for bringing up for review cases at law; but any mere irregularity in getting up the record may be waived.

In the case at bar no writ of error has ever been issued, and the time for issuing one had expired a month prior to the hearing. The result is, the appeal must be dismissed.

VIDER et al. v. O'BRIEN.

(Circuit Court of Appeals, Seventh Circuit. May 31, 1894.)

No. 124.

1. APPEAL—OBJECTIONS NOT RAISED BELOW—EXCEPTIONS TO CHARGE.

An exception to the judge's "charge in its entirety, and to the following portions thereof," followed by a series of propositions embracing substantially all of the charge, is not good where any part of the charge is correct.

2. SAME—ASSIGNMENTS OF ERROR.

Under a rule of court requiring an assignment of errors to "set out separately and particularly each error asserted and intended to be urged," there should be a separate assignment of error in respect to each part of the charge which is alleged to be erroneous.

3. SAME—BRIEFS.

Under a rule of court requiring appellant's brief to contain a specification of the errors relied on, each specification of the brief should conform substantially to the particular assignment of error on which it is based.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

This was an action of assumpsit by M. W. O'Brien, trustee, against Olof Vider, William Kinsela, Michael J. Labounty, Charles Netterstrom, and Hugh Naughton. At the trial, the jury found for plaintiff. Judgment for plaintiff was entered on the verdict. Defendants brought error.

H. H. Anderson (J. J. Parker, of counsel), for plaintiffs in error.
Kraus, Mayer & Stein, for defendant in error.

Before WOODS and JENKINS, Circuit Judges, and BAKER, District Judge.

WOODS, Circuit Judge. The plaintiffs in error were the defendants below. The bill of exceptions shows that, at the conclusion of the court's charge to the jury, "the defendants then and there duly excepted to said charge in its entirety, and to the following portions thereof;" and there follows a series of 10 or more propositions, embracing substantially all of the charge except the statement of the case. That such an exception is not available, if any one of the portions excepted to is good, is settled by numerous decisions, as well as by rule 10 of this court (1 C. C. A. xiv., 47 Fed. vi.), which requires that the party excepting to the court's charge shall "state distinctly the several matters of law in such charge to which he excepts." A general exception to the giving or refusing of a series of instructions is not good. *Block v. Darling*, 140 U. S. 234, 11 Sup. Ct. 832; *Beaver v. Taylor*, 93 U. S. 46; *Worthington v. Mason*, 101 U. S. 149; *Railway Co. v. Zider*, 61 Fed. 908.

The assignments of error are also defective. Neither the original assignment, nor an additional assignment which the record shows to have been filed some days later than the first, conforms to the requirement of rule 11, that an assignment "shall set out separately and particularly each error asserted and intended to be urged," and, "when the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to *totidem verbis*, whether it be instructions given or refused." This means, clearly, that there must be a separate assignment of error in respect to each part of the charge which is alleged to be erroneous, or, to say the least, if it is sought by a single specification of error to bring into question more than one proposition, it must be distinctly alleged that there was error in giving, or in refusing, each severally of the propositions which it is intended to challenge. The language of the assignment here is: "The court erred in charging the jury as follows;" and there follows the same series of propositions to which the general exception is shown to have been taken.

There has been a failure, it is to be further noted, to comply with the requirement of rule 24, that the brief of the plaintiffs in error, after giving a concise statement of the case, shall contain a specification of the errors relied upon. A comparison of the language of this rule with that of rule 11 shows the intention to be that each specification of the brief shall conform substantially, if not literally, to the particular assignment of error on which it is predicated. And for convenience there ought to be, with each specification in the brief, a reference to the corresponding assignment of error, as well as to the place in the bill of exceptions or other part of the record where the alleged error is shown. It is possible that a painstaking search and comparison would show some of the numerous specifications of the briefs in this case to be substantially the same as some of the numerous assignments of error, but such search and comparison ought not to be imposed upon the court. The relation of each specification to its corresponding assignment should be in some way distinctly indicated.

Of the various objections made to the introduction and exclusion

of evidence it would serve no good purpose to make particular statements. The record shows no ruling of which the plaintiffs in error may justly complain.

The judgment below is affirmed.

CLARKE et al. v. RICHMOND & W. P. TERMINAL RAILWAY & WAREHOUSE CO. et al.

(Circuit Court of Appeals, Fifth Circuit. June 12, 1894.)

No. 203.

1. CORPORATIONS—STOCK CONTROLLED BY COMPETING CORPORATION—RIGHT TO VOTE.

Stock in a railroad corporation of the state of Georgia was registered in the name of a corporation of another state, and its voting power was held by another foreign corporation, neither of which was a carrier; but the voting power was controlled by a carrier corporation of another state, which was in competition with the railroad company as to interstate traffic, though not as to matters domestic to the state of Georgia. No contract affecting such stock was shown to have been made by the parties in Georgia, or with any Georgia corporation. *Held*, that the right to vote on such stock was not affected by the provision of the constitution of Georgia declaring illegal and void all contracts or agreements with corporations which may lessen competition in their respective businesses, or encourage monopoly.

2. APPEAL—DISCRETION OF COURT BELOW—COSTS.

An award of costs, within the discretion of the court below, will not be reviewed on appeal, except in case of grave and manifest abuse.

Appeal from the Circuit Court of the United States for the Southern District of Georgia.

This was a suit by Rowena M. Clarke against the Central Railroad & Banking Company of Georgia and others, in which Francis S. Hesselstine and others intervened and became co-complainants. The circuit court dismissed the bill. Complainants appealed.

For reports of previous decisions in the circuit court, see 50 Fed. 338; 54 Fed. 556.

A. O. Bacon, for appellants.

Henry Crawford and A. H. Joline, for appellees.

Before McCORMICK, Circuit Judge, and LOCKE and PARLANGE, District Judges.

McCORMICK, Circuit Judge. The Central Railroad & Banking Company of Georgia (hereinafter referred to as the Central Company) is a corporation created by and existing under the laws of the state of Georgia, having its origin in an act entitled "An act to incorporate the Central Railroad and Canal Company of Georgia," approved December 20, 1833, by which, and the various acts amendatory thereof and supplemental thereto, and by reason of its consolidation with the Macon & Western Railroad Company, a corporation created by and existing under the laws of the state of Georgia, and with other corporations, it was authorized to issue, and did, prior to the 1st day of January, 1887, issue, its capital

stock, which might be and was acquired by other corporations and by individuals; the ownership of its stock carrying with it the right to the holder, of record, of each share thereof, or his appointee or proxy, to cast one vote upon such share at any meeting of the stockholders to be held for any purpose, including the election of directors of the company. The main stem of the Central Company is a railroad running from the city of Savannah, through the city of Macon, to the city of Atlanta, with a branch extending from Gordon, in Wilkinson county, to Milledgeville, and is the only railroad directly owned by the Central Company. The total issue of stock of the Central Company is 75,000 shares, each of the par value of \$100, aggregating \$7,500,000. Up to the 1st day of June, 1891, the Central Company, as owner, lessee, or otherwise, operated and controlled railroads having an aggregate of 2,400 miles, covering the chief commercial points in Georgia, and in several of the adjoining states. It also operated and controlled, in like manner, ocean steamship lines running regular packet ships to Boston, New York, and Philadelphia; the aggregate value of all its properties being variously stated in the oral argument of counsel at from forty to sixty millions, with its business extended in some degree, and in one way or another, to all the country east of the Mississippi river, and beyond it, in some quarters. Prior to the 1st day of July, 1887, various persons, who had acquired and owned 40,000 shares of the capital stock of the Central Company, procured to be created and organized under the laws of North Carolina the Georgia Company, to which company they transferred their 40,000 shares of Central Company stock, receiving in exchange therefor 120,000 shares of the capital stock of the Georgia Company, of the par value of \$100 each, together with 4,000 of its first mortgage collateral trust bonds, each for the sum of \$1,000, the payment of the principal and interest of which was secured by a mortgage or deed of trust by which the 40,000 shares of the Central Company stock were hypothecated for the benefit of the holders and owners of these bonds, in which mortgage or deed of trust it was provided that the voting power belonging to these 40,000 shares of stock of the Central Company should be exercised by the Georgia Company, its successor, successors, or assigns, by proper proxy to be given by the Central Trust Company of New York, the trustee in the mortgage. The whole number of shares of capital stock of the Georgia company was limited by its charter to 160,000. It appears that only the 120,000 shares above mentioned were ever issued. These 120,000 shares were all acquired and held by the Richmond & West Point Terminal Railway & Warehouse Company (hereinafter called the Terminal Company). On the 1st day of March, 1889, the Terminal Company, by a deed of trust to the Central Trust Company of New York, trustee (covering other matters and property), hypothecated, as security for the owners of certain of its bonds, 119,900 shares of the 120,000 shares of the capital stock of the Georgia Company, and 2,200 shares of the capital stock of the Central Company, providing that the voting power belonging to these hypothecated shares should be exercised

by the Terminal Company, its successor, successors, or assigns, by proper proxy to be given by the trustee. The Terminal Company owns and holds a majority of the capital stock of the Richmond & Danville Company (hereinafter referred to as the Danville Company), and through the Danville Company, or otherwise, controls all the different transportation lines known as the Piedmont Air Line. The aggregate amount of the par value of the stocks and bonds of the lines embraced in the Piedmont Air-Line system, owned by the Terminal Company, is alleged to be more than \$34,000,000. It is alleged that the Terminal Company controlled, by stock ownership or otherwise, the lines comprising the East Tennessee, Virginia & Georgia system of railroads, aggregating 2,600 miles. It is alleged that these systems are competing carriers throughout the extent of the territory touched by the traffic of the Central Company. On January 1, 1889, the Danville Company acquired by lease, to run for 20 years from that date, all the railroad lines and other rights then held or to be acquired by the Georgia Pacific Company. On the 1st day of June, 1891, the Central Company made a lease of all of its lines to the Georgia Pacific Company, and thereupon the Danville Company entered into possession and control of all the properties of the Central Company. The interest on all bonds for which the Central Company was liable was duly paid. The semiannual dividend of $3\frac{1}{2}$ per cent. on the capital stock of the Central Company and on the stock of the Southwestern, for the payment of which the Central was bound, was duly met; the last payment being made in December, 1891. On March 3, 1892, Rowena M. Clarke, one of the appellants (a minority stockholder of the Central Company), exhibited her bill to one of the judges of the circuit court, in chambers, alleging that the lease of the Central Company to the Georgia Pacific was unauthorized and unlawful; that the use of the properties of the Central Company by the Danville Company was destructive; that the control of the majority of the capital stock of the Central Company by the Terminal Company was in violation of the constitution of Georgia, and against the public policy of that state; that the officers and directors of the Central Company were the creatures of the Terminal Company, and that it would be idle for her to apply to them to obtain for the stockholders the relief of which the stockholders were in urgent need,—and praying that the court, by a receiver, would take possession of all the properties and business of the Central Company, declare the lease to the Georgia Pacific void, require an accounting from the other defendant companies with the Central Company, and enjoin the exercise of the voting power of the capital stock of the Central Company held in violation of the constitution and public policy of Georgia. The Georgia Pacific Company, the Danville Company, the Terminal Company, the Central Company, E. P. Alexander, president of the Central Company, and 11 other directors of the Central Company, were made defendants. On March 4, 1892, the circuit court, at chambers, passed an order that the defendants show cause, on a day named, why the injunction prayed for should not be granted pendente lite, and why the prayer for a permanent

receiver should not be granted; in the meantime appointed E. P. Alexander, the president of the Central Company, temporary receiver of all the property and assets of that company, providing that the ordinary business of the company and its connections be continued and conducted as usual till further order, without change of books or of accounts. On March 24, 1892, the Georgia Pacific and the Danville Companies filed their respective answers to this rule to show cause, disclaiming all rights under the lease which the bill prayed to have annulled. The motion for the appointment of a permanent receiver and for an injunction pendente lite, coming on to be heard, a decree was passed on the 28th March, 1892, appointing the president and directors of the Central Company a board of receivers, with usual powers, with this addition:

"It is further ordered that said directors, herein appointed receivers as aforesaid, shall have and exercise in the operation of said railroad, and in the conduct of ordinary business of said company, all the powers belonging to the directors of said company under its charter, and in accordance with the said charter and by-laws of said company, not inconsistent with this order nor the possession of said property by this court, and that, as directors of said company, they shall have the power to elect a president, and to fill any vacancy or vacancies in their number in the same manner as is provided for the filling of vacancies which may occur by resignation or otherwise in the board under the charter, but shall not pledge or dispose of any of the securities of said company, to raise money, without the approval of this court, except in the regular course of business."

It was also provided in the decree—

"That said Central Railroad & Banking Company of Georgia, and its directors, are enjoined and prohibited, pendente lite, from allowing the said Central Trust Company of New York, or the said Richmond & West Point Terminal Railway & Warehouse Company, or any other railroad company competing with the Central Railroad of Georgia that may, pending this order, acquire ownership of said stock, from voting said 42,200 shares of the stock of said Central Railroad & Banking Company of Georgia, or any part thereof, at any election or meeting at which the holders of the stock of the said Central Railroad & Banking Company of Georgia are entitled to vote under their charter. It is further ordered that an election for directors of the Central Railroad & Banking Company of Georgia shall be held at the principal office of the company, in the city of Savannah, on the 16th day of May, 1892, at such hours as may be fixed by the charter and by-laws of the company for such election, and that at such election no votes shall be received on behalf of the 42,200 shares of stock standing in the name of the Central Trust Company of New York, and alleged in the bill to be controlled by the Richmond & West Point Terminal Railway & Warehouse Company, unless upon a bona fide transfer of the same, approved by the court, and that the directors elected by the stockholders at such election shall, upon their qualification, constitute the board of directors of the Central Railroad & Banking Company of Georgia until the next election."

On May 9, 1892, the Georgia Company and the Terminal Company each separately presented to the court its surrender and transfer to the Central Trust Company of New York, in whose name this stock was registered, the right to vote the same at the election ordered for the 16th of May; and the Central Trust Company, showing the nature and purpose of its holding, and the interest of those secured, asked to be allowed to vote the stock at that election. The prayer of this application was denied by an order passed May 14, 1892. The election for directors was held May 16, 1892.

The Central Trust Company of New York, by its proper proxy, applied to the inspectors of the election to be allowed to deposit and have counted the votes of this stock. In obedience to the order of the court this application was, of necessity, refused by the inspectors, and that stock was excluded from participating in the election. The Central Company was thus relieved from the domination of the Terminal Company. Thereupon the Central Company brought its independent suit for an accounting against the companies against whom an accounting was prayed in the bill in this case, and it also filed its cross bill in this suit August 1, 1892, praying—

"That an accounting may be ordered between said Richmond & Danville Railroad Company, said Richmond & West Point Terminal Railway & Warehouse Company, and said Georgia Pacific Railway Company and your orator, and that your orator may have a decree against said companies, jointly and severally, for the said sum of \$2,500,000, and for such other and further sums as may, upon an accounting, be found to be due to said Central Railroad & Banking Company of Georgia."

The appellants say in their printed brief:

"From this time on the complainants' bill had nothing to accomplish, except the adjustment of costs, and to make the injunction against the voting of the Terminal Company's stock permanent."

The record before us shows that the suit continued to be fruitful in novel proceedings and results, but we will not divert our attention from the single remaining purpose of complainants' bill, so well expressed in their brief. The bill coming on for final hearing and decree, the circuit court, on June 30, 1893, passed its decree as follows:

"Come now the parties, by their respective solicitors, and this cause came on for final hearing upon the pleadings, testimony, and exhibits, and was argued by counsel. Upon consideration whereof, it is finally ordered, adjudged, and decreed that except as to the averments of the bill concerning the invalidity of the lease dated June 1, 1891, from the Central Railroad & Banking Company of Georgia to the Georgia Pacific Railway Company, all rights under which were disclaimed by the answers of the Georgia Pacific Railway Company and the Richmond & Danville Railroad Company, filed herein March 24, 1892, the said bill of complaint be, and the same is hereby, dismissed for want of equity; and the injunction herein granted on March 28, 1892, restraining and prohibiting the exercise of any voting power on the forty-two thousand two hundred shares of stock in the Central Railroad & Banking Company of Georgia, set out in the bill, is hereby rescinded and vacated. It is further ordered that the complainant Rowena M. Clarke, and the interveners, Francis S. Hesseltine, Rebecca M. Hesseltine, Charles H. Woodruff, and A. O. Bacon, who have become co-complainants herein, be, and they are hereby, taxed with one-half of all the costs of this action accrued and made after March 28, 1892. The clerk is ordered to make such taxation, and file the same in court, and the said Clarke and her co-complainants are ordered, within ten days thereafter, to pay into court one-half the amounts of costs so taxed by the clerk; and the other half of such taxed costs is charged against the defendants, except the said Central Trust Company of New York and the Central Railroad & Banking Company of Georgia, and day is given. The question of the validity of the lease by the Central Railroad & Banking Company of Georgia to the Georgia Pacific Railway Company, as between said parties to the same and the Richmond & Danville Railroad Company and the Richmond & West Point Terminal Railway & Warehouse Company, is not passed upon in this decree."

It is clear from an inspection of this decree that the judge of the circuit court who presided when it was passed considered that there was then nothing at issue between the parties to this appeal, except the right to vote the 42,200 shares of stock. There was no longer any issue as to the validity of the lease. That issue presented by the bill, having been terminated by the disclaimers of the adversary parties made 24th March, 1892, was not passed on in the decree. As to it, the office of the bill had terminated. Hence, as to it, the bill was not dismissed, having done its work; and, no one resisting, its having or wanting equity had become, and continues to be, immaterial. The only question raised by the assignment of errors on this appeal, for us to consider, is, should the 42,200 shares of stock in question have been disfranchised while held by the parties then holding it, or by such parties similarly related to the Central Company as a carrier? The appellants contend that this question must be answered in the affirmative. They rest their contention on this provision of the constitution of Georgia:

"The general assembly of this state shall have no power to authorize any corporation to buy shares or stock in any corporation in this state or elsewhere, or make any contract or agreement whatever, with any such corporation, which may have the effect, or be intended to have the effect, to defeat or lessen competition in their respective businesses, or to encourage monopoly; and all such contracts and agreements shall be illegal and void."

The judge of the circuit court, in announcing his judgment, remarked, "The authorities have been read almost to confusion." We do not need to view the case at bar through a cloud of precedents, the application of which is so doubtful or remote that they will tend rather to obscure our vision than to aid our inquiry. Nor is it necessary to indulge in speculation as to the ultimate power of Georgia over the subject, or as to the undefined powers of a court of chancery to affirmatively deal with questions of state policy. As we have seen, the Central Company had its origin in the legislation of Georgia more than 60 years ago. It does not distinctly appear at what precise date the 75,000 shares which constituted its entire capital stock were originally issued and sold in accordance with its charter, but it is evident that this was done long before the adoption of the provision of the constitution invoked by the appellants. The present holders of the stock in issue are not Georgia corporations. Unless they are forbidden by the provision of the Georgia constitution just quoted, their right to acquire and hold the stock depends on the terms of the charters of the respective companies. If we may distinguish between its dividend-bearing quality and its voting power, the only limitation, if any, set to its voting power, is that it shall not be used to encourage monopoly, or lessen competition between carriers. The Central Trust Company of New York, in whose name the stock is registered, is not a carrier company in Georgia or elsewhere. The Georgia Company, which in 1887 acquired 40,000 shares of this stock, and retained its voting power till the filing of the bill and appointment of a receiver in this case, is not a carrier company. The Danville Company, which, it is insisted, controls the voting power of all the

stock in question, is a carrier corporation; but, so far as it is in competition with the Central Company, it is as to interstate traffic, and not to any material extent in matters domestic to the state of Georgia. It is settled that the powers of corporations are derived from the sovereign that creates them. When they enter another jurisdiction, and make contracts, their contracts are governed by the laws of the state in which the contracts are made. It is not shown here that any contract affecting this stock was made by these parties in Georgia, or with any Georgia corporation. It is contended that this stock should not be allowed to vote, because it is held, or its voting power is held, by another corporation, which, through this stock, and its other holdings of corporation stocks, does, or may and purposes to, so control the Central Company's system and its competing systems as to "lessen competition in their respective businesses, or to encourage monopoly." The logical, ultimate, practical result of this contention is that any stockholder in two Georgia corporations, or in one Georgia corporation and in a corporation of another state which may compete for interstate traffic to be carried out of or into the state of Georgia, cannot vote his stock in both corporations, and, if only one is a Georgia corporation, he cannot vote his stock in that corporation. We say "any stockholder," because the logic of the contention applies as well to holders who are natural persons as to corporations not created by the general assembly of Georgia. Referring to this contention, summarized somewhat differently, the judge in the circuit court is reported to have said, "It is an anomaly beyond expression, to my mind." To those only very partially cognizant of the state of stock holdings in this country, the contention seems to be revolutionary. We need not question the power of Georgia to so provide, but we must inquire, has she so provided? Has the language of her constitution such self-acting affirmative force as to require a court of chancery to enjoin the exercise of the voting power of this stock by its present holders at the suit of these appellants, on the case they have made? We conclude that it has not such force.

"No appeal lies from a mere decree for costs." In *re City Nat. Bank* (April 30, 1894) 14 Sup. Ct. 804, citing *Bank v. Hunter*, 152 U. S. 512, 14 Sup. Ct. 675. If the matter of costs, submitted on this appeal, is not such a mere decree for costs as will not support an appeal, it is such a matter as lies so largely in the discretion of the chancellor that the court of appeals would not review it, except in a case of grave and manifest abuse. The judgment of the circuit court is affirmed.

MARBURY et al. v. KENTUCKY UNION LAND CO. et al.¹BERRY et al. v. SAME.¹

(Circuit Court of Appeals, Sixth Circuit. May 8, 1894.)

Nos. 145 and 146.

1. CORPORATIONS—GUARANTY OF BONDS AND STOCK OF OTHER CORPORATION.

The charter of a land company gave it powers to acquire mining and timber lands, to take the ore and timber therefrom and manufacture them, and to acquire rights of way "to export" its products, with all powers necessary to the full use and enjoyment of the powers granted; and authorized it, "in furtherance" of those powers, to effect "a temporary or permanent consolidation" with any railroad company. *Held*, that the land company had power to acquire stock of a railway company, and guaranty its bonds and dividends on its preferred stock, in order to secure the construction of a railroad necessary to the success of the land company, thus accomplishing all that a complete consolidation could accomplish, with less risk and responsibility.

2. SAME—CONSIDERATION FOR GUARANTY.

Such guaranty was given by the land company with the assent of the stockholders, on a contract by well-known bankers and fiscal agents to take a very large amount of the bonds so guarantied of a railway company, nearly all the stock of which was owned by the land company, which contract had been substituted for a previous contract, giving another party an option to take a smaller amount of the bonds, at a higher rate of interest, but without a guaranty. *Held*, that the guaranty should not be set aside as without consideration or benefit to the land company, although it was not shown that the party to the original contract was unable to comply with it.

3. SAME.

Other bonds of the railway company, delivered by it to the land company in payment of a debt for advance, were negotiated by the land company, part by sale and part by pledge for loans, on its guaranty, given after the repeal of the clause in its charter permitting it to consolidate with a railway company. *Held*, that such guaranty was also within its powers, the right to borrow money being given by its charter.

4. GUARANTY OF DIVIDENDS—EXTENT OF LIABILITY.

After a land company had guarantied dividends at a certain rate on preferred stock of a railway company, all the property of the railway company was sold on foreclosure of mortgage, and the land company became insolvent, and all its assets passed by statutory assignment for the benefit of its creditors, including future and contingent demands. *Held*, that holders of such stock were entitled, as against the assets of the land company, to its par value, there being nothing to show this to be an unjust capitalization of the guarantied income.

5. CORPORATIONS—INVESTMENT IN STOCK OF OTHER COMPANIES — INTEREST OF THIRD PARTIES.

Exchanges by a corporation of lands for stock of subsidiary companies will not be set aside in equity as ultra vires, where third persons, not parties to the proceedings, have invested money on the faith of the grants of the lands on one hand and of the ownership of the stock on the other, and such money has not been tendered them.

6. FEDERAL COURTS — FOLLOWING STATE PRACTICE — DISTRIBUTION OF ASSETS OF INSOLVENTS.

Gen. St. Ky. c. 44, art. 2, which provides that a fraudulent preference by a debtor shall operate as an assignment for benefit of creditors, being a rule of property, the construction thereof by the state court of appeals, making the mode of distribution of the debtor's assets, as to creditors having liens or collateral securities, the same as in cases of insolvent

¹ Rehearing denied.

decedents, controls the federal courts in the state, even where such decision of the state court was filed after a decree of the United States circuit court was entered declaring such fraudulent preference, but before a decree of distribution in the case. 57 Fed. 47, reversed.

Appeal from the Circuit Court of the United States for the District of Kentucky.

This was a suit by J. Kennedy Tod and others against the Kentucky Union Land Company and others to have an alleged fraudulent preference by the company declared, under the law of Kentucky, an assignment for benefit of its creditors. The circuit court rendered a decree for complainants, and appointed a special commissioner to report on claims filed, and on his report a decree was entered (57 Fed. 47), from which certain creditors, who had intervened, praying that certain guaranty debts of the corporation be declared void, appealed.

Dodd & Dodd, for Marbury et al.

William Lindsay, Grubbs & Morancy, and John W. Rodman, for Berry et al.

Butler, Stillman & Hubbard, Olin, Rives & Montgomery, and Humphrey & Davie, for J. Kennedy Tod & Co. and Central Trust Co.

St. John Boyle, for J. W. Gaulbert et al.

Before TAFT, Circuit Judge, and SEVERENS and RICKS, District Judges.

TAFT, Circuit Judge. These were appeals from a decree of the circuit court of Kentucky allowing certain claims against the estate of the Kentucky Union Land Company, an insolvent corporation. The action below was begun by J. Kennedy Tod & Co., judgment creditors of the land company, who filed a bill averring that the land company had attempted to prefer a creditor, made co-defendant, in contemplation of insolvency, and praying that, in accordance with the statutes of Kentucky, such attempted preference might inure to the benefit of all creditors, and that the assets of the corporation should be sold and distributed to all the creditors of the land company, as their interests might appear. The circuit court sustained the averments of the bill as to the attempted preference; decreed that it inured to the benefit of all the creditors, and then proceeded, in accordance with the statute, to bring in all the creditors for the distribution of the entire insolvent estate. A special commissioner was appointed to hear and report on claims filed. He made his report, but submitted certain questions for the decision of the court. It is the decree embodying the answer of the court to these questions that is here appealed from. The first decree of the court, which found the unlawful preference, and ordered the distribution of the estate among the creditors, is not complained of. Marbury & Jones, appellants, were creditors of the land company, and filed an intervening petition, praying that certain guaranty obligations of the land company might be declared void, as *ultra vires*, and without consideration. The

petition also sought to have set aside and held for naught, as in fraud of creditors, certain conveyances made by the land company to several subsidiary corporations in which the land company took the entire capital stock of the grantee corporations as consideration for the grants. These subsidiary corporations were made parties to the petition by subpoena. The petition was dismissed for want of equity. And this action of the court is assigned for error in the appeal of Marbury & Jones. The questions for our consideration are:

First. Had the Kentucky Union Land Company power, under its charter, and under the circumstances shown in the record, to receive and hold all the stock in a railroad corporation known as the Kentucky Union Railway Company, and guaranty the payment of its bonds and preference stock?

Second. Conceding that the land company had the power to guaranty the payment of semiannual dividends on the preferred stock of the railway company, what is to be the measure of the recovery of the trust company with whom such guaranty was made for the benefit of the preferred stockholders against the assets of the land company?

Third. Should a court of equity, in an action like the one at bar, and under the circumstances of this case, set aside and hold for naught the conveyance made by the Kentucky Land Company to the subsidiary corporations, and bring the land conveyed into court for sale and distribution as part of the assets of the defendant land company?

Fourth. Under the statute of Kentucky forbidding preference in contemplation of insolvency, should creditors with security for their debts be permitted to prove and receive dividends upon their claims in full, or should they be required to wait in the distribution, until unsecured creditors shall have received as much on their claims as the secured creditors receive from their collateral or other security?

The circuit court held that the land company had the power to make the guaranties in question; that the measure of recovery on the guaranty of dividends was such a sum as would yield when invested a return equal to the dividends insured; that equity would not set aside the transactions between the land company and the subsidiary corporations; and that creditors, secured and unsecured, should be allowed to prove their claims in full against the insolvent estate, without regard to collateral held.

It is necessary to state, in as summary way as may be, the facts developed by the record. The Kentucky Union Land Company was organized under a special act of the Kentucky legislature, passed May 6, 1880, and was then known, by the terms of the act, as the Central Kentucky Lumber, Mining, Manufacturing & Transportation Company. The act gave it the right to change its name, and this right it exercised in May, 1888, by assuming the name of the Kentucky Union Land Company. It will be convenient hereafter to refer to it as the "Land Company." By the second section of the act, it was made "capable in law of purchasing, selling,

holding, leasing, conveying, receiving by gift or devise, and disposing of all real and personal property and estate," and of "making all contracts and by-laws, and doing all lawful acts necessary and proper for the business and powers hereby conferred upon" it, "properly incident thereto." By the third section the company was given the power, when authorized by a majority vote of the shareholders, "to borrow money on the credit of the company, not exceeding in amount the capital stock of said company," "and to issue bonds therefor, secured by mortgage on the property of the company." By the fourth section it was permitted to increase the stock of the company to four millions of dollars. The seventh and important section was as follows:

"The said company shall have power to engage in the business of mining and manufacturing in any part of this commonwealth, and it may purchase and lease mineral and timbered lands, and contract for and purchase ore, timber, and machinery for manufacturing the same, and may open and develop mines of iron, coal, or other minerals, and may acquire by purchase or condemnation the necessary right of way for exporting the products of the said mines and the same timber, either in the crude or manufactured state, and may establish and operate such works, rolling mills, sawmills, and stove factories, as may be expedient or necessary in the reduction and manufacturing of ores and the manufacturing of timber, or implements for mining, or cutting and preparing timber; and the said company may cut and prepare timber for market, and ship the same either in logs, plank, or manufactured articles; and shall have all rights and privileges, powers and franchises necessary to the full use and enjoyment of the powers herein granted; and may, in furtherance of the powers granted in this section, effect a temporary or permanent consolidation with any railroad or transportation company, chartered or to be chartered under the laws of this commonwealth; and the consolidated companies may have and exercise the powers of both companies, and act in the name of either of them, or in a joint name, to be agreed upon in the articles or deeds of consolidation."

The land company had acquired by purchase, prior to 1886, mineral and timber lands in eastern and southeastern Kentucky, lying principally in Powell, Wolfe, Estill, Breathitt, Perry, Letcher, Leslie, Clark, and Knott counties, amounting in the aggregate to upwards of half a million acres. By an amendatory act passed April 11, 1890, and accepted by the company, it was given power to increase its common stock to \$10,000,000, and to issue \$2,000,000 of preferred stock. The fourth section of the amending act was as follows:

"(4) That so much of section seven of said act as authorizes said company to effect a temporary or permanent consolidation with any railroad or transportation company is hereby repealed."

The Kentucky Union Railway Company, to be hereafter referred to as the "Railway Company," was organized under a special act of the Kentucky legislature passed in 1854, which empowered it to construct, equip, and operate a line of railway from a point near Newport or Covington, on the Ohio river, by the nearest practicable route to a point near Cumberland Gap, in the direction of Knoxville, and to build and operate branches running eastwardly through the mineral regions of Kentucky to the state of Virginia. Under this charter the company, prior to 1883, had built and operated

14 miles of road from Kentucky Union Junction, on the Chesapeake & Ohio Railway, to Clay City.

In 1887, the capital stock of the land company was \$4,000,000, and that of the railway company was \$5,000,000. The stock of both companies was owned by what was known as the "Tarr, Thomas, McGibben & Dodge Syndicate." One F. D. Carley and associates procured the incorporation of the Kentucky Coal & Iron Company, hereafter referred to as the "Coal and Iron Company," with the purpose of acquiring the entire interest in both the land and railway companies. The coal and iron company had express power to own and sell stock in other companies. While the record is not as specific as it might be on the subject, it is perfectly evident that the railway, as constructed, and as projected, was so situated with reference to the lands of the land company as to be a most important factor in increasing the value of its property, and in bringing its mineral and timber products to a lucrative market. It may be presumed that this was the reason why we find the two properties owned by one syndicate in 1887. The coal and iron company paid the Tarr syndicate about \$800,000 for both properties, and cleared off a mortgage on both properties for \$400,000 in doing so. The purchase price of the properties was paid by the issue of \$800,000 of bonds, secured by mortgage on the lands of the land company. This issue was subsequently taken up by the sale of preferred stock in the land company. The coal and iron company for a time held the entire stock in both the railway and land companies. Then the stock of the land company was distributed, \$1,600,000 to the stockholders of the coal and iron company, \$2,000,000 to F. D. Carley as a bonus for the negotiation or sale of the first mortgage bonds of the railway company, and the balance was put into the treasury of the land company as treasury stock. The entire stock of the railway company was voted for a time by the coal and iron company, and then, shortly before the issue of the first mortgage bonds of the railway company, it was transferred to the land company as its property, and was ever after used as such. At this point the coal and iron company disappears from the case.

In 1888 the railway company made a contract with F. D. Carley, giving him an option to take \$2,000,000 of a \$3,000,000 issue of bonds secured by first mortgage on the railroad, bearing 6 per cent. interest, at 90 cents on the dollar, with a bonus of \$2,000,000 of the stock of the land company. Carley contracted to sell \$1,000,000 of these bonds to J. Kennedy Tod & Co. at 92½ cents. This sale was not completed, for Tod & Co. proposed instead to take \$2,500,000 of the bonds if their form was somewhat changed, and a different plan of floating them was adopted. The plan was this: that the interest on the bonds should be changed from 6 per cent. to 5 per cent., and the land company should guaranty their payment, and that the land company should transfer 6,000 shares of \$100 par value of the stock of the railway company, upon which both the land and railway companies should guaranty the payment of 5 per cent. dividends, payable semiannually. Tod & Co. proposed to give

90 cents on the dollar for the bonds, accompanied by two shares of the guarantied stock for each bond as a bonus. The Carley contract was rescinded, and this plan was adopted. It was part of the plan that the proceeds of 500 of the 2,500 bonds sold should go into the treasury of the land company, to represent, as it was said, the value of the 14 miles of constructed road which was now to be mortgaged, and which the land company, as the sole owner of the stock of the railway company, was deemed to own, prior to the mortgage, free from incumbrance. The bonds and mortgage of the railway company, with the guaranty of the land company on the bonds, were issued in accordance with Tod & Co.'s suggestion in March, 1889, but were dated as of July, 1888. At the same time the railway company guarantied the payment of semiannual dividends of $2\frac{1}{2}$ per cent. on the 6,000 shares of its stock received from the land company, and gave an income bond to the Central Trust Company of New York to secure the payment of the same; the bond stipulating for the payment of the dividends regularly, and the payment of \$600,000 at the end of 100 years. It was provided that this \$600,000 was to be invested at that time by the trust company and its earnings were to be used to pay, as far as they would, the dividends accruing due thereafter. In this same bond agreement the land company covenanted with the trust company to pay the dividends in case the railway company should default, and the following was indorsed on each stock certificate:

"For value received, the Kentucky Union Land Company agrees and guaranties that the holder of the within stock shall receive dividends of $2\frac{1}{2}$ per cent. thereon on the 1st days of July and January of each year, beginning with the 1st days of July and January of each year, beginning with the 1st day of July, 1889. Witness the name of the Kentucky Union Land Company, hereunto signed by its president, and its corporate seal by its secretary."

In the present litigation the first mortgage bondholders are represented by J. Kennedy Tod & Co., and the holders of the preferred stock are represented by the Central Trust Company.

The projected railroad was constructed to Jackson, Ky., a distance of ninety-odd miles, at a total cost of \$3,500,000. Of this sum \$2,667,115 was paid, and the remainder was owing as a floating debt, when a receiver was appointed in the suit to foreclose the mortgage on the railway. The mortgage has been foreclosed, and the railway sold at a price which has not paid the first mortgage bonds. Of the amount of cash which was paid to construct the railway, \$1,800,000 was obtained by the railway company as proceeds of the 2,000 first mortgage bonds it issued, \$250,000 was secured from county subscriptions, and the balance, amounting to about \$600,000, was paid out of the treasury of the land company. To repay this indebtedness the railway company, July 5, 1890, issued a second mortgage to secure bonds amounting to \$1,300,000, only \$800,000 of which were actually issued, and they were all turned over to the land company. The land company guarantied the payment of the bonds, and sold \$395,000 of them at 70 cents on the dollar, pledged \$204,000 of them to secure a

loan from Tod & Co., and pledged substantially all the remainder of the bonds to secure other loans with Kentucky banks. J. W. Gaulbert was recognized by the court below as the representative of the second mortgage bondholders.

Between September, 1889, and November, 1890, the executive officers of the land company organized five subsidiary corporations, to whom the land company conveyed certain of its lands and buildings in exchange for all the stock of the companies except enough to qualify directors therein. The first of these was organized October 3, 1889, with a capital stock of \$500,000, as the Kentucky Union Lumber Company, to which the land company conveyed land, and a sawmill, a planing mill, and other improvements at Clay City. The capital stock was pledged with Inman Swann & Co. to secure a loan evidenced by the obligation of both the land and lumber companies, amounting to \$230,000, the proceeds of which were used in improvements. The loan was secured by mortgage of the lumber company's land and plant.

The second subsidiary company, with a capital of \$4,000,000, was organized March 5, 1890, as the Three Forks City Company, and the land company deeded to it 2,700 acres of land, upon which the land company had previously issued a mortgage of \$175,000. The consideration was the stock of the new company, and \$370,000 of 6 per cent. bonds issued by it. The bonds were subsequently deposited with Tod & Co. as collateral for a loan to the land company. Some of the stock was sold at 10 cents a share, and \$18,550 realized for the land company.

Another was the Kentucky Industrial Consolidation Company, with common stock of \$2,000,000 and \$2,000,000 preferred. To this company the land company deeded 400 acres, with manufacturing plants and other improvements on it. The land company received the stock, and deposited 12,000 shares of the common stock and 19,700 shares of preferred stock with Tod & Co., to partly secure a loan of \$200,000.

Another was the Kentucky Union Improvement Company, with a capital stock of \$50,000. To this company the land company deeded lands in Clark county near Winchester. The stock received for the conveyance was deposited by the land company to secure a loan of \$25,000 from the Second National Bank of Louisville.

Finally, the executive officers of the land company organized the Kentucky Land & Title Company for the purpose of taking title to all the remaining lands of the land company, except the town site at Jackson, and selling the same. It is not necessary to notice this company further than to say that before the plan was completed, the receiver in this case was appointed, and, on his petition, all the stock of the new company was turned over to him by order of court, and, since this appeal was perfected, the new company has reconveyed to the land company all the land received from it. This has been made to appear to the satisfaction of the court since the case was submitted.

With this resumé of the facts, we come to the consideration of the four questions stated at the opening of this opinion.

First. Was it within the power of the land company to own the stock and guaranty the bonds and preference stock of the railroad company? The guaranties are attacked on two grounds: First, it is said that whether beneficial to the land company or not, they were wholly beyond its charter powers; and, second, that, even if it was within the power of the company to guaranty the debt of a railway company under circumstances where the guaranty was necessary to secure the construction of a railway which would be beneficial to the land company, the facts of this case, of which the present holders of the bonds had full notice, show that the guaranty was unnecessary, was without consideration, and was of no benefit either to the railway company or to the land company.

We may, then, first inquire into the general powers of the land company. The land company was given power by its charter (1) to acquire mining and timber lands; (2) to take from them the ore and timber; (3) to erect and operate factories of all kinds, and manufacture the ore and timber into finished products; (4) to acquire rights of way by condemnation over which to export either the crude or finished products; (5) to have all powers necessary to the full use and enjoyment of the foregoing powers; (6) in furtherance of the powers given in 1, 2, 3, and 4, to effect a temporary or permanent consolidation with a railroad or transportation company.

The land company acquired nearly all the stock in the railway company and guarantied its bonds. Assuming that the officers of the land company had reasonable ground for supposing that this would be ultimately beneficial to the land company in its mining, lumbering, and manufacturing business, are the two things not within the power of the land company?

It is well-settled law in this country and in England that a corporation is impliedly prohibited from doing anything which it is not expressly permitted by its charter to do, or which is not fairly incidental and necessary to the enjoyment of that which is expressly permitted. It is usually not permitted to acquire stock in another corporation, because, unless some other intent is manifest from the charter, it is presumed that in conferring the charter powers the state intended them to be exercised solely through the agency of the corporation upon whom they were conferred, and not by delegation to the officers of another corporation. *Marble Co. v. Harvey*, 92 Tenn. 115, 20 S. W. 427. Another reason why one corporation may not acquire stock in another, which is equally cogent to forbid it to guaranty the obligations of another, is that the state which conferred the franchise, as well as the stockholders who invested their capital in the enterprise, and the creditors who advance money on the faith of it, have the right to rely on the company's not engaging its funds or risking its property in any business which is not expressly or impliedly permitted by its charter.

A leading case is that of *Davis v. Railroad Co.*, 131 Mass. 258. There it was held to be beyond the power of a railroad company to guaranty payment of the expenses of a musical festival, which, it was supposed, would largely increase the business of the rail-

way company, because the stockholders of the railroad company had the right to object to risking the funds of the railroad company in a business so foreign and so different from that of the transportation of passengers as a musical festival. The opinion in the case is a learned one, and was delivered by Mr. Justice Gray. He summed up as follows:

"The holding of a 'World's Peace Jubilee and International Musical Festival' is an enterprise wholly outside the objects for which a railroad corporation is established; and a contract to pay or guaranty the payment of the expenses of such an enterprise is neither necessary nor an appropriate means of carrying on the business of the railroad corporation, is an application of its funds to an object unauthorized and impliedly prohibited by its charter, and is beyond its corporate powers. Such a contract cannot be held to bind the corporation by reason of the supposed benefit which it may derive from an increase of passengers over its road, upon any grounds that would not hold it equally bound by a contract to partake in or to guaranty the success of any enterprise that might attract population or travel to any city or town upon or near its line."

In the case of *Colman v. Railway Co.*, 10 Beav. 1, Lord Langdale, M. R., held that the Eastern Counties Railway Company, organized for the purpose of operating a railway running from London to the eastern coast of England, had no power to guaranty the dividends upon the stock of a steamship corporation organized for the purpose of transporting passengers from the terminus of the railroad company to Holland and the continent. Lord Langdale said:

"Ample powers are given for the purpose of constructing and maintaining the railway, and for doing those things required for its proper use when made; but I apprehend that it has nowhere been stated that a railway company, as such, has power to enter into all sorts of other transactions. Indeed, it has been very properly admitted that railway companies have no right to enter into new trades or business not pointed out by their acts; but it has been contended that they have a right to pledge, without limit, the funds of the company for the encouragement of other transactions, however various and extensive, provided the object of that liability is to increase the traffic upon the railway, and thereby to increase the profit to the shareholders. There is, however, no authority for anything of that kind. * * * To pledge the funds of this company for the purpose of supporting another company, engaged in a hazardous speculation, is a thing which, according to the terms of this act of parliament, they have not the right to do."

Another case is that of the *East Anglian Rys. Co. v. Eastern Counties Ry. Co.*, 11 C. B. 775. In that case it was held that one railway company could not maintain an action against another upon an agreement made by the latter to lease the former, and to pay the expenses incurred by the former in soliciting and promoting bills in parliament for its extension and improvement. Chief Justice Jervis, in delivering the judgment of the common pleas court in banc, speaking of the powers of the railway companies, said:

"They cannot engage in a new trade, because they are a corporation only for the purpose of making and maintaining the Eastern Counties Railway. What additional power do they acquire from the fact that the undertaking may in some way benefit their line? * * * Every proprietor, when he takes shares, has a right to expect that the conditions upon which the act was obtained will be performed; and it is no sufficient answer to a shareholder expecting his dividend that the money has been expended upon an undertaking which at some remote period may be highly beneficial to the line."

We have cited the foregoing cases to show what the objections are to acquisition of stock by one company in another, and to the guaranty by one company of another's obligations, in order that we may properly judge whether such objections can be sustained in the case at bar. The clause of the land company's charter giving it the power of temporary or permanent consolidation with a railway company is an express permission to it to give a partial control over its property and enterprise to the owners of the railway. It is further an express permission to risk the entire property of the land company in the business of railroading, for a permanent consolidation with a railroad company could mean nothing less. It is obvious that the legislature, in conferring this unusual power upon a mining and manufacturing company, fully recognized the fact that, without a railroad to reach its mineral and timber lands, such a company could not possibly be a success. For this reason it was willing to empower it to encourage the building of the necessary railroad, even to the extent of embarking its entire property in the success of the enterprise by a union of all its interests with those of the railway company. In this connection, the fact that the original name given to the land company was the Central Kentucky Lumber, Mining, Manufacturing & Transportation Company is to be noted. And still more significant is the power given the company to condemn a right of way "to export" its products. The place and manner of inserting in the seventh section of the charter the clause concerning consolidation are worthy of remark. After detailing with some redundancy the powers which the corporation may exercise in its mining, lumbering, manufacturing, and shipping business, the section proceeds: "And shall have all rights and privileges, powers and franchises necessary to the full use and enjoyment of the powers herein granted; and may, in furtherance of the powers granted in this section, effect a temporary or permanent consolidation with any railroad or transportation company," etc. The meaning of the legislature would be well interpreted by reading the two clauses thus: "And shall have all the powers necessary to the full use and enjoyment of the powers herein granted, even to the extent of effecting a temporary or permanent consolidation with a railroad company," etc. If now, as already said, this permits the land company to part with complete control over its own business, and to risk all its property in the business of railroading, it is difficult to see why there should not be included in such a power, as a part of, or less than, the whole, the right to acquire the stock in a railroad company, and to guaranty its bonds. In this wise the land company could retain complete control over the railway company, and need not risk all its property in the railroad business. The objections to such a course are entirely removed by the fact that the state intended, and the creditors and stockholders knew from the charter, that the land company could go into the railroad business, and had the power to share control of its business with the owners of a railroad. Nor could the state object that it was a perversion of the purposes for which the railway company was

organized that a mining and manufacturing corporation should acquire a controlling share of its stock, because the charter of the railway company expressly permitted other corporations to become owners of its stock.

The learned circuit judge in the court below, in a well-reasoned opinion, supported by authority, held that what was done here was a temporary consolidation within the meaning of this charter. In attacking this view, much stress is laid by counsel for the appellants on the fact that mention is made, in the clause authorizing union, of articles or deeds of consolidation, from which it is vigorously contended that the only consolidation permitted is a union evidenced by formal articles duly filed in a public office. The clause referred to is as follows: "And the consolidated companies may have and exercise the powers of both companies, and act in the name of either of them, or in a joint name, to be agreed upon in articles or deeds of consolidation." It may be suggested, in answer to this argument of appellants, that, while formal articles of consolidation may be proper in permanent consolidation, they are not required in mandatory language. More than this, a temporary consolidation must, in its nature, be less formal, and the union in name and property of companies soon to be separated be less complete. The words might be properly held to apply, therefore, only to the permanent consolidation.

But why is it necessary to show that what was done in this case was in fact a complete consolidation within the statute, to make it lawful? It seems to us that the purchase of the stock and guaranties can be supported on the ground that, even if they did not constitute a consolidation, they were legitimate steps towards a consolidation. They involved the exercise of powers similar to, but less extensive than, that of consolidation, and may fairly be said to have been included in it, as the part is included in the whole. It would be strange, indeed, if the land company had power, in order to encourage the construction of a railroad, to embark in the enterprise its total capital, with a railway company as a partner, and did not have power to accomplish the same purpose by risking only part of that capital.

The question of the construction of a charter is often a mixed question of law and fact, and is so influenced by the surrounding circumstances that the application of decided cases is more or less remote on this account. Nevertheless it may be well to refer to some of the many authorities which illustrate the extent to which courts have gone in supporting the exercise of powers by a corporation which were not expressly conferred in the charter, but which were held to be fairly included in the expressed powers.

In *Green Bay & M. R. Co. v. Union Steamboat Co.*, 107 U. S. 98, 100, 2 Sup. Ct. 221, the charter of a railroad company empowered its directors to make such agreements with any person or corporation whatsoever "as the construction of their railroad or its management and the convenience and interest of the company and the conduct of its affairs may, in their judgment, require." The General Laws of Wisconsin of 1853 authorized the company to make

such contracts with any other railroad company having its terminus on the eastern shore of Lake Michigan as would enable the roads to run in connection with each other in such manner as was deemed beneficial to their interests, and "to build, construct, and run, as part of their corporate property, such number of steamboats or vessels as they may deem necessary to facilitate the business of such company or companies." The question was whether the railroad company could hire a steamboat and guaranty its owner a gross income for the season. The general railroad act of 1872 authorized any railroad corporation of Wisconsin to accept from any other state any additional powers and privileges applicable to the carrying of persons and property by railway or steamboat, and to use them in said state. The railroad in question extended across Wisconsin from the Mississippi river to Lake Michigan. Mr. Justice Gray, in delivering the opinion of the court, said (page 100, 107 U. S., and page 221, 2 Sup. Ct.):

"The general doctrine upon this subject is now well settled. The charter of a corporation, read in connection with the general laws applicable to it, is the measure of its powers; and a contract manifestly beyond those powers will not sustain an action against the corporation. But whatever, under the charter and other general laws, reasonably construed, may fairly be regarded as incidental to the object for which the corporation is created, is not taken to be prohibited. *Thomas v. Railroad Co.*, 101 U. S. 71; *Attorney General v. Railway Co.*, 5 App. Cas. 473; *Davis v. Railroad Co.*, 131 Mass. 258."

After setting out the charter and general statutory powers of the railroad company under the laws of Wisconsin already referred to, the justice continued:

"These statutes show that the legislature of Wisconsin, recognizing the fact that from the geographical situation of the state the railroads which traverse it form part of a line of transportation extending across the continent, intended to confer upon the corporations owning such railroads very large powers of contracting with other corporations owning railroads or steamboats, whose course includes connecting parts of the same great line of transportation. To build and run, as part of the defendant's corporate property, such number of steamboats on Lake Michigan as it might deem necessary to facilitate its business, would be within the power expressly conferred by the statute of 1853; and we are of opinion that, taking into consideration all the statutes above quoted, it was equally within its corporate powers to hire, either by the trip or by the season, steamboats belonging to others running from its eastern terminus along the Great Lakes eastward, or to employ such steamboats to carry passengers and freight, in connection with its own railroad and business, under an agreement by which it guaranteed to the proprietors of the boats that their gross earnings for the season should not fall below a certain sum."

Now, it will be observed that the power to contract given in the charter of this railroad, if it stood alone, would not have warranted the hiring of the steamboat, or the guaranty of its gross earnings. *Pearce v. Railroad Co.*, 21 How. 442; *Colman v. Railway Co.*, 10 Beav. 1. Nor would the right to avail itself of privileges in running steamboats, granted the corporation by other states to be exercised in those states, have conferred such a power in Wisconsin. Moreover, so far as the report shows, there had been no such legislation in other states. The whole case indicates that the court, looking to the manifest necessity for steamboat connection in the successful operation of such a railroad, and to the rec-

ognition of that necessity by the legislature in conferring the power to build and run steamboats, and in other legislation, were of opinion that the power to secure steamboat connection by such guaranty was within the incidental powers of contracting, because such a power was of the same character as that of owning and running a steamboat expressly conferred, and involved less responsibility and risk of loss for the railroad company.

And so in this case, looking to the manifest necessity there was for the construction of a railroad in order to make the land company's project a success, and looking to the emphatic recognition of that necessity by the Kentucky legislature in permitting either a temporary or permanent consolidation with a railroad company, we think that the power to secure the construction of a proper railroad by taking its stock and guarantying its bonds was fairly within the incidental powers conferred in such ample language, because it accomplished all that a complete consolidation could accomplish without so much risk or responsibility for the land company.

In *Branch v. Jesup*, 106 U. S. 468, 478, 1 Sup. Ct. 495, it was held that a power in a railroad company to incorporate its capital stock with the stock of another company included as a lesser power the right to sell its road and franchises.

In *Hill v. Nisbet*, 100 Ind. 341, authority conferred upon a railroad corporation by statute to buy a railroad, or to consolidate with another corporation owning it, was held to include the power to buy stock in the latter corporation. See, also, *Ryan v. Railway Co.*, 21 Kan. 365; *Wehrhane v. Railroad Co.*, 4 N. Y. St. Rep. 541.

In *Smead v. Railroad Co.*, 11 Ind. 104, a railroad company was chartered for the specific purpose of constructing a railroad from Indianapolis to the Ohio state line, to connect there with a certain Ohio railroad. It was given power to make such contracts and agreements with the connecting road for the transportation of freight and passengers and for the use of its road as to the board of directors might seem proper. Under this general power it was held that the Indiana corporation might give its bills and promissory notes to the Ohio corporation to enable the Ohio corporation to change its gauge, and thus make the connection between them more efficient.

In *Low v. Railroad Co.*, 52 Cal. 53, a railroad company with power to lease the road of another company was held to be authorized to guaranty the bonds of the lessor corporation.

The foregoing cases illustrate how a more extensive power has been held to include a less power of the same character. Other cases may be referred to to illustrate how powers not included within any express power have yet been held to be fairly incidental to the main and expressed objects of a corporation.

In the case of *Ft. Worth City Co. v. Smith Bridge Co.* (decided by the supreme court of the United States, January 15, 1894) 14 Sup. Ct. 339, it was held that a company organized under the laws of Texas "for the purchase, subdivision, and sale of land in cities," which owned a large amount of land near the city of Ft. Worth, separated from the city by the Trinity river, had the power, as fairly

incidental to the main object of its incorporation, to make a contract with a bridge company to pay one-third of the cost of a bridge to be built over Trinity river to connect its land with the city, even though the bridge was to be public property.

In *Vandall v. Dock Co.*, 40 Cal. 83, where a corporation was organized for the purpose of buying, improving, selling, and otherwise disposing of real estate, it was held that the corporation might properly appropriate a portion of its funds to a railroad running in the neighborhood, for the purpose of increasing the facilities and lessening the cost of transportation to its property.

In *Watt's Appeal*, 78 Pa. St. 370, a corporation owning a very large body of lands had power by its charter to aid in the development of minerals and other materials and to promote a settlement and clearing of the country. It was held that the building of saw-mills and an hotel for the accommodation of those having business in connection with carrying out the prime object of the corporation was within the corporate powers.

In *Whetstone v. University*, 13 Kan. 320, it was held by the supreme court of Kansas, Mr. Justice Brewer delivering the opinion, that a town-site corporation, organized for the purpose of locating and laying out a town site and making improvements therein, with power to acquire and convey at pleasure all such real and personal estate as might be necessary and convenient to carry into effect the objects of the corporation, had the power to donate a few of its lots for the purpose of procuring the erection of a school building within a short distance of the property.

The cases last cited are all of them stronger cases than the one at bar, for in all of them the courts were obliged by construction to go outside and permit the investment of the property of the company in a business not expressly authorized by the charter. Here we keep within the letter of the charter, for here the company has the right to embark its entire capital and risk it all by consolidation with a railway company in the business of building and running a railroad, and we only hold that, having such a power, it has the right to do less than that, and risk only a part of its funds by lending its credit to such a railway company, and retaining control of it by owning its entire stock.

We now come to the second objection to the validity of the guaranties. It is said that, conceding the power to guaranty the bonds of the railroad if it was necessary to secure the construction of the railroad to do so, the evidence discloses that it was in this case wholly unnecessary, and conferred no benefit on the land company which it would not have enjoyed without it. As *Tod & Co.*, the purchasers of the bonds, and the present holders, knew all the facts, it is contended that the total absence of probable benefit from the guaranty to accrue to the land company, which was a condition precedent to the lawful exercise of the power, destroys the validity of the guaranty in the hands of *Tod & Co.*

In the first place, the power being conceded, the question of determining the occasion when its exercise will be beneficial to the corporation is one largely in the discretion of the stockholders upon

whom it is conferred. A court will be very slow to set aside a contract as *ultra vires* because not beneficial to the corporation, where the general power to make it is conceded, and when the stockholders, at the time it was made, with the lights they then had, considered it to be beneficial. These guaranties were entered into by the stockholders at a duly-called meeting, without a dissenting voice, and no stockholder since has objected to them. The statement for the appellants is that the railway and land companies made a contract with Carley in 1888, by which, for a bonus of \$2,000,000 of land company stock, he agreed to take two millions of first mortgage 6 per cent. bonds of the railway company, not guarantied by the land company, at 90 cents on the dollar of par value; that before this contract could be carried out, and without any evidence that Carley was unable to comply with it, the companies, with his consent, rescinded it, allowed him to keep his stock, and substituted the contract with Tod & Co., which required the land company's guaranty. In the first place, the record does not disclose what the final contract with Carley was. It is referred to in the resolution of the railway company as an "option" to take two millions of bonds at 90 cents within a year. If it was merely an option, it would not bind him to take any bonds at all. In the second place, it is not claimed that he was to take more than \$2,000,000 of the bonds, while Tod & Co. took and paid for \$2,500,000. But, even if there had been a binding contract on Carley to take as many bonds as Tod & Co. took, we should not hold that the change of contracts was without consideration or benefit moving to the land company. We may very well presume that it was properly thought by the stockholders to be to the advantage of the land company to obtain the contract of well-known bankers and fiscal agents like Tod & Co. in exchange for the obligation of Carley. Such a presumption is not rebutted by failure to show as a fact that Carley was not able to complete his contract. Many a man is regarded as financially very strong whose ability to carry out such a contract as this was may be a matter of conjecture. The advance of two or three millions of dollars is so large a transaction that to make certain of its completion by procuring the undertaking of one whose ability in such matters has been proven and is well known is often worth very great concessions. Tod & Co. were under no obligation to take \$2,500,000 of the bonds, and they only did so on the faith of the land company's guaranty. The consideration moving from them for the guaranty was the money they paid. On the whole case, we are of opinion that the Tod contract was substituted for the Carley contract in entire good faith, and because the stockholders of the land company thought, and had reasonable ground for thinking, it was best for their company and its interests to do so.

It is claimed that these guaranties of the first mortgage bonds and the preference stock were entered into after the debts of the appellants were contracted, and after they had a right to object to a diversion of the assets of the land company to unauthorized objects. Whether this claim, if true, would affect the question need not be discussed, because it is not true. The contract with Tod & Co.

was made in March, 1889, and no claim of any of the appellants antedates that. The mortgage was dated back to July, 1888, and so were the guaranties, but the obligation to give the guaranty was entered into in March, 1889.

We may notice at this point another charge against the good faith of this transaction, based on the fact that not until the guaranty was proposed did the stock of the railway company appear in the name of the land company. Up to that time it had been held in the name of the coal and iron company. The intimation is that the placing of it in the treasury of the land company was part of a fraudulent scheme on Tod & Co.'s part to procure the guaranty of the land company on the railway company's bonds, the only purpose being to give the land company such an appearance of interest in the railway company as to justify the guaranty. There is nothing in the charge. The purchase price of the entire interest in both companies had been met by the issue of \$800,000 of bonds by the land company. For this, preference stock was afterwards substituted. As the land company was thus made to pay for the property of both companies, it was natural that it should become the owner of the railway by becoming the holder of its stock; and this relation increased the propriety of the land company's assisting the railway company to float its bonds.

Consideration thus far has been given to the land company's guaranty of the first mortgage bonds and of the preference stock of the railway company. The guaranty of the second mortgage bonds of the railway company was entered into after the clause in the land company's charter permitting it to consolidate with a railway company had been repealed. As already stated, these bonds, amounting to \$800,000, were delivered by the railway company to the land company in payment of advances by the latter to the former, and were negotiated by the land company, half by sale, and the other half by pledge for loans, and the proceeds went into the treasury of the land company. It is thus apparent that the principal debtor on these bonds is the land company, and that the money paid for them went to it and not to the railway company. Having been delivered to it to satisfy an actual debt, it was plainly within the power of the land company to guaranty the bonds, in order to sell them, and realize the benefit of the intended payment. In doing so the land company was merely borrowing money, as it had the right to do under its charter, and was incurring a liability not absolute, but only contingent. The power of the land company to enter into such an obligation for such a purpose is completely established by the case of *Railroad Co. v. Howard*, 7 Wall. 392. In that case it was held that a railroad corporation, with power to issue bonds for the construction of its road, might guaranty the bonds of cities and counties, which had been lawfully issued for the purpose of aiding the railroad in the construction. In this case the land company had the power to issue bonds for its own purposes, the railway company had the power to issue bonds to pay its lawful debts, and the land company had power to receive them in payment of a debt due to it. If so,

the land company had the right to realize on the bonds, and, as a means of doing this, to guaranty their payment. In *Arnot v. Railway Co.*, 67 N. Y. 315, it was held that, even if the guaranty of bonds by a railway company had been originally *ultra vires*, the fact that they had come into the hands of the guarantor after their first issue, and had been reissued to raise money for the guarantor, made them binding obligations of the guarantor. See, also, *Rogers L. & M. Works v. Southern Railroad Ass'n*, 34 Fed. 278.

For the reasons stated, we are of opinion that the guaranties of the land company, which Marbury and Jones, in their intervening petition, prayed the court to declare null and void, were binding, and that the relief sought in respect of them was properly denied.

Second. We come now to the question of the proper measure of the claim of the Central Trust Company representing the preference stockholders of the railway company. The contract of the land company was that the railway company would pay to those stockholders $2\frac{1}{2}$ per cent. on \$600,000 semiannually. The railway company has ceased to be. Its assets have been sold in a foreclosure suit, and the possibility that any dividends will be paid by it is entirely gone. The land company is insolvent, and its assets are to be finally distributed. The condition of the two companies destroys the contract, and in such a case the measure of damages properly includes those which are prospective. *Sedg. Dam.* § 90; *Amos v. Oakley*, 131 Mass. 413. Moreover, by virtue of the statute under which this action is brought, the preference found by the circuit court to have been made by the land company operated as an assignment of all its assets, and inured "to the benefit of all its creditors in proportion to the amount of their respective demands, including those which are future and contingent." *Gen. St. Ky. c. 44, art. 2, § 1.* The difference between the pecuniary condition of the stockholders in perpetual receipt of dividends and their present condition is represented by such a sum as would produce forever the payment of $2\frac{1}{2}$ per cent. semiannually, which the circuit court found to be a sum equal to the par value of the stock. There is nothing in the record to show that this is an unjust capitalization of the guaranteed income, and we find no error in it.

Third. The next question is in regard to the subsidiary corporations. It is well settled in this country that one corporation is prohibited from investing its property in the capital stock of another, unless there is express power to do it, or unless there is something peculiar in the express powers from which it can be fairly implied. *Marble Co. v. Harvey*, 92 Tenn. 115, 20 S. W. 427; *Franklin Co. v. Lewiston Sav. Bank*, 68 Me. 43; *Mechanics & W. M. Mut. Sav. Bank v. Meriden Agency Co.*, 24 Conn. 159; *Sumner v. Marcy*, 3 Woodb. & M. 105, Fed. Cas. No. 13,609; *New Orleans, F. & H. S. S. Co. v. Ocean Dry Dock Co.*, 28 La. Ann. 173; *Central R. Co. v. Pennsylvania R. Co.*, 31 N. J. Eq. 475, 494; *Valley Ry. Co. v. Lake Erie Iron Co.*, 46 Ohio St. 44, 18 N. E. 486. This does not prevent a corporation from receiving the stock of another in payment of, or in security for, a debt in due course of business (*Howe v. Carpet Co.*, 16 Gray, 493), but it prevents a deliberate and permanent investment of a corporation's assets in the

stock of another. Now, we find nothing in the charter of the land company which authorized it to organize and take all the stock in one or more subsidiary corporations. The manifest intention of the legislature in conferring upon the land company the powers contained in its charter was that the company should exercise them itself. It was to do the mining and lumbering business, not some other corporation. If it had too much land to conduct mining and lumbering operations for itself on every part of it, it had ample power to sell the land. But it did not have power to subscribe to the capital stock of other corporations, and pay its subscription by deeding its lands and property to them. The deeds were, therefore, in fulfillment of an ultra vires contract. But it is claimed that, the contracts having been executed, equity will not set them aside, even though they were ultra vires. This question was not considered by the circuit judge in his opinion, and was probably not brought to his attention. The dismissal of the petition has been assigned for error and argued, but not fully. Indeed, it has been rather slighted by counsel on both sides. The subsidiary corporations were made parties to the intervening petition of Marbury & Jones, by subpoena duly issued, but of the five only the Kentucky Union Lumber Company answered. J. Kennedy Tod & Co., the complainants, answered the petition also. As already stated, the Kentucky Title & Land Company has reconveyed all the land received by it from the land company, and its case needs no consideration. No decrees pro confesso were taken against the corporations which did not answer. Issues of fact were raised by replication to the answers filed. No evidence seems to have been taken, especially directed to the issues thus raised, but enough appears in the record to show that large loans were made by third persons on the faith of the transfers of land to these various subsidiary corporations in every case except that of the Kentucky Title & Land Company, and that extensive improvements have been made on the land conveyed. Moreover, the stock and lands received for the land have been pledged by the land company to secure debts of its own. It is therefore apparent that, not only have all the contracts for the exchange of land for stock been executed, but that third persons, not parties to the intervening petition of Marbury & Jones, have invested money on the faith of the grants of the land on the one side and of the land company's ownership of the stock on the other. Without discussing the question whether creditors can set aside a completed exchange of land for stock as an illegal disposition of the assets of the corporation against them, because ultra vires, when the action is begun before third persons acquire any right in the land or the stock, we are very clear that it would be inequitable to set aside the transactions here complained of, in the absence of the third persons who have advanced money on the faith of their validity, and who have not been tendered the money advanced by them on the stock or invested by them in the lands sought to be recovered. The decree dismissing the intervening petition of Marbury & Jones was, therefore, rightly dismissed.

Fourth. The last question for our consideration is whether the distribution of the estate of the land company shall be according to the ordinary equitable rule, or in accordance with the Kentucky statute which governs the distribution of the estates of deceased insolvents.

We have decided, in the case of *Bank v. Armstrong*, 8 C. C. A. 155, 59 Fed. 372, that under the provisions of the national banking act for winding up insolvent national banks, which requires a ratable distribution on the allowed claims of creditors, all creditors, both secured and unsecured, are entitled to a pro rata distribution of the assets of the bank on their claims as they exist at the time of the declared insolvency, unaffected by collateral then held or by collections from collateral made after that time. In this we followed the general principles of equity, because there was nothing in the statute to prevent their application. This is the rule adopted by the court of appeals of Kentucky for distribution of an insolvent estate under a voluntary assignment for the benefit of all creditors. *Logan v. Anderson*, 18 B. Mon. 119; *Bank v. Patterson*, 78 Ky. 291. The statute under which this action was brought was passed in 1856, and is article 2 of chapter 44 of the General Statutes of Kentucky. By its first section that article provides that every act of any debtor, resorted to in contemplation of insolvency with the design to prefer creditors, "shall operate as an assignment and transfer of all the property and effects of such debtor, and shall inure to the benefit of all his creditors (except as hereinafter provided) in proportion to the amount of their respective demands, including those which are future and contingent." Section 2 provides that such transfers inuring to the benefit of creditors, generally, shall be subject to the control of courts of equity upon petition of any creditor filed within six months of the act of attempted preference. Section 3 permits any number to unite in such petition against the debtor and the transferee, and further provides that "the action and proceedings as to the mode of proving claims, and otherwise, shall be conducted as actions and proceedings for the settlement of the estates of deceased persons are now required to be conducted, so far as the same are applicable." Section 4 allows the appointment of a receiver by the court, and the compulsory transfer of all the property of the debtor to him, and the disclosure by the debtor of all his debts, etc. Section 5 provides that the court may make distribution from time to time, and that the allowance or disallowance of any claim at any distribution shall be a final judgment appealable as other final judgments. Section 7 is as follows: "In the distribution of the assets of any debtor, as provided, debts due as guardian or administrator or executor shall have priority; as also debts due as trustee, if the trust be created by deed or will duly recorded in the proper clerk's office." The last and eighth section provides that "the claims of creditors are required to be verified in the mode required by law in respect of claims against the estates of deceased persons before any portion of the assets shall be received therefrom."

The estates of insolvent decedents are distributed in Kentucky

under section 33 et seq. of article 2 of chapter 39 of the General Statutes of the state. Sections 33 and 34 are as follows:

"33. If the personal estate of a decedent be not sufficient to pay his liabilities, then the burial expenses of such decedent, and the costs and charges of the administration of his estate, and the amount of the estate of a dead person, or of a ward, or of a person of unsound mind, committed by a court of record to, and remaining in the hands of a decedent, shall be paid in full before any pro rata distribution shall be made; but this preference shall not extend to a demand foreign to this state. All other debts and liabilities shall be of equal dignity, and paid ratably in the administration of his estate; and should more than the ratable share of any debt be paid, his personal representative shall only receive credit for its proper proportion.

"34. When such an estate is covered by liens, giving a creditor a priority on such property, the proceeds thereof shall be first applied to the discharge of such lien, and the residue shall be subject to a pro rata division among the other creditors. But when any creditor has a lien, and the property subject to the lien is not sufficient to discharge the debt, he shall not be entitled to any portion of the residue of the estate, until all the creditors not having liens shall have received a sum equal, pro rata, with such lien creditor."

Sections 35, 36, and 38 prescribe the form of proof by affidavit required before a claim can be allowed, and section 37 provides that until such proof has been presented, and the claim rejected, no suit can be brought. It is obvious from section 34, above quoted, that the mode of distributing insolvent estates of decedents between secured and unsecured creditors is very different from that prevailing in equity, when unaffected by statutory restrictions. Which mode shall be adopted in the distribution of estates under the statute concerning fraudulent preferences? If this were a question of general equity jurisprudence, there would be no doubt that we ought to follow our previous decision in *Bank v. Armstrong*, supra. This was the view of the circuit judge. But the difficulty in doing so is that this is a proceeding governed by statute. That expressly prescribes in section 7 a priority in the distribution of the estate for fiduciary debts of the debtor identical with that prescribed in the statute for distributing the estates of insolvent decedents. It directs that claims against the estates of the insolvent shall be presented on the same proof and in the same form as that required against the estates of deceased insolvents. It directs that the action and proceedings as to the mode of proving claims or otherwise shall be conducted as in the settlement of estates of deceased persons. The distribution of the estates of dead insolvents and of living insolvents between secured and unsecured creditors would seem to be in *pari materia*. No reason occurs to us why the legislature should have made any distinction in the settlement and distribution of insolvent estates because the insolvent happened to be dead. In this view we do not think it a strained construction to hold that the general words "or otherwise" in the third section include "mode of distribution." It does not militate against this view that in a subsequent section there is a specific provision as to certain priorities in distribution, because there is also in a subsequent section a specific provision as to the mode of presenting claims.

The court of appeals of Kentucky have held that the mode of distribution under the two statutes must be the same. Though they

do not appear to give the same broad meaning to the words "or otherwise" in the third section as that above suggested, they reach the same result; not, as it seems to us, on principles of general equity jurisprudence, but as a construction of the intent and meaning of the legislature expressed in the fraudulent preference statute. The case is that of *Bank v. Lockridge*, 92 Ky. 472, 18 S. W. 1, and it presented the same question we have here. Judge Pryor, in delivering the opinion of the court, said:

"Section 34, art. 2, c. 39, Gen. St., provides the manner in which the estate of a debtor who dies insolvent shall be distributed, and is as follows: 'But when any creditor has a lien, and the property subject to the lien is not sufficient to discharge the debt, he shall not be entitled to any portion of the residue of the estate until all the creditors not having liens shall have received a sum equal pro rata with such lien creditor.' The distribution as between creditors, where the debtor dies insolvent, is made plain by this statute; and the question arises, did the legislature, in enacting the law to prevent fraudulent preferences, recognize or classify the estates of those passing by operation of law to creditors with the estates of insolvent decedents as to the mode of distribution? All such estates are subject to the control of courts of equity, and some equitable rule of distribution must be ascertained. It is apparent that the lawmaking power, when enacting the law in regard to sales, etc., in contemplation of insolvency, had in view the act regulating proceedings in the settlement of the estates of debtors who had died insolvent. Section 3 of article 2 of chapter 44 provides, where estates pass to creditors by operation of law, that 'the action and proceedings as to the mode of proving claims and otherwise shall be conducted as actions and proceedings for the settlement of the estates of deceased persons are now required to be conducted, so far as the same are applicable,' etc.; and by section 7 it is further provided 'that in the distribution of the assets of any debtor, as provided, debts due as guardian or administrator or executor shall have priority, as also debts due as trustees, if the trust be created by the deed or will, duly recorded in the proper clerk's office.' The statute has designated the claims of those who, under this operation of law passing the estate to creditors, shall have prior liens, following the priority given to claimants against the estates of those dead, showing plainly that the legislature regarded the act of insolvency as placing the estate of the insolvent debtor in the same condition, and to be distributed in the same manner as the estate of a decedent, while the third section of the act may apply to the mode of proceeding along, such as filing the petition and proving claims. A careful reading of both sections indicates that the legislature was attempting to regulate the mode of distribution as well as the mode of proceeding by the provisions of the statute with reference to the estates of deceased persons."

Certainly here was an attempt to determine the meaning and intent of the legislature from the language used by that body, and that is construction. The statute is a rule of property, and the construction of it by the court of appeals is controlling with federal courts. Said Mr. Justice Gray, speaking for the supreme court, in *Union Bank of Chicago v. Kansas City Bank*, 136 U. S. 223, 10 Sup. Ct. 1013:

"The question of the construction and effect of a statute of a state regulating assignments for the benefit of creditors is a question upon which the decisions of the highest court of the state establishing a rule of property are of controlling authority in the courts of the United States. *Brashear v. West*, 7 Pet. 608, 615; *Allen v. Massey*, 17 Wall. 351; *Lloyd v. Fulton*, 91 U. S. 479, 485; *Sumner v. Hicks*, 2 Black, 532, 534; *Jaffray v. McGehee*, 107 U. S. 361, 365, 2 Sup. Ct. 367; *Peters v. Bain*, 133 U. S. 670, 686, 10 Sup. Ct. 354; *Randolph's Ex'r v. Quidnick Co.*, 135 U. S. 457, 10 Sup. Ct. 655."

It is sought to escape the effect of this principle by reference to the fact that the decision of the Kentucky court of appeals was not filed until after the decree of the circuit court declaring the fraudulent preferences was entered in this case. We do not think that this affects the question. The decree of distribution had not yet been made. In *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10, the question was of the construction of a Missouri statute fixing liability of stockholders. The circuit court of the United States had given the statute what the supreme court of the United States thought to be a proper construction at a time when the Missouri supreme court had not expressed any opinion on it. Subsequently, after the decree of the United States circuit court was entered, and before the appeal from it was heard, the Missouri supreme court gave the statute another construction. This the supreme court of the United States refused to follow, but affirmed the circuit court on the ground that when the circuit court decree was entered the question was *res integra*. This case differs from that in the fact that here the decision of the Kentucky court was published before the circuit court was called upon to make distribution under the statute. More than this, as already stated, were the question *res integra*, we should be inclined to reach the same result as the court of appeals. The distribution of the land company's estate should be, therefore, in accordance with the rule prescribed by section 35 of article 2 of chapter 39 of the General Statutes of Kentucky, concerning estates of decedents.

The decree of the circuit court is reversed, with directions to take further proceedings in accordance with this opinion.

HUMBOLDT MIN. CO. v. AMERICAN MANUFACTURING, MINING & MILLING CO. et al.

(Circuit Court of Appeals, Sixth Circuit. May 8, 1894.)

No. 107.

1. JUDGMENT ON PLEADINGS—RENDITION AND ENTRY.

Rev. St. Ohio, § 5328, which provides that judgment may be rendered for the party entitled thereto on the statement in the pleadings, although a verdict has been found against him, authorizes such a judgment before verdict.

2. CORPORATIONS—GUARANTY OF CONTRACT OF OTHER CORPORATION.

A corporation organized under the law of Ohio for the purpose of making ironwork for mining plants has not power to guaranty the performance of another's contract for the erection of a mining plant, and the accompanying warranties, on the ground that the guaranty will secure a sale of the ironwork used in the plant.

3. SAME—ESTOPPEL.

Performance of such contract on the part of the party to whom the guaranty is given does not estop the corporation from denying its power to give the guaranty.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

This was a suit by the Humboldt Mining Company against the American Manufacturing, Mining & Milling Company and the Variety Iron-Works Company for breach of contract. A motion by the iron-works company for judgment in its favor on the pleadings was granted. Plaintiff brought error.

The Humboldt Mining Company filed its petition in the circuit court for the northern district of Ohio against the American Manufacturing, Mining & Milling Company and the Variety Iron-Works Company, in which it alleged that it was a corporation duly organized according to law, and a citizen of the state of Tennessee; that the defendant the American Manufacturing, Mining & Milling Company, hereafter referred to as the "Milling Company," was a corporation duly organized under the laws of Colorado, with its principal place of business in Cleveland, Ohio; that the defendant the Variety Iron-Works Company, hereafter referred to as the "Iron-Works Company," was a corporation organized under the laws of Ohio, with its principal place of business at Cleveland, Ohio; that the plaintiff, being the owner of a silver mine in Colorado, made a contract with the defendant the milling company to construct for it a crushing, pulverizing, and concentrating plant; that the milling company warranted that the plant should break and pulverize the plaintiff's ore to a certain degree of fineness at the rate of 50 tons for every 24 hours, that it could be operated with a certain number of men, and that it should be shipped and erected for use within a certain time, and further stipulated that, if the riffles which were to be furnished as part of the plant should fail to do the work warranted, satisfactory substitutes therefor should be at once supplied.

The allegations with reference to the iron-works company in the petition were as follows:

"The said defendant the Variety Iron-Works Company was organized for the purpose, amongst other things, of manufacturing and selling ironwork for such plants, and the said defendants agreed with each other that, if said contract should be entered into, it, the said Variety Iron-Works Company, would be permitted to furnish to its codefendant the ironwork for said plant at an agreed price. In consideration thereof, and of the profit to be derived therefrom, and of the said contract between the plaintiff and its said codefendant, it, the said Variety Iron-Works Company, before the delivery of said contract to plaintiff, executed an agreement at the foot thereof, whereby it, the Variety Iron-Works Company, guaranteed to plaintiff the faithful performance by the said American Manufacturing, Mining and Milling Company of said contract; that the said Variety Iron-Works Company was permitted to furnish said ironwork, and the same was furnished as hereinafter stated."

The petition then averred that the plaintiff performed all of the contract on its part, but the milling company failed in many respects to comply with its contract; that the plant which was put up proved to be defective, and failed to conform to the requirements and warranties, and was wholly unfit and valueless for the purpose it was furnished,—all to the damage of plaintiff in the sum of \$50,000, for which plaintiff asked judgment against both defendants.

A demurrer was filed to the petition by the iron-works company, but the court does not seem to have made any ruling upon it. Subsequently the iron-works company filed a separate answer and an amended answer. The latter contained several defenses, of which the only one here requiring notice was as follows: "For a second defense these defendants say that they admit that the secretary of the Variety Iron-Works Company signed the agreement of guaranty which appears upon the said contract, whereby it, the Variety Iron-Works Company, purported to guaranty to the plaintiff the faithful performance by the said American Manufacturing, Mining and Milling Company of the said contract, and that the copy of the said pretended agreement of guaranty which appears upon the petition is a true copy of the agreement attached to the said contract. They deny, however, that the contract was the contract of the defendant the Variety Iron-Works Company. They aver that the said Variety Iron-Works Company had no corporate power to enter into said pretended agreement of guaranty, and that the admitted execution of the

same was beyond the corporate power of the said Variety Iron-Works Company, and was wholly void."

A reply was filed to the answer of the iron-works company by the plaintiff, but its averments had no bearing upon the defense of ultra vires.

After the pleadings were completed, the iron-works company made a motion that on the pleadings judgment be entered in its favor. The court granted the motion, and accordingly entered the judgment which it is now sought to review by this writ of error.

Gilbert & Hills and Morgan & McFarland, for appellant.

E. A. Angell (J. H. Webster, on the brief), for appellees.

Before TAFT and LURTON, Circuit Judges, and BARR, District Judge.

TAFT, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The first objection made to the judgment is that under the Code of Ohio there was no power in the circuit court to grant the motion for judgment upon the pleadings.

Section 5312 of the Revised Statutes of Ohio, which is part of the Code of Civil Procedure, provides that:

"In an action against several defendants, the court may render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper."

It is perfectly obvious that in this case a judgment might be taken against the principal and in favor of the guarantor, and therefore that section 5312 applies.

Section 5328 of the Revised Statutes provides that:

"When, upon the statement in the pleadings, one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, although a verdict has been found against such party."

It was in accordance with this section that the court below entered the judgment here complained of. The contention on behalf of the plaintiff is that this section applies only after a verdict has been rendered, and that until then the court has no power to enter judgment. There is no such limitation in the words of the section, and it would seem to be absurd that when, upon the statements of the parties to the pleadings, one or the other is entitled to judgment, the court should go through the useless ceremony of submitting to a jury immaterial issues in order to enter judgment upon the pleadings without regard to the verdict.

The question in the case is whether the averment of the petition in reference to the corporate character of the iron-works company, read in the light of the corporation laws of Ohio, shows the guaranty sued on to be in excess of the powers of the company. Corporations, in Ohio, since the adoption of the constitution of 1851, have been organized under general laws. By the general incorporation act of May 1, 1852, provision was made for the incorporation of different kinds of companies, classified according to their objects. Section 63 et seq. of that act provided specifically for the incorporation of manufacturing corporations. Subsequently the same sections were made applicable to a great variety of companies which were not manufacturing corporations. In 1880, when the statutes of Ohio were

embodied in a revision, it was thought best to repeal old section 63 of the act of 1852, and its amendments, and to substitute what is now section 3235 of the Revised Statutes, which reads as follows:

"Corporations may be formed in the manner provided in this chapter for any purpose for which individuals may lawfully associate themselves except for dealing in real estate or carrying on professional business; and if the organization is for profit, it must have a capital stock."

Under this section all manufacturing corporations of Ohio are formed. The manner in which corporation is effected may be seen from the following sections of the same chapter:

"Sec. 3236. Any number of persons not less than five, a majority of whom are citizens of this state, desiring to become incorporated shall subscribe and acknowledge, before an officer authorized to take acknowledgments of deeds, articles of incorporation the form of which shall be prescribed by the secretary of state which must contain: 1. The name of the corporation, which shall begin with the word 'The' and end with the word 'Company' unless the organization is not for profit. 2. The place where it is to be located, or where its principal business is to be transacted. 3. The purpose for which it is formed. 4. The amount of its capital stock, if it is to have capital stock, and the number of shares into which the stock is divided. * * *

"Sec. 3238. The official character of the officer before whom the acknowledgment of articles of incorporation is made shall be certified by the clerk of the court of common pleas of the county in which the acknowledgment is taken and the articles shall be filed in the office of the secretary of state, who shall record the same and a copy duly certified by him shall be prima facie evidence of (the) existence of such corporation. * * *

"Sec. 3239. Upon such filing of the articles of incorporation the persons who subscribed the same, their associates, successors and assigns, by the name and style provided therein, shall thereafter be deemed a body corporate, with succession and power to sue and be sued, contract and be contracted with, acquire and convey at pleasure all such real or personal estate as may be necessary and convenient to carry into effect the objects of the incorporation, to make and use a common seal, the same to alter at pleasure, and to do all needful acts to carry into effect the objects for which it was created."

The foregoing sections are part of chapter 1, tit. 2, of the Revised Statutes, concerning corporations in general, both those for profit and those not for profit; and the subsequent chapters of the same title relate to corporations for particular purposes. The last section of the first chapter provides that the provisions of this chapter do not apply when special provision is made in any subsequent chapter, but that the special provision shall govern, unless it clearly appears that the provisions are cumulative. *State v. Live-Stock Co.*, 38 Ohio St. 347. There are in subsequent chapters of the title several sections specifically referring to certain kinds of manufacturing corporations, and their powers and limitations. See sections 3855, 3857, 3859, 3862-3866. But of these the only section which could possibly have any relevancy to this case is section 3862, reading as follows:

"Mining and manufacturing companies engaged in the manufacture of articles in the whole of iron or part of iron and wood may take, hold and convey such real estate and personal estate as is necessary or convenient for the purpose for which it was incorporated, and may carry on its business or so much thereof as is convenient in any county in this state, or beyond the limits of this state and may there hold any real or personal estate necessary or convenient for conducting the same."

It is obvious from the foregoing that, after the incorporators shall have stated in the articles the purpose for which the company is to be formed, its powers are fixed by general laws.

We come now to the averments of the petition as to the purpose for which the company whose powers are in question was organized. The pleader in the petition was attempting to state facts with reference to the iron-works company which would show the existence of the power to make the guaranty. The two facts thus stated were: First, that the company was organized for the purpose of manufacturing ironwork for mining plants; and, second, that it was profitable to the company to make the guaranty, because thereby it secured a customer. The fact that the pleader did not specify what were the other purposes for which the company was formed, either in the petition or even in the reply after the issue of ultra vires had been made by answer, excludes the hypothesis that the other purposes so indefinitely referred to furnished any justification for the exercise of the power of guaranty. While, under section 5096, Rev. St. of the Ohio Code, pleadings are to be liberally construed with a view to substantial justice, this does not mean that every equivocal word or phrase is to be construed in favor of the pleader. All that it means is that the language of the pleader is to be given a fair and reasonable construction, without regard to technical rules. *McCurdy v. Baughman*, 43 Ohio St. 78, 1 N. E. 93; *Robinson v. Greenville*, 42 Ohio St. 625; *Crooks v. Finney*, 39 Ohio St. 57. The fair and reasonable construction of the petition is that the Variety Iron-Works Company was organized for the purpose of manufacturing ironwork, and therefore had by law the power to make the guaranty in question. The question presented on the pleadings, therefore, is whether a corporation organized under the laws of Ohio for the purpose of making ironwork for mining plants may guaranty the performance of another's contract for the erection of a mining plant, and the accompanying warranties, on the ground that the guaranty will secure a sale of the ironwork to be used in the plant. The warranties covered parts of the contract in the fulfillment of which the iron works would and could exercise no control, and in which it had no such direct and legitimate interest as to warrant its risking its capital therein. If the warranties had only covered the character of the ironwork furnished by the guarantor company, a different question might be presented. As it is, we think such a guaranty not within the incidental powers of a manufacturing corporation. The stockholders of the corporation had the right, in making their investments, to rely upon it that no part of the funds of the corporation, whose stockholders they were becoming, should be risked in the business of another corporation, over which they should have no control. The restriction by the state was that the manufacturing business in which they were to engage should be carried on through the sole agency of the corporation which they were forming.

Section 3266 of the Revised Statutes of Ohio provides that "no corporation shall employ its stocks, means, assets or other property directly or indirectly for any other purpose whatever than to accomplish the legitimate objects of its creation."

There is no court in the country which has been stricter in enforcing the principle that corporations are prohibited from exercising any powers which are not expressly conferred upon them in their charters, or which are not fairly incidental to the express objects of their creation, than the supreme court of Ohio. In *Valley Ry. Co. v. Lake Erie Iron Co.*, 46 Ohio St. 50, 18 N. E. 486, it was held that a company incorporated for the purpose of manufacturing could not subscribe to the capital stock of another, and that a subscription so made was ultra vires, and void. The company to whom the subscription was made was a railroad company, and the courts said:

"No claim is made by the defendant that the iron company had any express statutory authority to use its capital or assets in aid of the construction of a railroad by subscription to its capital stock or otherwise. The only averment as to this is that it, the iron company, conceived that it would be benefited by the reduction of the price of coal at Cleveland, its place of business, and the market which the construction of the road would afford for its manufactures, and by these considerations was induced to make the subscription. But all this can be of no avail, in the face, at least, of the prohibition contained in section 3266 of the Revised Statutes, that 'no corporation shall employ its stocks, means, assets, or other property, directly or indirectly, for any other purpose whatever than to accomplish the legitimate objects of its creation.'"

In *Coppin v. Greenlees & Ransom Co.*, 38 Ohio St. 275, it was held that, under the law and constitution of Ohio, a corporation organized for manufacturing purposes had no power to acquire or convey its own stock except in satisfaction of a debt due to it. See, also, *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350.

In *Straus v. Insurance Co.*, 5 Ohio St. 59, it was held that an insurance company, authorized by its charter to invest its funds and capital stock as should be deemed best by the directors for the safety of the capital and interest of the stockholders, had no power to purchase upon credit a promissory note of one insured by the company, and entitled to indemnity for the loss, for the purpose of setting off such note against the claim. In this, which is a leading Ohio case upon the subject of corporate powers, Judge Ranney lays down the principle as follows:

"It is now universally agreed that corporations have such powers, and such only, as the act creating them confers, and are confined to the exercise of those expressly granted, and such incidental powers as are necessary to carry into effect those expressly conferred. * * * In no state of the Union have these principles been adhered to with more unyielding tenacity than in this. *Com'rs v. Holcomb*, 7 Ohio, 232 (pt. 1); *Bank of Chillicothe v. Town of Chillicothe*, Id. 31 (pt. 2); *Bank v. Swayne*, 8 Ohio, 257; *Bartholomew v. Bentley*, 1 Ohio St. 41."

The general rule in this country and in England is that one corporation is impliedly prohibited from guaranteeing the contract or debt of another. *Mor. Priv. Corp.* § 423; *McLellan v. File Works*, 56 Mich. 579, 23 N. W. 321; *Aetna Nat. Bank v. Charter Oak Life Ins. Co.*, 50 Conn. 167; *National Park Bank v. German-American Mut. Warehouse & Security Co.*, 116 N. Y. 292, 22 N. E. 567; *Madison, W. & M. Plank-Road Co. v. Watertown & P. Plank-Road Co.*, 7 Wis. 59; *Davis v. Railroad Co.*, 131 Mass. 258; *Colman v. Railway Co.*, 10 Beav. 1; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 290, 6 Sup. Ct. 1094; *Marble Co. v. Harvey*, 92 Tenn. 115, 20 S. W. 427.

The objection to the guaranty is that it risks the funds of the company in a different enterprise and business under the control of another and different person or corporation, contrary to what its stockholders, its creditors, and the state have the right from its charter to expect.

We have examined the question of the power of corporations to become guarantors of other persons and corporations in the case of *Marbury v. Land Co.* (decided at this session) 62 Fed. 335. In that case we upheld the power to guaranty the obligations sued on by reason of the existence of certain peculiar and unusual powers in the guarantor company of consolidation with the company whose obligations were guarantied, but it is pointed out in that decision that ordinarily it is not within the power of a trading corporation to guaranty the obligations of another.

For these reasons we think that the contract of guaranty by the Variety Iron-Works Company set up in the petition was beyond the power of that company, and therefore that it could not be held to any liability thereon.

It is said, however, that the contract has been performed on behalf of the plaintiff, and, therefore, that the defendant is estopped to deny its power to make it. We do not think that any such principle has application here. Strictly speaking, a corporation is never estopped to deny its power to make a contract where the extent of its powers and of the facts relevant thereto were or should have been known to the parties seeking to enforce the contract when it was entered into. In cases where property has been received or money paid to the corporation seeking to avoid the obligations of an ultra vires contract, the person delivering the property or paying the money has the remedy of recovering back that which was given to the corporation on the faith of the ultra vires contract. This, however, as has been said several times by the supreme court of the United States, is not a recovery on the contract, but is, in effect, an avoiding of the contract, and a restoration of the parties to the status quo ante. *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 145 U. S. 393, 12 Sup. Ct. 953; *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 11 Sup. Ct. 478. In this case no money or property was paid by the plaintiff to the guarantor defendant, and there is no way by which the parties can be restored to their condition before the contract was entered into and performed. However this may be, the suit here is upon the contract, and, as the contract is void, it gives the plaintiff no right of action against the corporation. For these reasons the judgment of the circuit court is affirmed, with costs.

CHICAGO, R. I. & P. RY. CO. v. STAHLEY.

(Circuit Court of Appeals, Eighth Circuit. June 25, 1894.)

No. 430.

1. FEDERAL COURTS — FOLLOWING DECISIONS OF STATE COURTS — STATUTE ADOPTED FROM ANOTHER STATE.

Where a statute of one state, after it has there received a settled construction, is adopted in another state, if the supreme court of that state construes the statute differently, such construction will be accepted by the federal courts as the true interpretation within that state.

2. MASTER AND SERVANT — INJURIES TO EMPLOYEES OF RAILROAD COMPANIES — STATUTORY PROVISIONS.

Comp. Laws Kan. 1879, p. 784, § 4914, making a railroad company liable "for all damages done to any employee of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees," having been construed by the supreme court of the state as not limited to injuries caused in the movement of trains, is properly applied, in the federal courts, to a case where one employé was injured by negligence of another while both were engaged, in a roundhouse, in putting a recently-arrived engine in condition for immediate use.

3. TRIAL — PROVINCE OF COURT AND JURY — EXPRESSION OF OPINION ON FACTS.

The simple expression of a personal opinion by a judge of a United States court, in charging the jury, that a certain act was, under the circumstances, negligence, is not ground for reversal, where the portion of the charge immediately preceding left to the jury the question of negligence in such act.

In Error to the Circuit Court of the United States for the District of Kansas.

This was an action by E. S. Stahley against the Chicago, Rock Island & Pacific Railway Company for personal injuries. On trial in the circuit court the jury found a verdict for plaintiff, and judgment for plaintiff was entered thereon. Defendant brought error.

The facts in this case are, briefly stated, as follows: Plaintiff below (defendant in error) was in the employ of the railway company at Horton, Kan. At the time of the accident he was working in the roundhouse, which was situated near to the tracks, and contained stalls for 20 locomotives. A new locomotive had recently been brought from a manufactory in the east, and he, with three other employés of the railway company (one of whom was named Dougherty), was engaged in putting it in order for use; it being at the time of its arrival what is called a "dead" engine,—that is, an engine capable of being moved on the tracks, but with some of the machinery and rods as yet not attached. The four, while thus employed, attempted to lift a driving rod, and attach it to the engine. This driving rod was about eight feet long, and weighing, according to the plaintiff's witnesses, from 700 to 800 pounds, and, according to the defendant's testimony, from 400 to 433 pounds. Two took hold of the rod at one end, and two at the other, and, while carrying it to its place, Dougherty and his associate, at one end, without notice or warning to the others, let go their hold; and the sudden jerk caused by the dropping of that end on the ground resulted in injury to the plaintiff, who was one of the two holding the rod at the other end. To recover for such injury, plaintiff brought this action against the railway company. The verdict and judgment were in favor of the plaintiff, and the defendant sued out this writ of error.

There was at the time in force in the state of Kansas a statute as follows: "Every railroad company organized or doing business in this state shall be liable for all damages done to any employee of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees, to any person sustaining such damage." Comp. Laws

1879, p. 784, § 4914. At the trial, the fact of the injury having been proved, the court was asked to charge that the plaintiff could not claim the benefit of this statute because it embraced "within its meaning only those persons engaged in the hazardous business of operating a railroad," and the refusal to give this instruction is the principal matter complained of.

The other error alleged is in giving this instruction: "At this point is where, I think, the stress of the case comes, to determine in the first place whether Dougherty and his associate dropped the rod in the manner claimed by the plaintiff, without any warning whatever to plaintiff; and, second, whether or not the plaintiff was at the time in the exercise of ordinary care, that is, such as a man under such circumstances would ordinarily exercise. If you find these two propositions in the affirmative, the plaintiff would be entitled to recover in this case such damages as you can say, from the whole evidence, is fair and proper compensation for the injuries suffered."

W. F. Evans (M. A. Low and J. E. Dolman, on the brief), for plaintiff in error.

A. F. Martin, for defendant in error.

Before BREWER, Circuit Justice, and CALDWELL and SANBORN, Circuit Judges.

BREWER, Circuit Justice (after stating the facts). The Kansas statute was taken from the legislation of the state of Iowa, and it is insisted by counsel for the railway company that Kansas, in adopting the Iowa statute, adopted it with the limitations and construction theretofore placed thereon by the supreme court of Iowa, and that, therefore, in order to determine its meaning and scope, we must look to the decisions of that court.

It is undoubtedly true that, when one state adopts the statute of another, it is presumed to take it with the settled construction given to it in the state from which it is taken. That proposition has been often recognized by the supreme court of the United States. Thus, in *McDonald v. Hovey*, 110 U. S. 619-628, 4 Sup. Ct. 142, that court, by Mr. Justice Bradley, said:

"It is a received canon of construction, acquiesced in by this court, that, where English statutes—such, for instance, as the statute of frauds and the statute of limitations—have been adopted into our own legislation, the known and settled construction of those statutes by courts of law has been considered as silently incorporated into the acts, or has been received with all the weight of authority." *Pennock v. Dialogue*, 2 Pet. 1, 18; *Smith, St. & Const. Law*, § 634; *Sedg. St. & Const. Law*, 363."

And again, in *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U. S. 263, 284, 12 Sup. Ct. 844 it was said by Mr. Justice Brown:

"But, so far as relates to the question of 'undue preference,' it may be presumed that congress, in adopting the language of the English act, had in mind the constructions given to these words by the English courts, and intended to incorporate them into the statute."

Indeed, in construing this very statute, the supreme court of Kansas, in *Railway Co. v. Haley*, 25 Kan. 35, 53, said:

"We concur in the views expressed by the Iowa court as to the constitutionality of the statute, and hold it a valid exercise of legislative power. As our state has adopted the statute from Iowa, the judicial construction given to it in that state follows it to this state. *Bemis v. Becker*, 1 Kan. 228. Therefore, the act embraces only those persons more or less exposed to the hazards of the business of railroading."

See, also, *Trust Co. v. Thomason*, 25 Kan. 1.

But, while this is an undoubted rule of construction, there is another which is more applicable to the present case; and that is that, when a right is given or a liability imposed by a statute of a state, the settled determination by the courts of that state as to its scope and meaning is controlling upon the federal courts. We follow the state courts in their construction of state statutes of this nature. *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10; *Claiborne Co. v. Brooks*, 111 U. S. 400, 4 Sup. Ct. 489; *Bucher v. Railroad Co.*, 125 U. S. 555, 8 Sup. Ct. 974; *Detroit v. Osborne*, 135 U. S. 492, 10 Sup. Ct. 1012. This rule is paramount to the one heretofore referred to. Applying it to the case at bar, if the supreme court of Kansas, although the statute had been adopted from the state of Iowa after it had there received a settled construction, should construe it differently, the federal courts would accept the construction placed by the supreme court of Kansas as the true interpretation of the statute within the limits of that state. Or, to state the proposition in another way, if a precisely similar statute was enacted in two adjoining states, and yet, notwithstanding such similarity, the settled course of decision in those states resulted in a different interpretation of the same language, the federal courts would accept the construction given by the courts of each state, respectively, as the true meaning of the statute in such state.

Following this established rule of federal decision, there is no difficulty in respect to the first of these questions. The circuit court properly refused the instruction in respect to the nonapplicability of the statute. The terms of the statute are general. The liability is imposed upon a railroad company "for all damages done to any employee of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees." The letter of the statute is broad enough to include every employé of a railroad company, no matter what the character of his service, or that of the other employé by whose negligence he is injured. While this literal construction of the statute is not that placed upon its language by the supreme court of Kansas, that court has held that the liability is not limited to those cases in which the injury is caused in the movement of railroad trains. The cases of *Railway Co. v. Harris*, 33 Kan. 416, 6 Pac. 571, and *Railroad Co. v. Koehler*, 37 Kan. 463, 15 Pac. 567, show to what extent that court carries the terms of this statute. In the first of these cases, *Harris* was a section hand employed in repairing the track of the railroad company,—taking out old rails and putting in new ones. While so doing, he was injured by the negligence of another employé engaged in like service. It will be seen that this injury in no way resulted from the actual movement of trains, but occurred while the party injured and the negligent coemployé were engaged in the work of putting the track in condition for use; and the court, on page 421, 33 Kan., and page 571, 6 Pac., uses this language:

"In the case before us, at the time of the injury complained of, plaintiff below was in the employ of the railway company, and was actually engaged in the business of the company, upon its roadbed and tracks, in the work

of replacing old rails of the track with new ones; and, while assisting in removing a rail from a push car upon the track, he was injured, without fault on his part, by the negligence of his coemployés. With our construction of the statute, there is nothing in the petition or findings of fact to prevent his recovery."

In the second of these cases the deceased, an employé of the company, was engaged with others in transferring rails from a pile alongside the track onto a car, and while so doing was killed through the negligence of one engaged in like service, and the company was held liable, within the terms of this statute; the court, on page 469, 37 Kan., and page 567, 15 Pac., saying:

"The service was actually performed on the company's road, was necessary to its use and operation, and the result in the case sufficiently shows the hazardous character of the service."

It is difficult to distinguish those cases from the present. Here, as there, the injury did not result from the movement of the trains, but occurred while the employé injured and the employé injuring were engaged in work not remotely, but directly, connected with the operation of the road. Putting a track in condition is no more directly connected with the movement of trains than putting an engine in condition. It will be noticed that this plaintiff was not at work in a machine shop, or in any other place not actually and necessarily used in the daily work of operating the railroad, but in a roundhouse, which is only a building in which engines are housed and prepared for use. A roundhouse is as much a necessity for railroading as a stable for the livery business. He was not engaged in repairing an old engine or constructing a new one, but in putting that engine which had recently arrived in condition for immediate use. He was, as in those cases, not engaged in any outside work remotely related to the business of the company; he was not cutting ties on some distant tract to be used by the company in preparing its roadbed, nor in mining coal for consumption by the engines, nor even in the machine shops of the company, constructing or repairing its rolling stock; but the work which he was doing was work directly related to the movement of trains,—as much so as that of repairing the track. We are unable to distinguish this case, in principle, from the two referred to in the decisions of the supreme court of Kansas; and therefore, as this is a case arising in that state, we must hold that the circuit court did not err in ruling that the plaintiff was entitled to the benefit of this statute.

The other instruction complained of is challenged on the ground that thereby the court took from the jury the question as to whether Dougherty and his associate were guilty of negligence in dropping the rod as they did. This instruction should be read with that portion of the charge immediately preceding, which is as follows:

"If, on examining the testimony, you are satisfied from the evidence that Dougherty and his associate, whoever he was—there seems to be some doubt as to who he was—threw this rod down, and without any warning whatever, in the manner stated by plaintiff and Mr. Norton, my own view is he was not using that due care and caution which a prudent man would ordinarily exercise under like circumstances, and which in this case he was bound to exercise. If you find that to be true, then I think you would be

warranted in saying he was guilty of negligence, and that the plaintiff, in that event, would be entitled to recover. * * * It seems to me that, if he had hold of the rod in the manner he states,—the manner that Dougherty states he had hold of the rod,—if he had been notified, as I think he had the right to be, before the other end was dropped upon the floor, he might perhaps have released his hold in a way that would not have brought upon him the injury complained of in the case; but upon this whole matter I simply call your attention to the evidence and testimony, and submit the matter for your consideration. Upon this proposition you have the right to entertain views contrary to those entertained by the court, as to the effect of this evidence.”

We think a fair inference from this language is that the judge left to the jury the right to pass upon the question as to the negligence of Dougherty and his associate, simply expressing a personal opinion that the dropping of the rod by them without any warning was, under the circumstances, negligence. Such an expression of opinion is permitted in the courts of the United States. *Starr v. U. S.*, 153 U. S. 614, 14 Sup. Ct. 919. With that opinion we fully concur. It seems to us that there can be little doubt that if four men take hold of a rod of great weight, for the purpose of carrying and putting it in position, it is exceedingly careless for those at one end to let go their hold, and drop their end to the ground, without giving warning to those who hold at the other end, for thereby they necessarily subject them to a sudden strain and jerk.

These are the only questions presented in the record. The one seems settled by the decisions of the supreme court of Kansas, and in respect to the other, as a matter of general law, we entertain little doubt. The judgment of the circuit court is therefore affirmed.

BALTIMORE & O. R. CO. v. MEYERS.

(Circuit Court of Appeals, Seventh Circuit. March 6, 1894.)

No. 77.

1. COURTS—JURISDICTION OF CIRCUIT COURT OF APPEALS.

Where the jurisdiction of the court below is not the sole question presented by the record, but other questions are involved, the circuit court of appeals is authorized to determine that question, as well as the others.

2. SAME—ILLEGAL COMBINATION OF RAILROAD COMPANIES.

Jurisdiction over an action against two railroad companies jointly operating a railroad, for injuries inflicted through negligence in its management, is not affected by the illegality of their combination.

3. FEDERAL COURTS—SUIT IN DISTRICT OF DEFENDANT'S RESIDENCE.

The requirement that suits in federal courts shall be brought in the district where the defendant lives confers an exemption, in the nature of a personal privilege, that may be waived, and has no application to a suit removed from a state court to the federal court by the defendant.

4. CARRIERS—INJURIES TO PASSENGERS—CONTRIBUTORY NEGLIGENCE.

A railway passenger, on asking the conductor and brakeman of the train whether it would stop at a certain station, was informed that it would stop at a railroad crossing near it, where he could get off. When the train was about a mile from the place, moving at the rate of 35 miles an hour, the passenger, at the invitation of the brakeman, because it was expected that the train would make only a very short stop, went on the platform, and

while waiting there, holding to the car rail, was thrown from the platform by the sudden stopping of the train. *Held*, that the question whether he was negligent was for the jury.

5. SAME.

Rev. St. Ind. § 3928, which relieves railroad companies from liability, in certain cases, for injuries received by passengers when on the platform of a car, does not apply to passengers who, at the invitation of the brakeman, go on the platform for the purpose of alighting.

In Error to the Circuit Court of the United States for the District of Indiana.

This was an action by John E. Meyers against the Baltimore & Ohio & Chicago Railroad Company and the Baltimore & Ohio Railroad Company for personal injuries. A demurrer to the complaint by the last-named defendant was overruled. At the trial the jury found a special verdict, on which judgment was ordered for plaintiff against the Baltimore & Ohio Railroad Company, and that company brought error.

On the 18th of January, 1890, John E. Meyers, the defendant in error, and a citizen of the state of Indiana, brought suit in the circuit court of Lake county, in that state, against the Baltimore & Ohio & Chicago Railroad Company, to recover damages for alleged personal injuries received while a passenger on its railroad. On the 4th day of February, 1890, on motion of the plaintiff, by his counsel, the defendant was ruled to answer on the first Thursday of the then present term of that court; and thereupon, on that day, that company filed its petition and bond in that court for the removal of the cause into the circuit court of the United States for the district of Indiana, upon the ground that Meyers, the plaintiff, at the commencement of the suit and then, was a citizen of the state of Indiana, and the defendant, the Baltimore & Ohio & Chicago Railroad Company, was a corporation organized under the laws of the state of Ohio, and a citizen of that state. The record discloses no order of the state court upon that petition. On the 11th day of February, 1890, the parties appeared by counsel, the rule to answer theretofore made was stricken out, and the plaintiff had leave to amend his complaint, and make the Baltimore & Ohio Railroad Company a party defendant. An amended complaint, conforming to the order of the court, was on that day filed; and thereupon a summons issued against the Baltimore & Ohio Railroad Company, returnable the second day of the next term of the court. On the 28th of April, 1890, all the parties appeared by counsel, and publication was ordered of depositions theretofore taken; and thereafter, on that day, the Baltimore & Ohio Railroad Company filed its petition and bond for the removal of the cause into the United States circuit court for the district of Indiana upon the ground of diversity of citizenship; Meyers being a citizen of the state of Indiana, and the Baltimore & Ohio Railroad Company a corporation under the laws of the state of Maryland, and a citizen of that state. A transcript of the record was filed by the defendants in the United States circuit court on the 6th day of May, 1890, and the cause docketed by order of the court; and thereafter, on the 27th day of May, 1890, it appearing to the court that through misprision the cause had been separated into two parts, the causes were consolidated, and the plaintiff, by leave of the court, filed an amended complaint, as follows: "That he (the plaintiff) was at the commencement of these suits, and ever since has been and is, a citizen of the state of Indiana. That the defendant the Baltimore & Ohio & Chicago Railway Company ever since has been and is a corporation duly organized and existing under the laws of the state of Ohio, and is a citizen of that state, and that the Baltimore & Ohio Railroad Company was at all times and is a corporation organized and existing under and by virtue of the laws of the state of Maryland, and is a citizen of that state. And, complaining, plaintiff says: That on, before, and since the 16th day of October, 1889, there was and ever since has been a railroad engaged in the business of passenger carrier, extending from the city of Chicago, across the state of Indiana, into the state of Ohio,

which is owned and operated by the defendants, sometimes known as the Baltimore & Ohio Railroad Company, and at other times as the Baltimore, Ohio & Chicago Railway Company, which railway line passes through the counties of Laporte, Porter, Lake, and others, which railway line passes through a certain village in the state of Indiana known as Alida. That on said day plaintiff became and was a passenger, for hire, on a certain passenger train of said defendants, to be carried thereon, having purchased a ticket at —, in the state of Ohio, entitling him to go to the city of Chicago, for which he paid the usual and proper charges, to wit, \$——. That some time before said train on which plaintiff was so being carried as a passenger as aforesaid arrived at said town of Alida, in Laporte county, Indiana, at which there was another railroad crossing the line of said defendants, upon which the passenger was riding, the plaintiff ascertained that he could stop at and get off said train at said town, and not proceed further on said train over said line, and thereby reach his home more readily than to proceed to the city of Chicago, and so informed the agents, employes, and servants of the defendants in charge of said train, and expressed to them his desire to stop at said town of Alida for that purpose, and inquired whether the train would stop, and whether he could do so. And thereupon, and then and there, the said employes, agents, and servants having charge of and operating and running said train of said defendants over said line informed the plaintiff that he could safely stop at said town, and then and there safely alight and get off of said train, but that he would have to be in readiness to get off of said train immediately on its arrival at said railroad crossing at said town, as the train would only make a very brief and short stop at said railroad crossing, and that such stop would be the only one said train would make at said town of Alida. As said train afterwards approached the said town and crossing, the said agents, servants, and employes of said defendants requested and notified the plaintiff to leave his seat in the car in which he was riding, and to come to and take his place on the platform and steps of said car, so as that he might get off without any delay on the stopping of said train at said town and crossing. And plaintiff obeyed said notification and directions then and there so given him, and proceeded at once to leave his seat in said car, and walk to the door thereof, when the defendants' said servants, employes, and agents opened the door, and he took his place upon the said platform and steps, when, where, and as requested and directed so to do by the agents of the defendants aforesaid; the train being then and there in motion, and not yet having arrived at the stopping place. And while he was so standing upon said steps as directed, and exercising due and proper care and caution to prevent accident to himself, the agents, servants, and employes of the defendants running, controlling, and operating said train, carelessly, negligently, and without notice to the plaintiff, suddenly and quickly, and with great force, brought said train to a sudden and immediate stop, which stop was so quick and sudden, and being without notice to the plaintiff, so that he was, without any fault or negligence on his part, at once, with great force, thrown from said train, with great violence, to the ground, and then and there, without any fault or negligence on his part, struck the ground, and received cuts and bruises upon his head, face, arms, body, and legs, inflicting upon him great pain, and causing permanent and lasting injury to himself, in both body and mind, and disabling him from hereafter following his vocation in life. That by reason of said injuries so wrongfully inflicted upon him, without any fault on his part, he has lost time of the value of one thousand dollars (\$1,000), has expended for medicines, medical aid, and nursing one hundred dollars (\$100), and has suffered great pain from thence till now, and must continue to suffer during life, and is disabled for life physically, and his mental faculties are permanently injured and impaired. He avers that by reason of the premises aforesaid he was and is damaged in the sum of \$15,000, for which he prays judgment."

Afterwards, on the 25th of June, 1890, the Baltimore & Ohio Railroad Company demurred to the complaint, mainly upon the grounds that the complaint did not state a cause of action, and that neither the federal court nor the state court had any jurisdiction over the defendants, or over the cause of action. On the 22d of October, 1890, the demurrer was overruled, and the

two railroad companies, defendants, severally answered, pleading the general issue. The cause was brought to trial in May, 1892, and the jury found a special verdict, which, so far as is material to be stated, is as follows: "On or before the 16th day of October, 1889, the defendant the Baltimore & Ohio Railroad Company was operating a railroad across the state of Indiana, said railroad crossing the track of the Louisville, New Albany & Chicago Railroad Company, in Laporte county, in this district, at a station called Alida. * * * On said October 16, 1889, the plaintiff, John E. Meyers, then and ever since a citizen of the state of Indiana, became a passenger on the passenger train No. 47 of said Baltimore & Ohio Railroad Company, running from Wheeling, West Virginia, over the road aforesaid, to the city of Chicago; taking the train at Fostoria, Ohio, and having a ticket for his passage from thence to the city of Chicago, which was taken up by the conductor during the passage. Said train No. 47 passed through Fostoria in the night, arriving at Alida early in the morning. The plaintiff, desiring to leave the train at Alida, and take the south-bound train of the Louisville, New Albany & Chicago Railroad Company at Alida to his home, at Wheatland, during the night, asked the conductor and also the brakeman of said train, whose duties were to look after and help passengers on and off the train, whether the train No. 47 would stop at Alida; and he was informed by them that the said train would not stop at the platform station, but would stop at the railroad crossing, and that he could get off when the train so stopped. Later in the morning, when the train was within about one mile from Alida, the brakeman came to the front door of the car in which Meyers was riding with a friend, who desired to get off at the same place, and motioned with his hand for them to come forward, leaving the car door open, and he (the brakeman) stepping forward to the platform on the next car ahead. The brakeman gave the plaintiff this notice so that he might get off as soon as the train should stop, because it was expected it would only make a very short stop at said railroad crossing. * * * Plaintiff, in answer to the summons of the brakeman, went forward, and took his place at the front end of the coach in which he was riding, on the platform, the train at the time moving at the rate of thirty-five miles per hour. * * * He took his stand on the north side of the car door, on the platform, with one foot on the platform and one on the first step below,—his back towards the car,—and holding firmly with each hand on the car rail. While standing thus, and waiting for the train to come to a stop so that he might alight, the train, suddenly, quickly, and with great force, and without notice to him, jerked with such force and violence as to loosen the hold of his hands upon the car rail, and throw him from the car violently to the ground, where he fell at a distance of 1,490 feet east of the railroad crossing. Said jerking was occasioned by the sudden, unusual, and unnecessary application of the air brakes. * * * At the time of said accident, plaintiff was holding firmly to said railing, leaning back against the car so as to protect himself, and was using reasonable and ordinary care for that purpose. Said accident to the plaintiff was wholly caused by the carelessness and negligence of the employees of said Baltimore & Ohio Railroad in operating said train, in causing it to suddenly check, and without fault or negligence upon the part of said plaintiff. The defendant had, on the inside of the car door in which the plaintiff was riding, a notice warning passengers from riding on the platform while the train was in motion, but the plaintiff's attention was not called thereto, nor did he see the same. The plaintiff was on the platform, at the time of the happening of the accident, at the invitation of the brakeman, in the discharge of his duties as aforesaid, for the purpose of getting off the train as soon as the same should stop for the crossing. The accident happened on the morning of said October 16, 1889, shortly after sunrise." Whereupon, the plaintiff below filed his motion for judgment against the Baltimore & Ohio Railroad Company. The Baltimore & Ohio Railroad Company moved the court for judgment in its favor on the special finding of the jury, and also moved for a new trial.

The motions of the plaintiff in error were severally overruled. The motion of the plaintiff below for judgment on the special verdict against the Baltimore & Ohio Railroad Company was granted, and judgment ordered against that company, and in favor of the plaintiff, and in favor of the Baltimore &

Ohio & Chicago Railroad Company against the plaintiff. There appear to have been no exceptions taken upon the trial, except that at the conclusion of the testimony the plaintiff in error moved the court to instruct the jury to return a verdict in its favor upon the ground that under the pleadings and upon the testimony the plaintiff was not entitled to recover. The court overruled the motion, to which proper exception was taken. The errors assigned are as follows:

"First. The said circuit court erred in overruling the demurrer of the defendant to the complaint of the plaintiff herein.

"Second. Said circuit court erred in refusing to instruct the jury to return a verdict in favor of the defendant the Baltimore & Ohio Railroad Company upon the ground that under the pleadings and all the testimony the plaintiff was not entitled to recover against it in this case.

"Third. The circuit court erred in overruling the motion of the defendant herein the Baltimore & Ohio Railroad Company for a judgment in its favor upon the special findings of the jury.

"Fourth. The said circuit court erred in rendering judgment in favor of the plaintiff therein, John E. Meyers, and against the Baltimore & Ohio Railroad Company, one of the defendants therein.

"Fifth. The said circuit court erred in overruling the motion of the defendant therein the Baltimore & Ohio Railroad Company for a new trial."

J. H. Collins, for plaintiff in error.

A. C. Harris, Stuart Bros. & Hammond, and Wm. B. Austin, for defendant in error.

Before FULLER, Chief Justice, JENKINS, Circuit Judge, and GROSSCUP, District Judge.

JENKINS, Circuit Judge (after stating the facts). The statute organizing this court (26 Stat. 826, c. 517) provides for appeals or writs of error to the supreme court from the circuit court in any case in which the jurisdiction of the court is in issue, and that in such case the question of jurisdiction shall alone be certified to the supreme court from the court below. The circuit courts of appeals have appellate jurisdiction to review the final decisions of the lower courts in all cases other than those authorized to be removed into the supreme court. In *McLish v. Roff*, 141 U. S. 661, 668, 12 Sup. Ct. 118, the supreme court construe this provision of the statute, and assert that the defeated party "must elect whether he will take a writ of error, or appeal to the supreme court on the question of jurisdiction alone, or to the circuit court of appeals upon the whole case. If the latter, then the circuit court of appeals may, if it deem proper, certify the question of jurisdiction to this court." Notwithstanding our recent ruling in *Manufacturing Co. v. Barber*, 9 U. S. App. —, 9 C. C. A. 79, 60 Fed. 465, that when the sole question presented by the record goes to the jurisdiction of the court below we are without authority to determine the question, we do not doubt, in view of the recent decision of the supreme court in *Maynard v. Hecht*, 151 U. S. 324, 14 Sup. Ct. 353, that when, as in this case, other questions are involved, we are authorized to determine that question as well as the others. In the case referred to the court say:

"The act did not contemplate several appeals in the same suit, at the same time, but gave to a party in the suit in the circuit court, where the question of the jurisdiction of the court over the parties or subject-matter was raised and put in issue upon the record at the proper time and in the proper way,

the right to a review by this court, after final judgment or decree against him, of the decision upon that question only, or by the circuit courts of appeals on the whole case."

And, even were this otherwise, we cannot doubt that we may consider the question of jurisdiction, so far as necessary to satisfy ourselves whether, in the exercise of the discretion lodged with us, the question of jurisdiction involved is sufficiently grave to warrant its submission to the supreme court upon proper certificate, as required by the ruling in *Maynard v. Hecht*, *supra*.

The averment of the declaration is that the two railway companies jointly operate a railroad within the state of Indiana. It is insisted that the state court had no jurisdiction because there is no authority to sue foreign corporations which have formed partnership or other joint combinations for doing business in the state of Indiana, and that there is no authority for any such combination of corporations to be sued in the federal court. It does not appear in what manner the two railway companies are interested in the operation of this railroad; and we deem it entirely immaterial to inquire. The statutes of Indiana provide that a railroad corporation may be sued in any county in which or through which its line of road runs; and it was clearly competent for the state courts to take jurisdiction of a suit of this character, for injuries inflicted in the operation of a railway in Indiana by two or more railway corporations co-operating in the management of the railway, irrespective of any question of power in those companies to form such combinations. If they acted in so doing without authority of law, they are none the less liable for injuries incurred through negligence in their management of the road. One cannot shield one's self from responsibility for wrong done because, in the doing of the wrong, he was acting without authority of law.

So far as concerns the jurisdiction of the federal court, but a word is necessary. The diverse citizenship of the parties is confessed. The respective railroad companies are chartered under the laws of, and are citizens of, states other than the state of Indiana, whereof the plaintiff below was a citizen. The companies removed the cause into the federal court upon the ground of such diverse citizenship. The provision that no civil suit shall be brought in a circuit or district court of the United States, against any person, by any original process or proceeding in any other district than that whereof he is an inhabitant, confers an exemption, in the nature of a personal privilege, that may be waived, and has no application where the defendant to a suit in the state court, who is a nonresident of the state, removes the cause into the federal court of that state.

It is somewhat obscurely suggested that no proper service was had in the state court. The record does not disclose the nature of the service, and it does not appear that any application was made to the state court to vacate the service. The record does make known that the parties appeared upon the application for the publication of depositions. That was probably a general ap-

pearance to the suit; but it is only necessary to observe, with respect to the suggestion of improper service of process, that jurisdiction is only challenged here by demurrer to the amended declaration, and such pleading does not disclose the nature of the service of process, or present for determination any question with respect thereto, and that the filing of such a pleading is a general appearance to the action, and a waiver of any defective service of process.

The objection to the jurisdiction is of such slight merit that we do not feel ourselves warranted in the submission of the question to the supreme court.

The other assignments of error go to the right of action, and may be considered together.

The defendant in error desired to stop at Alida, but was informed by the brakeman, whose principal duty was to assist passengers to embark and to alight from the train, that the stoppage was not ordinarily made at the station at Alida, but that the train necessarily stopped before coming to the railway crossing east of Alida, and that he could leave the train at such crossing. As the train approached and was within a mile of the crossing, the brakeman opened the front door of the car in which the defendant in error was seated, and motioned him to come forward. He took his stand upon the platform, holding firmly to the railing (the brakeman stationing himself upon the rear platform of the forward car), and, as is alleged, and as the jury found, while he was so standing there awaiting the stoppage of the train, and by reason of the sudden, unusual, and unnecessary application of the air brakes, the train suddenly, and with great force, jerked and threw him from the train. The question presented is whether the act of the defendant in error, in so standing upon the platform while the train was in motion, was such an act of contributory negligence as debars a recovery. Undoubtedly, it is more or less perilous for a passenger to stand upon the platform of a car in motion; and if there be no justification for the act he would be chargeable with negligence contributing to his injury, for no one has right to place himself unnecessarily in a situation of manifest danger. *Wills v. Railroad Co.*, 129 Mass. 351.

We are quite in accord with the principle urged to our attention by counsel for the plaintiff in error, stated by Mr. Patterson in his work on *Railway Accidents* (section 276), as follows:

"The fact that a servant of the railway invited or even directed the passenger to occupy a position of danger will not render the railway liable for injuries resulting therefrom, if the danger was so obvious that a reasonable man would not have obeyed the servant or accepted his invitation. Nor will the railway be liable to a passenger who is injured in alighting at a dangerous place because the conductor tells him that passengers sometimes alight there, but does not either invite or command the particular passenger to alight at that point. Nor will the railway be held responsible if the servant was not expressly or impliedly authorized to give the invitation."

It will be observed that one factor in the rule is that the danger must be so obvious that a reasonable man would not have obeyed the servant or accepted his invitation, for the test of negligence, in such case, is what, under the circumstances, a reason-

able man would ordinarily have done. Thus, in *Railroad Co. v. Jones*, 95 U. S. 439, a laborer in the service of the company claimed he had been directed to ride on the pilot of the locomotive, and in so doing was injured. The court held that the location was so obviously a place of peril that there was no justification in his taking such a risk, if he had been directed so to do, and it was said that he might as well have obeyed a suggestion to put himself on the track before the advancing wheels of a locomotive. But whether or not one is guilty of negligence in standing upon the platform of a car in motion is dependent upon the circumstances of the case, and is determined by the consideration whether a reasonably prudent man, under the circumstances existing, would have done so or not. The duty of the passenger is dictated and measured by the exigency of the occasion. Here the defendant in error had announced to him, by the act of the brakeman, that the train was about to come to a stop. He was notified and directed to come forward that he might alight so soon as the train had stopped. He had been warned that the train would stop but for a moment, and that he must be in readiness to alight promptly. He was notified to take the position which he did upon the platform of the car. He had a right to presume that the train was abating its speed, with a view to stopping. We think it was a proper question to be submitted to the jury whether the defendant in error, under the circumstances, was guilty of an act which a reasonably prudent man in like situation would not have done. Under the circumstances, we cannot say, as a matter of law, that he had no right to rely on the judgment of the servant of the company in charge of the car, and could not rightfully assume that in following his direction he would not expose himself to unnecessary or unusual peril. *Filer v. Railroad Co.*, 59 N. Y. 351; *Railroad Co. v. McCloskey*, 23 Pa. St. 526; *Railroad Co. v. Kelly*, 92 Ind. 371; *Railroad Co. v. Carper*, 112 Ind. 26, 13 N. E. 122, and 14 N. E. 352.

There may be instances of voluntary and unnecessary riding upon the platform of a car in motion, which would be held by the court, as matter of law, to amount to contributory negligence preventing a recovery. Each case must be resolved in the light of its attendant circumstances. The present case, in our judgment, is one in which we cannot say, as matter of law, that the act of the defendant in error was unjustifiable. The question of contributory negligence is generally a question of mixed fact and law, to be resolved by the jury under proper instructions from the court, except where the negligence is so clear that the court would be authorized to withdraw the consideration of the question from the jury, and determine that negligence as matter of law. *Railroad Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569; *Elliott v. Railway Co.*, 150 U. S. 245, 14 Sup. Ct. 85. This we cannot do in the present case. The company was clearly responsible for the act of the brakeman in inviting the passenger to the platform, under the circumstances alleged in the declaration and found by the jury. A corporation is responsible for acts of an agent performed in the

discharge of duty within the general scope of his agency, although the particular act may not have been directly authorized. It was the duty of the brakeman to assist passengers to alight. His invitation to the passenger was in the discharge of that duty. Although, in so doing, he violated a rule of the company, and thereby caused injury to the passenger, the danger of complying with the invitation not being obvious, the master cannot escape liability for the act of the servant performed in the discharge of his duty.

It is urged that there is exemption from liability here by reason of the provision of the statute of Indiana (Rev. St. § 3928) which declares:

"In case any passenger on any railroad shall be injured on the platform of a car, or any baggage, wood, or freight car in violation of the printed regulations of the company posted up at the time in a conspicuous place inside of its passenger car then in the train: such company shall not be liable for the injury, provided said company at the time furnished cars sufficient for the proper accommodation of the passengers."

It was found by the jury that, on the inside of the door of the car in which the defendant in error was riding, the company had placed a notice warning passengers from riding on the platform when the train was in motion. This statute was obviously intended to absolve the company from responsibility for damages to passengers imprudently and improperly standing or riding upon the platform; but we cannot conceive that it was designed to apply to a case of a passenger justifiably leaving a car, the platform being the only mode of egress, and the defendant in error being there, by invitation of the servant of the company, for the purpose of alighting. He was not, we think, riding upon the platform, within the meaning of the statute. *Buell v. Railroad Co.*, 31 N. Y. 314; *Railroad Co. v. Miles*, 88 Ala. 256, 6 South. 696.

The other objections urged to the judgment are of minor importance, and we do not find it necessary to consider them.

Our conclusion is that the judgment must be affirmed.

UNITED STATES SUGAR REFINERY v. PROVIDENCE STEAM & GAS PIPE CO.

(Circuit Court of Appeals, Seventh Circuit. March 10, 1894.)

No. 61.

1. CONTRACTS—ACTION FOR BREACH—EVIDENCE.

The exclusion of a question to a witness in an action on contract cannot be held erroneous, on the ground that the question related to a condition of the contract, where it also included other conditions not embraced in the contract.

2. SAME.

In an action for the price of automatic sprinklers furnished by plaintiff to defendant under a contract providing that the size of the pipes should conform to the schedule required by defendant's underwriters, evidence of the cost of making the sprinklers conform to a certain schedule, not shown to have been adopted by the companies that insured defendant's property, is not admissible.

8. **SAME.**

In such action, a report on the sprinklers furnished made by an inspector appointed by an association of insurance companies is admissible in evidence to show that the insurance companies to whom the report was transmitted acted upon it in insuring defendant's property.

4. **SAME—INSTRUCTIONS.**

The evidence did not show that there were any well-known, printed requirements of insurance companies, which were known to plaintiff when the contract was made. *Held*, that an instruction which assumed the existence of such requirements, and required plaintiff to prove that his sprinklers conformed thereto, was properly refused.

5. **SAME.**

Defendant having accepted the sprinklers, an instruction to the effect that any defect in them would bar plaintiff's right to recover anything was properly refused.

6. **APPEAL—OBJECTIONS NOT RAISED BELOW—INSTRUCTIONS.**

On an instruction that defendant was entitled, under a counterclaim, to be allowed for an amount expended by him, an objection that it did not embrace expenditures which the evidence showed he would be obliged to make is not available on appeal, if the attention of the court below was not called to the matter.

7. **COSTS ON APPEAL—VOLUMINOUS RECORD.**

Where the printed record is unnecessarily prolix, but it does not appear from the record itself which party is responsible therefor, the facts on that point may be presented to the court of appeals by affidavit or other proof, so that the unnecessary costs may be taxed to the proper party.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

This was an action of assumpsit by the Providence Steam & Gas Pipe Company against the United States Sugar Refinery. At the trial the jury found for plaintiff. Judgment for plaintiff was entered on the verdict. Defendant brought error.

Edwin Walker and Arthur J. Eddy, for plaintiff in error.

Richard Prendergast and Thomas Cratty, for defendant in error.

Before WOODS, Circuit Judge, and JENKINS and BUNN, District Judges.

JENKINS, District Judge. By the contract of February 19, 1890, the defendant in error undertook to equip the plant of the plaintiff in error with the Grinnell Automatic Sprinklers, furnishing the necessary piping and labor. It was to be the wet-pipe system. The contract provided that "the sizes of pipe will conform to the schedule required by your underwriters." The work was guaranteed to be water-tight, and satisfactory in every respect. It was completed in the early summer of 1890. On January 14, 1891, the Providence Company agreed to change the sprinkler system from the wet to the dry system, furnishing the necessities "to make the same a most complete job, and which shall be satisfactory to your underwriters." The contract further provided, "If it shall be found that the pipes as now erected are not tight enough, you [the Sugar Refinery Company] to pay any cost we [the Providence Company] may be put to to make them so, which shall be a nominal figure in any event." The change was effected and completed by May 5, 1891. Upon the building so equipped, insurance was procured

between November, 1890, and August, 1891, in some 68 companies, to the amount of at least \$376,000. Prior to November, 1891, and until some three months after suit brought, there was no controversy between the parties with respect to the character of the work. Payment was postponed until July, 1891, and then refused upon the sole ground that during the progress of the work a servant of the Providence Company was accidentally killed, and the Sugar Refinery Company feared it might be held liable in damages for his death, and the parties could not agree with respect to the form of the bond of indemnity demanded. On the 7th of November, 1891, the Sugar Refinery complained of inability to get the water out of the pipes, in preparation for cold weather, and denounced the whole system as one necessary to be removed. Under the general issue the plaintiff in error gave notice that it would prove an indebtedness of the defendant in error growing out of the contract, because, among other things:

"The sizes of the pipe did not and does not conform in size to the schedule adopted by the leading insurance companies throughout the country, as agreed and warranted, and that the system and sizes of pipe did not conform to the schedule required by its underwriters, meaning thereby the underwriters of the various insurance companies to which the defendant might apply for insurance, and meaning thereby the well-known requirements of the various insurance companies, as agreed and warranted, whereby the sprinkler system became and was of no use or value to defendant; and by reason of the unfitness of said sprinkler system, as aforesaid, the same afterwards, to wit, on," etc., "became wholly useless to the defendant, and a burden and damage to defendant's various buildings and property, whereby the same must be removed, at great cost and expense to defendant, and to the damage of defendant's building and property, and the entire work of equipping said building with a sprinkler system which will meet the requirements of said contracts and agreements must be commenced and done over again, to the great loss, delay, and damage of said defendant; and various portions of said piping in said system, owing to said imperfect workmanship, have heretofore frozen and burst, and water has collected in various places, causing defendant great loss and damage by reason of said water so collecting and freezing and bursting, in the endeavor to repair said damage and prevent further loss, whereby the defendant was damaged to the amount of fifteen thousand dollars."

The alleged error at the trial mainly relied upon is in the exclusion of the question propounded to the witness West, as follows:

"Let me ask you, Mr. West, aside from the question of leakage, and all expense, if any, required to remedy leakage, from your examination of the system, and your knowledge of its present condition as testified to, what would it cost to properly fix that system so that the water can be properly drained from the system, with as few elbows and dips as possible, with sizes of pipe to conform to this list, to wit: Three-quarter inch pipe, one head allowed; one inch pipe, three heads allowed; one and a quarter inch pipe, five heads allowed; one and a half inch pipe, nine heads allowed; two inch pipe, seven heads allowed; two and a half inch pipe, twenty-seven heads allowed; three inch pipe, forty-six heads allowed; three and a half inch pipe, seventy-eight heads allowed; four inch pipe, one hundred and fifteen heads allowed; five inch pipe, one hundred and seventy-five heads allowed,—and the further requirement that in buildings where the floor area requires more than one hundred and seventy-five heads, or a five inch riser, the equipment must be divided into two systems with two risers. What would be the expense to make that system, as you found it, conform to those requirements, aside from all expense attached to the leakage?"

Prior to the propounding of this question, the counsel for the plaintiff in error had submitted the question of the cost to make the system, as the witness found it, conform to the requirements of a particular schedule, known as the "Chicago Fire Underwriters' Schedule for Requirements of Sprinklers." Upon objection the court ruled the question to be improper, but that the witness might describe the system as he found it. The witness had then proceeded to say that he found certain of the pipes tipped toward the extreme end, and upon some of the floors of the building found more sprinklers than required by the Chicago underwriters on certain sized pipe, and thereupon the question stated was propounded to the witness.

It is apparent to the court, from the desultory conversation which ensued between counsel upon both sides and the court, following this question, that all parties were led away from any view of the purpose of the question as now claimed by counsel. The discussion went to the question whether the Sugar Refinery Company, having obtained all the insurance required upon the plant equipped with this fire extinguisher, could defeat the right of action because in some respects the plant did not comply with the schedule prepared by some company. The court announced that the defendant below might prove the existence of anything that would justify the cancellation of the policies. But this seems not to have been satisfactory to the defendant's counsel, who, upon being questioned by the court if he wished to show that the insurance companies did not stand by these schedules, replied that either the contract, when it says the "requirements," means something, or it does not, and thereupon the objection was sustained. A reference to the contract shows that the stipulation was that the "sizes of pipe will conform to the schedule required by your underwriters." Another stipulation in the contract is this: "The entire work is to be done subject to the approval of your underwriters, and to be accepted by them, which we guaranty will be done." A provision in the second contract is to the effect that the work "shall be satisfactory to your underwriters."

We think the objection to the question was properly sustained, because:

First. If it was desired to show that the sizes of pipe did not conform to the underwriters' schedule, the question should have been limited to that subject, and should not have embraced the other conditions in the question. It is not allowable to embrace in a single question several conditions not required by the contract, joined to a single condition that is required by the contract, and to claim error in the exclusion of the question, upon the ground that it embraced a condition contemplated by the contract. Here the question required of the witness an estimate of the cost of adjusting the proper drainage of the system, of supplying pipes of the sizes conforming to particular schedules, and also of dividing the system into two systems with two risers. The contract does not require that the system should conform to any schedule, except in respect to sizes of pipes.

Second. The question was also objectionable because it refers to the requirement of the Chicago Fire Underwriters' Association, without any proof that that association was the one contemplated in the contract. The expression, wherever used in both contracts, is "your underwriters." That manifestly means the insurance companies to whom the Sugar Refinery Company might apply for insurance, or those companies who should furnish such insurance. And such was the plea of the Sugar Refinery Company, "and that the system and sizes of pipes did not conform to the schedule required by its underwriters; meaning thereby the underwriters of the various insurance companies to which the defendant might apply for insurance, and meaning thereby the well-known requirements of the various insurance companies, as agreed and warranted, whereby," etc. Manifestly, in large measure, this plant was contracted for with a view to reduce the cost of insurance. Hence, the provision that the work should be done subject to the approval of, and should be satisfactory to, "your underwriters." It was conceded that the Sugar Refinery Company had procured all the insurance it desired; and in the absence of evidence tending to show that those insurance companies had issued their policies under misapprehension of the conditions existing, or that any of them had sought to cancel their policies by reason of the alleged defective condition of the plant, there was no room to claim that the work was not satisfactory to the underwriters of the Sugar Refinery Company. The only reference in the contract to a schedule is the clause that the "sizes of pipe should conform to the schedule required by your underwriters." It was necessary, if there was a breach of the warranty in that respect, for the defendant below to show that the schedule presented to the witness was one which the underwriters insuring the plant had established or adopted, and such schedule must be so identified before the witness could be interrogated with respect thereto. There were three schedules offered in evidence, no two of which were alike in respect of their requirements. We have searched the record in vain for evidence upon the question of what schedule was within the contemplation of the parties, or what schedule had been adopted by the underwriters of the Sugar Refinery Company, and this it was essential to show before the schedule to which the witness was referred could be assumed to be the one contemplated by the contract.

It is also objected that the court erred in permitting the introduction in evidence of certain papers purporting to be the report of inspection of the sprinkler system, made by one Born, and in permitting the witness Simonds to testify with respect to the inspection by Born. Mr. Simonds was an insurance agent, and chairman of the "committee on improved risks,"—a body of gentlemen appointed by different insurance companies, and having in charge the subject of risks upon plants supplied with the automatic sprinkler system. The committee employed Born to make examination, inspection, and report upon the plant of the plaintiff in error; and he made such report, which was produced by the witness, and upon which the different insurance companies appointing that committee

acted in taking risks. The court admitted the report in evidence to show that the policies issued were not hastily or carelessly issued, but after inspection; and, in answer to a suggestion of counsel that the report could not be considered by the jury as evidence of the character of the work after the completion of the dry system, the court remarked that, if it was entitled to admission for any purpose, it might come in for the present, and counsel could call the attention of the court to the question later on. Subsequently, the matter was again called to the attention of the court, and the counsel for the defendant in error limited his offer of the report simply as evidence tending to show information to some of the underwriters connected with that committee. The court remarked that the jury had been instructed that the report was admitted simply to show that an inspection was made. We think the evidence was properly admitted for the purpose stated by the court,—as tending to show that the insurance companies to whom the report of the inspection was transmitted acted upon it in issuing insurance upon the plant; and, however that may be, it is clear that there is no available error here, for not only is the bill of exceptions wanting in averment that the report was read in evidence which is essential (*Association v. Lyman*, — U. S. App. —, 9 C. C. A. 104, 60 Fed. 498), but it declares that the report was not read to the court or to the jury in evidence or in argument.

We proceed to consider the errors assigned with respect to certain instructions which the court was asked to give in its charge to the jury. The first instruction to which our attention is called is as follows:

"The mere fact that certain insurance companies have issued policies upon the property of the defendant company, or that certain inspectors may have passed the sprinkler system as all right, is not conclusive evidence that the system meets the requirements of the contract. If you find from the evidence that there are certain well-known printed requirements of insurance companies and underwriters, and which were known to the plaintiff company when it made the contracts, then those requirements are to govern, in the absence of other understanding with defendant; and if you find on comparing the system, as put in, with those requirements, that it does not conform to them, then the approval afterwards of any inspector or insurance company, or particular board of underwriters, cannot make good plaintiff's breach of contract. The defendant company is entitled to have the system put in according to the contracts, and is not bound by the acceptance or approval of other parties."

We think this instruction faulty, because it assumes that there were certain well-known printed requirements of insurance companies and underwriters, which were known to the plaintiff company when it made the contract, and that those requirements were to govern, in the absence of other understandings with the defendant. The three schedules, as we have before remarked, were quite wide apart in their requirements, and we have failed to discover any evidence showing that this contract was made in the light of any of them. The contract itself required that the sizes of pipe should conform to the schedule required by the underwriters of the plaintiff in error. It did not require that the

entire system should conform to the requirements of any underwriter. And we think the charge of the court entirely fair to the plaintiff in error, wherein he instructed the jury that although the defendant's underwriters were satisfied with the system, and accepted risks upon the plant, it was yet necessary for the Providence Company to establish that the system was such a one as the contract called for, and one open to no substantial objection.

It is claimed that the court erred in refusing an instruction to the jury, of which a part is as follows:

"There is evidence tending to show, and it is claimed by the defendant, that, when plaintiff's men made the change to the dry system, they tested it with the air a number of times, and were unable to make the system hold air as it should, whereupon they left it with the water on, knowing that it would not hold air without leaking. Now, if you find from the evidence that plaintiff's employes and foreman in charge, Mr. Scott, tried the air, and found that the system leaked too much air for a dry system, and with this knowledge they wrongfully left the system with the water on, without completing it so it would hold air properly for a dry system, and that the defendant did not learn this until November, then the court instructs you that the plaintiff cannot recover in this action for work done, except in H and G; and if you find the system in buildings H and G so leaky and defective, or otherwise contrary to the agreement and guaranties, then the plaintiff cannot recover in this action at all."

This instruction was clearly erroneous, because, by the terms of the second contract, the expense of making the pipes tight enough for the dry system was to be paid by the plaintiff in error; and a default in wrongfully leaving the system with the water on, without completing it so that it would hold air properly for a dry system, would not prevent the Providence Company from recovering in this action for the work done upon the wet system, although the company might be liable in damages for such default. The latter clause of that part of the request quoted is also faulty in that it assumes that the plaintiff below could not recover at all if the system in the buildings H and G was leaky, or in any wise contrary to the requirements and guaranty. Or, in other words, it was claimed that any defect would prevent a recovery, although the plaintiff in error had accepted the plant, and had obtained insurance in view of the equipment.

In a part of the charge, to which exception is taken, the court instructed the jury that if the system was defective, and the plaintiff was notified and failed to correct the defect, and the defendant had been obliged to expend money in making the system efficient or operative, the defendant was entitled, under a counterclaim, to a reduction for the amount thus expended. It is objected to this part of the charge that it was limited to the amount which the evidence showed the plaintiff in error had expended, and did not embrace expenditures which the evidence showed the plaintiff in error would be obliged to make. It is only necessary to say, in respect to this exception, that the attention of the court was not called to the matter. If counsel desire corrections with respect to the tense used by the court in its charge to the jury, the attention of the court should have been specifically called at the time to the error, if error there was. It will not answer to permit coun-

sel to take exception, after the trial, to what may have been a mere slip of the tongue on the part of the trial judge, when he has been afforded no opportunity for correction. And it may also be properly observed, in this connection, that the issue presented by the plaintiff in error was merely whether the sprinkler system was worthless and valueless for the purposes indicated and contemplated by the parties, to wit, as an additional protection to the plant from fire, and that their claim for damages was for a specific sum stated to have been expended in keeping the works in repair and operation, and for further sums by way of damage to the plant in putting in the system, and the necessary expenses to take down and remove the system.

We think the case was fairly submitted to the jury by the trial judge, and that no error intervened to the prejudice of the plaintiff in error.

It is lastly urged that in case of affirmance an order may be entered requiring the defendant in error to pay the costs of appeal. This request is preferred upon the ground that the plaintiff in error has been put to a needless expense of some \$700 in printing a record unnecessarily prolix, compelled thereto by the act of the defendant in error. It is asserted that the plaintiff in error, as required by the rules, tendered a condensed bill of exceptions, which embraced all the testimony pertinent to the errors assigned; that that bill of exceptions was objected to in the court below by the defendant in error, who insisted that a literal transcript of the stenographer's minutes of the testimony upon the trial should be embodied in the bill; and it is stated that the trial judge directed a new bill to be prepared, embodying all testimony introduced at the trial, which was signed by the judge, but that he said at the time that the defendant in error must assume the responsibility for the size of the record. This record contains nearly 400 printed pages, and embodies a large mass of matter irrelevant to the questions upon which the opinion of the court was desired. We can perceive no good purpose to be served in the manner in which this bill of exceptions has been prepared, and we think the subject well warrants the criticism indulged by the supreme court in the case of *Railway Co. v. Stewart*, 95 U. S. 279, 284. And see *Price v. Parkhurst*, 10 U. S. App. 497, 3 C. C. A. 551, 53 Fed. 312; *Association v. Lyman*, 9 U. S. App. —, 9 C. C. A. 104, 60 Fed. 498. It does not appear upon the record that the trial judge, as is asserted by counsel, placed the responsibility of the unnecessarily prolix bill of exceptions upon the defendant in error. We are unable, by the record before us, to place the fault, if fault there be. We have therefore concluded to permit counsel to present to the court, upon affidavits or other proofs, the facts concerning the matter, that due order may be had in the premises with respect to the proper apportionment of costs.

The judgment will be affirmed.

TABOR v. COMMERCIAL NAT. BANK OF CLEVELAND.

(Circuit Court of Appeals, Eighth Circuit. June 25, 1894.)

No. 370.

1. CORPORATIONS—LIABILITY OF OFFICERS FOR CORPORATE DEBTS—FAILURE TO FILE REPORTS.

Under section 16 of the general corporation law of Colorado (Mills' Ann. St. 1891, § 491), requiring annual reports of the financial condition of a corporation to be filed in the county in which its business is carried on, and, in case of failure to do so, making the directors liable for the debts of the corporation, where a certificate of incorporation states, in compliance with section 2 of the act, the place and county in which the principal office of the corporation in the state shall be, such reports must be filed in that county, notwithstanding the certificate also states that the principal business of the corporation is to be carried on in another state.

2. SAME—JUDGMENT AGAINST CORPORATION.

A judgment against such a corporation for the recovery of money is a debt, within the meaning of the statute, and may be counted on in an action under the statute against a director, without pleading the original indebtedness, there being no question of the time when the debt was incurred.

3. STATUTES—EXPRESSION OF SUBJECT IN TITLE.

In the general corporation law of Colorado, enacted under the title "An act to provide for the formation of corporations" (section 16), requiring the filing of annual reports of the financial condition of corporations, and, in case of failure to do so, making the directors liable for debts of the corporation, is "clearly expressed in its title," as required by Const. Colo. art. 5, § 21.

4. PLEADING—STRIKING ALLEGATIONS FROM ANSWER.

Striking out an allegation of an answer that a certain company had no corporate existence, because organized to do all its business without the state, is not error, where the answer contains a previous express admission that the company was a corporation organized under the laws of the state.

5. APPEAL—OBJECTIONS NOT RAISED BELOW.

An objection and exception to the introduction of certain evidence, for which no ground was assigned, cannot be considered on appeal.

6. SAME.

On a trial by the court, where no request was made for a peremptory declaration that the evidence was insufficient to entitle plaintiff to judgment, a general finding for plaintiff cannot be reviewed on a single exception to the finding and the judgment thereon.

In Error to the Circuit Court of the United States for the District of Colorado.

Horace A. W. Tabor, the plaintiff in error, brings this writ of error to reverse a judgment in favor of the Commercial National Bank of Cleveland, the defendant in error, and against him as a director of the Montana Mining, Land & Investment Company, a corporation of Colorado, for one of the debts of that company. His liability to pay this debt was adjudged to have arisen from the failure of that corporation to make the annual reports required by section 16 of the general law of Colorado for the formation of corporations. Gen. Laws Colo. 1877, p. 149; Mills' Ann. St. 1891, § 491.

Section 2 of that law provides that: "Any three or more persons who may desire to form a company for the purpose of carrying on any lawful business may make, sign and acknowledge before some officer competent to take the acknowledgment of deeds, certificates in writing, in which shall be stated the corporate name of the company, * * * the name of the town or place, and the county, in which the principal office of the company shall be kept, * * * and when any company shall be created under the laws of this state for the purpose of carrying on part of its business beyond the limits thereof, such certificate shall state that fact, and shall also state the name of the

town and county in this state in which the principal office of said company shall be kept, and shall state the name of the county in which the principal business of such company is to be carried on within this state."

Section 3 provides that a certified copy of the record of one of these certificates shall be evidence of the existence of the company named in it, and section 4 that such company shall be a body corporate and politic in fact and in name. Gen. Laws Colo. 1877, pp. 146, 147; Mills' Ann. St. Colo. 1891, §§ 475, 476.

Section 16, *supra*, provides that: "Every such corporation shall annually, within sixty days from the first day of January, make a report, which shall state the amount of its capital and the proportion actually paid in, and the amount of existing debts; which report shall be signed by the president and shall be verified by the oath of the president or secretary of said company, under its corporate seal, and filed in the office of the recorder of deeds of the county where the business of the company shall be carried on. And if any such corporation shall fail so to do, unless the capital stock of such corporation has been fully paid in and a certificate made and filed as provided in section twelve (12) of this act, all the directors or trustees of the company shall be jointly and severally liable for all the debts of the company that shall be contracted during the year next preceding the time when such report should by this section have been made and filed, and until such report shall be made."

The complaint, which was filed August 5, 1892, alleged that the Montana Mining, Land & Investment Company was a corporation of the state of Colorado; that in December, 1891, the defendant in error recovered a judgment against it in one of the courts of general jurisdiction of the state of Montana; that execution was issued thereon, and the judgment thereby satisfied in part, but that the mining company still remained indebted to the defendant in error on account of this judgment in the amount of \$3,820.84; that the plaintiff in error had been a stockholder and director of the mining company from its incorporation; that the certificate of incorporation of this company, which had been signed by the plaintiff in error, stated that the principal place and business office of the company was in the city of Denver, in the county of Arapahoe, in the state of Colorado; that neither the mining company nor any of its officers or agents had ever filed in the office of the recorder of deeds of that county, or anywhere else, any of the reports required by section 16, *supra*, nor had any of them ever filed a certificate that the capital stock of the company had ever been paid in as required by the section 12, referred to in that section.

In the amended answer, upon which the case was tried, the plaintiff in error admitted the incorporation of the mining company under the laws of Colorado; that the office of the corporation was in the city of Denver, in the county of Arapahoe, in that state; that he was a stockholder and director of the corporation; and that the company had never filed any report or certificate in the office of the recorder of deeds of any county in Colorado or elsewhere. He denied the incorporation of the defendant in error, the rendition of the judgment against the company, that there was anything due on account of this judgment, and the issuance and return of the execution upon it. The foregoing admissions and denials remained in the answer through the trial.

The plaintiff in error complains that the court below struck out of the answer, before the trial, allegations to the effect that the certificate for incorporation of the mining company did not name any county in Colorado in which its principal business would be carried on, but stated that the principal business of the company was to be carried on in certain counties in the state of Montana and in any part of the state of Colorado in which the corporation might desire to do business, and allegations to the effect that none of its mining operations or other business was intended to be or was carried on in the state of Colorado; that the mining company was a corporation without any corporate existence, because it was organized under the laws of Colorado to do all its business without that state; and that section 16, *supra*, was an unconstitutional law, because its subject was not clearly expressed in the title of the act in which it was contained.

A jury was waived, and the court tried the case, made a general finding in favor of the defendant in error, and rendered judgment accordingly.

M. B. Carpenter and W. N. McBird, for plaintiff in error.

Henry T. Rogers, Lucius M. Cuthbert, and D. B. Ellis, for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

Corporators and directors who secure the grant of a corporate franchise under the general corporation laws of a state ought to bear the burdens as well as enjoy the benefits of those laws. The corporation formed under such laws is conclusively presumed to be a resident and inhabitant of the state under whose laws it is organized. "It must dwell in the place of its creation, and cannot migrate to another sovereignty." *Bank v. Earle*, 13 Pet. 519, 588; *Runyan v. Coster*, 14 Pet. 122, 129; *Ex parte Schollenberger*, 96 U. S. 369, 377. The statutes of the state by virtue of which the franchise vests become the charter of the corporation, and those who seek and accept such a franchise tacitly agree to perform the requirements, assume the responsibilities, and discharge the liabilities the laws of the state impose. Such laws have no extraterritorial force, no operation beyond the borders of the state that enacts them, except by comity alone; and hence it must be presumed that all their requirements must be fulfilled within the border of that state, unless the statutes otherwise clearly provide.

The state of Colorado, for the protection of the stockholders and the security of the creditors of its corporations, has required each corporation to make and to file with the recorder of deeds of the county in which the principal business of the corporation in that state shall be carried on, annual reports of the amount of its capital stock, the proportion actually paid in, and the amount of its existing debts; and has provided that, in case of a failure of any corporation to file any of these reports within 60 days after the 1st day of January in each year, the directors of the corporation shall be jointly and severally liable for all its debts contracted during the year preceding the time when such report should have been filed and until it is filed. The plaintiff in error was one of the corporators, and has ever since been one of the directors, of the Montana Mining, Land & Investment Company, which was a corporation organized several years ago under the laws of the state of Colorado. This corporation has never filed any report of its financial condition, and on this account the court below rendered judgment against the plaintiff in error for one of the debts of the corporation. He admits that the written certificate which he signed, and on which this corporation is founded, stated that the principal place and business office of the corporation in Colorado would be in the city of Denver, in the county of Arapahoe, and state of Colorado, and that the corporation has always maintained, and still maintains, an office in that city. But

he says that this certificate also stated that the principal business of the corporation was to be carried on in the state of Montana and in any part of the state of Colorado where the corporation might desire to transact business; and he further says that none of the mining or other business of the corporation was intended to be, or was in fact, carried on in any of the counties of Colorado.

In our opinion, this constitutes no defense to this action, and these allegations were properly stricken from his answer. Corporations and directors who accept the franchise to be a corporation under the general laws of a state can no more free themselves or their corporation from the discharge in that state of the duties those statutes impose upon them, or divest themselves of the responsibilities and liabilities imposed upon them by those statutes, by simply conducting their business beyond the borders of the state, than the Ethiopian can by migration change his skin, or the leopard his spots. The corporation statutes of Colorado constitute the charter of this corporation,—the law of its being. They required annual reports of its financial condition to be filed in the county in which its business was carried on. Gen. Laws Colo. 1877, p. 149, § 16. This meant that these reports should be filed in the county in Colorado in which its business was carried on; not in Montana, nor in any other state. Any other construction would be absurd, because this statute is without force beyond the boundaries of Colorado. The directors cannot escape this duty and liability by conducting their business in another state. The statutes of Colorado require them to maintain an office and place of business in that state, and to file their reports in the county in which that place of business is located. It is no answer to the charge of their failure to perform the latter duty that they failed to perform the former.

Moreover, it was with the recorder of deeds of the county in which the certificate of incorporation stated the business of the corporation in Colorado would be carried on, not with the recorder of the county in which it was actually carried on, that the corporation was required by this statute to file these reports; and the answer admits that the certificate stated that the business office of the corporation was in Arapahoe county, and that it did not name any other county in Colorado where its business would be carried on. In sections 125–127 of the general laws of Colorado for the formation of corporations (pages 184, 187, Gen. Laws 1877; sections 625, 630, Mills' Ann. St. 1891), a method is provided through which, by a vote of the stockholders and the filing of a proper certificate, a change of the name, or of the place of business, or of the number of the members of the board of directors, or of the amount of the capital stock of such a corporation may be made. It goes without saying that the place where the business was to be carried on named in the certificate could no more be changed without a compliance with this statute than could the name or the amount of the capital stock or the board of directors, and until it was so changed the reports were required by the statute to be filed with the recorder of deeds of Arapahoe county. *Starch Factory v. Dolloway*, 21 N. Y. 449, 454; *McHarg v. Eastman*, 4 Rob. (N. Y.) 635, 639.

Again, the last clause of section 2, p. 144, Gen. Laws Colo. 1877 (section 473, Mills' Ann. St. 1891), which relates to a corporation organized in Colorado to do a part of its business without the state does not require the certificate of incorporation to state the name of the county in which the principal place of business of the corporation is to be carried on, but only the name of the county in which the principal business of the corporation within the state of Colorado is to be carried on. The answer nowhere denies that the certificate did state that the principal office and the place where the principal business of the corporation in Colorado was to be carried on was in Arapahoe county, and it admits that all the business that the corporation ever did carry on in Colorado—the business of maintaining an office—was conducted in that county. Under these admissions it was not material that the corporation carried on the principal part of its business in another state. The certificate fixed the county in which it was required to file its reports.

The next averment stricken from the answer was that section 16, supra, is unconstitutional, because the title of the act in which it was enacted did not clearly express the subject embraced in that section. Section 21, art. 5, of the constitution of Colorado provides that "no bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title. * * *" Section 16 was one of one hundred and thirty-two sections of a general law providing for the formation and government of corporations in the state of Colorado, and for the responsibilities and liabilities of their stockholders and officers. The title of the bill which became this law was, "An act to provide for the formation of corporations." The section in question was clearly germane to the subject expressed in this title, and fully protected by the settled rule for the interpretation of such a provision in constitutions. That rule is that, where the subject of the bill is clearly stated in the title, the law will not be held obnoxious to this clause of the constitution on account of the presence in it of any provisions that are germane to the subject expressed in the title, or that would be naturally suggested by it as necessary or proper to a complete accomplishment of the purpose it discloses. *Travelers' Ins. Co. v. Township of Oswego*, 7 C. C. A. 669, 59 Fed. 58, 64; *In re Breene*, 14 Colo. 407, 24 Pac. 3; *State v. Cassidy*, 22 Minn. 312, 322, 326, and cases cited; *State v. Barrett*, 27 Kan. 213, 218, and cases cited.

The only other allegation stricken from the answer was that the mining company had no corporate existence, because it was organized to do all its business without the state of Colorado. In an earlier part of the answer the plaintiff in error had expressly admitted that the mining company was a corporation organized under the laws of that state, and there was certainly no error in striking from the answer this inconsistent statement. This disposes of all the objections made to the order of the court striking out portions of the answer. There was no error in this order.

It is assigned as error that the court below admitted in evidence the judgment roll and proceedings in the Montana court in the case of the Commercial National Bank against the mining company, but

upon an examination of the bill of exceptions we find that, while the plaintiff in error objected and excepted to the introduction of this evidence, he assigned no ground for his objection. It is well settled that an appellate court cannot consider an objection unless the specific ground for it was brought to the attention of the trial court. *U. S. v. Shapleigh*, 12 U. S. App. 26, 4 C. C. A. 237, 249, 54 Fed. 126; *Ward v. Manufacturing Co.*, 5 C. C. A. 538, 56 Fed. 437; *Burton v. Driggs*, 20 Wall. 125, 133; *Camden v. Doremus*, 3 How. 515, 530; *Baldwin v. Blanchard*, 15 Minn. 489, 496 (Gil. 403).

It is next assigned as error that the court erred in finding for the defendant in error on the evidence. This assignment, however, rests upon a single exception to the finding of the court and the judgment thereon. It is as futile as an exception to the verdict of a jury. The finding of the court below was general, and that court was not requested, before the trial closed, to make a peremptory declaration that the evidence was insufficient to entitle the defendant in error to judgment; and in the absence of such a request it is well settled that this court is not authorized to review the finding of the court below. *Adkins v. W. & J. Sloane*, 61 Fed. 791; *Village of Alexandria v. Stabler*, 1 C. C. A. 616, 50 Fed. 689; *Martinton v. Fairbanks*, 112 U. S. 670, 5 Sup. Ct. 321; *Cooper v. Omohundro*, 19 Wall. 65; *Insurance Co. v. Unsell*, 144 U. S. 439, 451, 12 Sup. Ct. 671.

Finally, it is insisted that the complaint is insufficient to sustain the judgment below because it counts upon the judgment against the mining company, and does not plead the original debt on which that judgment is founded. The argument is that, under section 16, supra, the plaintiff in error is only liable for the debts of the mining company contracted within a certain time, and that a judgment is not a contract debt, and is not such a debt as this statute contemplates. It is worthy of notice that in this case there is no question of the time when the debt in question was incurred, because the corporation never filed any reports, and the plaintiff in error became liable for all its debts. The only question is, was this judgment a debt of the corporation within the meaning of this statute? A judgment for the recovery of money is the highest evidence of a debt. While, as against others than parties and privies to it, it may not be evidence of the facts on which it was rendered, it is evidence against everybody of its rendition, and of the fact that the judgment debtor owes the judgment creditor the amount of the judgment. *Greenl. Ev.* § 538. By force of the statutes of Colorado the plaintiff in error has become liable for the debts of this corporation. Whatever was a debt of the corporation is now his debt. This judgment was a debt of the corporation, and, while many contradictory decisions may be found in the state of New York as to the effect of such a judgment as evidence in a suit against a stockholder or director, we are of the opinion that the weight of reason and of authority is that this judgment may be counted upon in a complaint to recover its amount under this statute from the plaintiff in error, and may be introduced in evidence to prove the debt it establishes. *Frost v. Investment Co. (Minn.)* 59 N. W. 308; *Slee v. Bloom*, 20 Johns. 669, 682; *Grund v. Tucker*, 5 Kan. 70, 78; *Donworth v. Cool-*

baugh, 5 Iowa, 300; *Wilson v. Coal Co.*, 43 Pa. St. 424, 427; *Merrill v. Bank*, 31 Me. 57; *Came v. Brigham*, 39 Me. 35; *Milliken v. Whitehouse*, 49 Me. 529.

The judgment below is affirmed, with costs.

GRISWOLD v. HARKER et al.

(Circuit Court of Appeals, Eighth Circuit. June 25, 1894.)

No. 373.

PATENTS—LIMITATION BY PRIOR STATE OF ART—INFRINGEMENT—WAFFLE IRONS.

In the *Selden* and *Griswold* patent, No. 229,280, for an improvement in waffle irons, consisting in a construction of the hinge connecting the parts of the pan, whereby one of the pivots or journals on which the pan rotates forms part of the hinge, while the opposite pivot or journal is formed on the divided handle, so that the pan opens in the same plane with its axis of rotation, the claims for such hinge and journals or pivots are not restricted to the peculiar constructions described, either by the prior state of the art, or by patents describing various similar cooking utensils not provided with a hinge; and therefore those claims are infringed by the waffle iron described in the *Harker* and *Williams* patent, No. 277,422, the only variation in construction being the making of the hinge itself the journal. 55 Fed. 991, reversed.

Appeal from the Circuit Court of the United States for the District of Minnesota.

This was a suit by Matthew Griswold, doing business as the Griswold Manufacturing Company, against John B. Harker and F. M. Ruttan, doing business as John B. Harker & Co., for infringement of a patent. The circuit court dismissed the bill. 55 Fed. 991. Complainant appealed.

J. C. Sturgeon (F. M. Catlin, on the brief), for appellant.

A. C. Paul, for appellees.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

SANBORN, Circuit Judge. This is an appeal from a decree dismissing a bill brought by the appellant, Matthew Griswold, against the appellees, John B. Harker and F. M. Ruttan, for infringement of the first two claims of letters patent No. 229,280 to *Selden* and *Griswold*, issued June 29, 1880, for improvements in waffle irons. The claims are:

"(1) In a waffle iron, the hinge upon which the pan opens, provided with one of the journals or pivots on which the pan is rotated. (2) The journals or pivots on which the pan rotates, formed upon or connected, one with the hinge upon which the pan opens, and the other on the handle for rotating and opening said pan."

In their specifications the patentees say:

"In waffle irons, as ordinarily constructed, the hinge connecting the two parts of the pan has been made separate from the pivot on which the pan rotates, and located on one side of the pan, relatively to said pivot. Our improvement consists in a novel construction of the hinge connecting the two parts of the divided pan, whereby one of the pivots or journals on which

the pan rotates is made to form a part of said hinge, the hinge and pivot being thus brought together, while the opposite pivot or journal on which the pan rotates is formed on the divided handle, by means of which the pan is rotated, and by means of which, also, either portion of the pan which for the time being is uppermost is lifted for opening the pan. It further consists in a novel construction and arrangement of the socket in the rim or supporting ring for the reception of the hinge and pivot, whereby the tilting or dumping of the pan is prevented when the cover is raised, and in a novel manner of attaching the wooden handles, as hereinafter described."

The patentees then minutely describe all the parts of the waffle iron,—the supporting ring upon which the journals rest, and within which the pan rotates; the handle to this ring; the hinge, a part of which forms one journal for the pan; the other journal, which is formed by the divided handle, one-half of which is attached to each half of the pan opposite the journal formed with the hinge; the sockets in which the journals rest; the pin which limits the revolving movement of the pan; and the particular method in which they preferred to construct all the parts of the iron. They accomplish their purpose, of bringing the hinge and one of the pivots or journals on which the pan rotates together, by inserting the small end of a wedge-shaped block between the two inner lugs or ears formerly in common use to form the hinge of the pan, and running the pin of the hinge through it. They make this block project beyond the socket provided for it in the supporting ring, and provide it with a head that prevents it from slipping through the socket to the inner side of the ring.

The waffle iron made and sold by the appellees is described in letters patent No. 277,422, May 8, 1883, to Harker and Williams. It is provided with divided handles which form one of the journals for the rotation of the pan, and the other journal is formed by the hinge which is on the side of the pan opposite the handles. Their pan opens in the same plane with its axis of rotation, and their construction remedies the same defects and accomplishes the same purposes as does the improved construction described in the patent to Selden and Griswold. The only variation from the construction of the improvements claimed by Selden and Griswold is that the appellees do not use the block inserted between the double lugs of the hinge and the socket in which it rests to form the hinge journal, but in lieu of this they extend beyond the supporting ring a single, semicylindrical lug from each half of the pan, pin these lugs together, and thus make the hinge itself the journal.

The court below dismissed the bill on the ground that the claims of the patent to Selden and Griswold must be restricted, in view of the prior state of the art, to the peculiar construction of the hinge formed with the journal, and the novel construction and arrangement of the socket described in the patent, and that the appellees did not infringe these claims, when thus construed.

The title of the appellant to this patent, and the utility of the invention it describes, are not contested in this court. A glance at the claims of the patent is sufficient to show that, unless they are restricted by the prior state of the art, the appellees are infringers. It was not the mere form of the hinge described in the patent in

suit that Selden and Griswold were seeking to claim. It was any hinge in a waffle iron which itself formed, or was provided with, one of the journals or pivots on which the pan was rotated. It was not a new hinge that they thought they had discovered or invented, but it was such an improvement in the construction of the waffle iron that the hinge could be placed in the same line with the axis of rotation of the pan, and at the same time perform the function of holding the two halves of the pan together at all times, and the further function of a journal for its rotation, while the handles attached to the pan opposite the hinge formed the other journal. It was the combination of the following essential elements that the patentees fairly described, claimed, and sought to secure by their patent: A hinge to the pan, located in the same plane with its axis of rotation; a hinge that would hold the two halves of the pan together continuously while it was performing its functions; a hinge that was provided with a journal on which the pan might be turned; a handle to each half of the pan, located directly opposite to the hinge, and together forming another journal for the rotation of the pan. It is undoubtedly true that if the prior state of the art exhibits the combination of all these essential elements, except the peculiarly constructed hinge the patentees show, accomplishing substantially the same purpose which their improved construction brings about, then the claims of this patent must be restricted to the peculiar construction of this hinge. *Stirrat v. Manufacturing Co.*, 61 Fed. 980. But the mere fact that the patentees' invention is but the combination of old ingredients or materials is no answer to the patent, for it is a general rule that a patentable invention may consist entirely in a new combination or arrangement of old or well-known ingredients or elements, provided a new and useful result is thereby attained. *Thomson v. Bank*, 10 U. S. App. 500, 509, 3 C. C. A. 518, 53 Fed. 250; *Seymour v. Osborne*, 11 Wall. 516, 542, 548; *Gould v. Rees*, 15 Wall. 187, 189.

The general rules governing the rights of patentees and inventors are now so well settled that they present but little difficulty, but the multiplication of patents to improvements, great and small, upon all classes of machines and implements, constantly presents the difficult question whether or not the claims of the patentees are so much broader than the actual invention they have made that those who are claimed to be infringers are authorized by the prior state of the art to use the machine or device they present, notwithstanding the patent. This is the question presented in this case. In other words, the question of infringement or noninfringement must be determined by the limitations placed upon this patent by the state of the art when it was issued. *McCormick v. Talcott*, 20 How. 402, 405.

Turning to the prior state of the art, as it is disclosed by the record before us, we find that prior to the invention of these patentees the two halves of the double pan of a waffle iron were hinged together by a pin passing through two lugs or ears that projected from each half of the pan. Pindles projected from the double pan, —on the sides of it, relatively to the hinge, and at right angles to

the plane in which the pan opened,—and these pindles were journaled upon a supporting ring or frame, in which the pan was suspended so that it could be turned upon the pindles. The pan was not provided with handles for turning it, but was made to rotate by pushing one side of it with a knife or some other utensil; and no pan of a waffle iron had ever been constructed, so far as this record discloses, which opened in the same plane with its axis of rotation, or which turned upon journals, one of which was connected with or formed the hinge, while the other was formed of the handles to the pan. In this state of the art the patentees made this invention. It is plain that there was nothing in the prior construction or use of waffle irons to restrict the claims of their patent.

But patents No. 24,024, dated May 17, 1859, to J. D. Harrington, for improvements in machines for roasting coffee; No. 27,176, dated February 14, 1860, to E. Webster, for improvements in revolving gridirons; No. 61,478, dated January 22, 1867, to E. J. Smith, for an improved cooking utensil; and No. 96,930, dated November 16, 1869, to Link and Curtiss, for an improvement in steak broilers,—are pressed upon our attention as anticipations of this invention, or restrictions of the scope of this patent. In our opinion they do not have this effect. They do not describe waffle irons. They describe cooking utensils consisting of supporting rings and revolving parts composed of divided halves opening in the same planes of the axes of their rotation. Each half is provided with two semicylindrical stems on the opposite sides of the revolving parts; and these stems, when the utensils are closed, form the journals on which the revolving parts are supported, and rotated upon the rings or frames. But the sine qua non of a waffle iron is a hinge which will hold the divided halves of the pan continuously together during all the operations of opening, filling, emptying, and closing the pan, so that all these operations can be conveniently and quickly performed. Such a hinge was a part of every waffle iron referred to in this record. Such a hinge, provided with a journal for the pan to turn upon, was an essential element of the combination claimed by Selden and Griswold. None of the utensils described in these anticipating patents have such a hinge. Not one of them is provided with any hinge at all. They are provided with different devices (such as a knob on the end of one of the stems, with a notch in it, into which the corresponding stem may be inserted when the utensil is closed,—patent No. 27,176, supra), by which the divided halves of the rotating parts are held together when they are closed; but the moment they are opened these halves become detached, and must again be attached to each other before they can be turned or operated. A waffle iron constructed on this principle would be useless. From such crude and hingeless utensils as these, or from the old, loosely-swinging waffle iron, without handles, and with its hinge on one side relatively to the pivots on which the pan was journaled, to the hinge provided with one of the journals on which the pan rotates, and the divided handles to the pan forming the other journal, so that the pan would open in the plane of its axis, and could be completely controlled by the handles at all times,

shown by the patent to Selden and Griswold, was a notable step in advance,—a marked improvement; and, to those who made it, we think the quality of inventors ought not to be denied. *Thomson v. Bank*, 10 U. S. App. 512, 3 C. C. A. 518, 53 Fed. 250; *Loom Co. v. Higgins*, 105 U. S. 580, 591; *Consolidated Safety-Valve Co. v. Crosby Steam-Gauge & Valve Co.*, 113 U. S. 157, 179, 5 Sup. Ct. 513; *Magowan v. Packing Co.*, 141 U. S. 332, 341, 343, 12 Sup. Ct. 71; *The Barbed-Wire Patent*, 143 U. S. 275, 281, 283, 12 Sup. Ct. 443, 450.

This view is confirmed by the facts that the patent in suit was dated June 29, 1880; that one or both the patentees have ever since been continuously manufacturing and successfully selling the irons constructed under this patent; that one of the appellees was a partner for several years in a firm which purchased these irons of one or both of the patentees; and that we now find him and his partner manufacturing and selling, not the hingeless utensils shown by the patents they plead, nor the old waffle iron, without handles, and with its hinge on one side of the pan relatively to its pivots, but an iron which embodies the very improvements of the patentees, with the exception of the mere colorable evasion of making the hinge itself the journal, in place of inserting the journal in the hinge. Actions often speak louder, and frequently more truthfully, than words. It is not impossible that the reason why the appellees are not using the old devices they plead is that the improvements described in this patent have made them useless and unmerchanta-ble. If this is not so, they can abandon the improvements of Selden and Griswold, and go back to the devices they plead.

In our opinion the first and second claims of the patent in suit are neither anticipated nor restricted by the prior state of the art, nor by the patents pleaded in the answer, and the appellees are infringers of them.

The decree below is reversed, with costs, and the cause remanded, with directions to enter a decree in favor of the appellant for a perpetual injunction, damages, and costs.

LE FAVOUR v. RICE.

(Circuit Court of Appeals, First Circuit. April 26, 1894.)

No. 74.

1. PATENTS—LIMITATION OF CLAIM—BOOT AND SHOE SHANKS.

In a patent claiming a boot and shoe shank, made of leather and steel, secured together by rivets, the specification stated that steel shanks were well known, but were objectionable, because almost certain to cut the parts against which they bear. *Held*, that the patent covered only a shank composed of two parts,—leather and steel, or their equivalents.

2. SAME.

The Rice patent, No. 68,652, for a boot and shoe shank, construed as limited by reference to the specification, and *held* not infringed.

In Error to the Circuit Court of the United States for the District of Massachusetts.

This was an action by Caroline A. Rice, guardian, against Joseph W. Le Favour, for infringement of a patent. The circuit court rendered judgment for plaintiff. Defendant brought error.

Frederick P. Fish and William K. Richardson, for plaintiff in error.

Almon A. Strout and Frank L. Washburn, for defendant in error.

Before COLT and PUTNAM, Circuit Judges, and NELSON, District Judge.

COLT, Circuit Judge. The subject-matter of this suit is a patent granted to Andrew Jacob Rice and Andrew James Rice, September 10, 1867, for an improved boot and shoe shank. The improvement consisted in making the shank of leather and steel, secured together by rivets. The specification declares:

"We make our shank in two parts, A and B. The part A is made in the desired shape for the shank, and the part B is made to fit upon it, and the two parts are then secured to each other in any convenient manner. We make the part A of leather, or any similar material possessing the requisite strength and pliability. * * * The part B we make of metal, as its only purpose is to strengthen the shank, and prevent it from getting out of shape. * * * Shanks of steel, leather, and other material are well known, but they are all liable to various objections. Steel shanks, though they are not liable to break, and retain their shape well, are almost certain, when the boot or shoe is worn, to cut the parts against which they bear, and all other shanks known to us are apt to break or get out of shape."

The claim is for a shank as an article of manufacture, made of leather and steel, secured together by rivets.

By the seventh assignment of error, the court refused to instruct the jury, at defendant's request, as follows:

"That, if the jury find that the defendant did not use in his shoes a shank made as an article of manufacture, of leather and steel, or equivalent materials, secured together by rivets, or equivalent means, the verdict must be for defendant."

The defendant's shank was made of a single piece of steel. It is clear to us that the patent can only be construed to cover a shank composed of leather and steel, or their equivalents. A construction which would so enlarge the patent as to embrace a shank made entirely of steel would be in violation of the express language of the specification, wherein it is stated that steel shanks were well known, and were open to the objection of cutting the parts of the leather against which they bore. There was also introduced in evidence several prior patents for different forms of steel shanks. We think the court, as requested by the defendant, should have charged the jury that the patent was for a shank composed of two parts,—namely, leather and steel, or their equivalents,—fastened together, and that, if the defendant did not use a shank so constructed, he was entitled to a verdict. As to the alleged waiver of this request by agreement of counsel, except so far as it was embraced in the judge's charge, we do not think the bill of exceptions supports the position of the plaintiff, now defendant in error. At most, the

waiver only extended to the question of anticipation, and it did not embrace the question of the legal construction of the patent.

For these reasons, the judgment of the circuit court is reversed, and this cause is remanded to that court, with directions to grant a new trial.

SHIPMAN ENGINE CO. v. McLAUGHLIN.

(Circuit Court, D. Massachusetts. June 28, 1894.)

No. 2,889.

PATENTS—LIMITATION OF CLAIM—HYDROCARBON FURNACES.

The Shipman patent, No. 304,365, for improvements in hydrocarbon furnaces, in view of its construction in the case of Shipman Engine Co. v. Rochester Tool Works, 34 Fed. 747, the language of its specifications, and the proceedings in the patent office, must be limited, in a suit where the parties and the evidence are substantially the same, as to both its first and second claims, to a structure in which the oil is drawn upward from the reservoir to the atomizing jet by suction, and an apparatus in which the oil is fed from the reservoir to the atomizing jet by gravity is not within the patent.

This was a suit by the Shipman Engine Company against George G. McLaughlin for infringement of a patent.

Samuel J. Elder and E. A. Whitman, for complainant.
Charles E. Mitchell and Josiah Sullivan, for defendant.

COLT, Circuit Judge. This suit is for infringement of letters patent No. 304,365, granted Albert H. Shipman, for improvements in hydrocarbon furnaces.

In the case of This Complainant v. Rochester Tool Works, 34 Fed. 747, the same patent was before Judge Wallace. The evidence in the two cases is substantially the same, and the parties are really the same, though the nominal defendant in the present suit is different. In legal effect, this suit stands as if it were a proceeding in the nature of contempt, brought against the Rochester Tool Company in the original suit, or a new bill brought against that company by the complainant. Judge Wallace held that the Shipman patent possessed patentable novelty, and that the defendant infringed the second claim. In the apparatus which was found to infringe this claim, the oil reservoir was located below the atomizer, and the oil was drawn upward by suction from the reservoir. After that decision the defendant, under the advice of counsel, made certain changes in the construction of its furnace, by locating the oil reservoir above the atomizer, and by inserting a stop valve in the oil pipe. The question in this case is whether this apparatus infringes the first claim of the patent. This claim does not describe the oil reservoir as located below the atomizer, and the oil drawn upward therefrom, and is therefore broader in its language than the second claim.

The solution of this question turns upon Judge Wallace's construction of the patent, the language of the patent itself, and the file wrapper and contents. Judge Wallace held that Shipman was

not a pioneer in the art of utilizing liquid fuel as a substitute for coal for producing heat or steam; that he only assumes to have invented certain improvements in hydrocarbon furnaces for use under a steam boiler; that his apparatus consisted of a "combination of parts, each of which was old and well-known when he took up the subject, several of which had previously been used in such burners to perform in combination the functions they performed in his apparatus, but all of which had never before been combined together in the same apparatus." He further held that the invention of Shipman resided in his valve or regulator in the steam pipe, by means of which the flow of oil is controlled by the steam suction which is automatically regulated by the valve; that this regulator performed a new function, in that it dispensed with an additional valve in the oil pipe which existed in prior furnaces. The old burners described in the Caldwell, Burbank, and Kite patents belong to the Shipman type, where the oil reservoir is located below the atomizer, and the oil is drawn up by suction; and Judge Wallace declares that these burners contain the combination found in the Shipman patent, with the exception of the regulator. The Dickerson patent, which belongs to the other type of burners, where the oil reservoir is placed above the atomizer, and the oil is fed to the atomizing jet by gravity, Judge Wallace decided, did not anticipate Shipman, because the oil is not obtained by suction, but by gravity, and because the regulator is required to be applied to the oil pipe as well as the steam pipe; in other words, the Dickerson apparatus contains a separate valve in each pipe, and the supply of oil is regulated by the valve in the oil pipe.

From a careful perusal of Judge Wallace's opinion, I think the Shipman patent must be limited to that class of hydrocarbon burners in which the oil is drawn upward by means of suction from a reservoir located below the atomizer.

This construction of the patent is confirmed by the language of the specification which says, "From the reservoir, Q, the liquid fuel is drawn upward through the pipe or oil conduit."

This construction is further confirmed by what took place in the patent office. The first claim of the patent on which the complainant now relies was twice rejected on reference to the Dickerson patent, whereupon Shipman writes as follows to the commissioner of patents:

"In the Dickerson invention the naphtha 'flows' to the burner, while in applicant's the fluid is raised to the jets by the action of the steam; and hence the supply of naphtha requires to be regulated by a cock operated by an attendant, in the one case, while in applicant's apparatus no liquid is delivered from the oil reservoir to the combustion devices, except when the steam is being discharged from its jet."

It is also significant that Shipman changed the words "fed upward," in his original application, to "drawn upward," as now found in his specification.

In view of these considerations, I think that the first claim of the Shipman patent, although broader in its language than the second claim, is limited to a structure in which the oil is drawn

upward from the reservoir to the atomizing jet by suction, and that an apparatus in which the oil is fed from the reservoir to the atomizing jet by gravity is not within the patent, and therefore cannot infringe it.

In an apparatus where the oil is fed by gravity, the oil pipe must, of necessity, contain some form of valve or regulator, in order to stop the flow of oil when the burner is not in operation. The defendant's apparatus has a stop valve in the oil pipe which opens when the steam reaches a certain pressure, and which closes when that pressure is reduced to a certain point; and the opening of the stop valve permits the oil to flow to the atomizing jet, and the closing of the valve prevents its further flow. In this respect it differs in construction and mode of operation from the Shipman device.

It may be true, as contended by the complainant, that, after the oil has reached the atomizing jet, its discharge, when the apparatus is in operation, is regulated, in part at least, by the steam pressure in the steam pipe, and that to this extent it resembles the Shipman burner, and differs from the Dickerson burner. Admitting this to be so, I do not think this circumstance brings the defendant's burner within any fair or legitimate construction of the Shipman patent.

Bill dismissed.

EDISON ELECTRIC LIGHT CO. et al. v. BOSTON INCANDESCENT LAMP CO. et al.

(Circuit Court, D. Massachusetts. June 11, 1894.)

No. 3,246.

PATENTS—LIMITATION OF CLAIM — INFRINGEMENT — INCANDESCENT ELECTRIC LAMPS.

In the Edison incandescent lamp patent, No. 223,898, claim 2, for the combination of carbon filaments with a glass receiver, from which the air is exhausted, and conductors passing through the glass, is not to be limited to the conductors of platinum wire pointed out in the specification, and employed in practice, for the patent covers a pioneer invention, and the elements of the combination other than the carbon filament are subordinate; and therefore the claim is infringed by a lamp, constructed under the Pollard patent of 1892, containing all the elements of the combination, but using conductors of powdered silver, although powdered silver was not a known substitute for platinum in the combination at the date of the Edison patent.

This was a suit by the Edison Electric Light Company and others against the Boston Incandescent Lamp Company and others. Complainants moved for a preliminary injunction.

Fish, Richardson & Storow, for complainants.

John Lowell and John Lowell, Jr., for defendants.

COLT, Circuit Judge. The second claim of the Edison incandescent lamp patent (No. 223,898) is for "the combination of carbon

filaments with a receiver made entirely of glass and conductors passing through the glass, and from which receiver the air is exhausted, for the purposes set forth."

The defendants' lamp, constructed after the Pollard patent, of November 1, 1892, contains all the elements enumerated in this claim, namely, a carbon filament, all-glass receiver, from which the air is exhausted, and conductors passing through the glass. The only difference between the two lamps is that the defendants use a film of powdered silver for the conductors passing through the glass, in place of platinum wire, which Edison points out in the specification of his patent as the material to be employed, and which is always found in the Edison lamp of commerce. In other respects the lamps are identical. While Edison uses platinum wire, he does not limit himself to this form of conductor in his claim. The language of the claim is "conductors passing through the glass," and therefore, on its face, the claim covers all kinds of material capable of carrying the electric current. If the claim had been limited to conductors of platinum wire, as the filament is limited to carbon, the case might be different.

The invention of Edison resides in the carbon filament; the other elements of the combination were old and subordinate, and represent, so to speak, only the environment of the filament. For this reason, I do not think the court should seek to restrict the plain meaning of the language of the claim. And there is another reason for giving the claim a broad construction. Edison made an important invention; he produced the first practical incandescent electric lamp; the patent is a pioneer in the sense of the patent law; it may be said that his invention created the art of incandescent electric lighting. Where a valuable invention has been made, the court will uphold that which was really invented, and which comes within any fair interpretation of the patentee's claim. *Merrill v. Yeomans*, 94 U. S. 568, 573.

The argument of the defendants is that this claim of the Edison patent must be limited to the use of platinum wire as a conductor, or its known equivalent, and that powdered silver was not a known equivalent at the date of the Edison patent. Looking generally at the state of the electrical art at the date of the Edison patent, and comparing platinum wire and powdered silver simply as elements, apart from any specific combination or invention, it cannot be said that one was not a known equivalent of the other, because powdered metals, including silver, have been recognized since 1860 as conductors of electricity. In asserting that powdered silver was not a known equivalent of platinum wire, the defendants must mean that it was not a known substitute in the combination or invention of the Edison patent, or in the art of incandescent electric lighting, and I think the evidence proves this to be true; but, in dealing with an invention which is broadly new, I am not prepared to accept the proposition that, in order to constitute infringement, an equivalent in a patented combination must always have been known at the date of the patent, or must have been such as would occur to a skilled mechanic exercising only ordinary mechanical skill.

While the language of the supreme court in *Rees v. Gould*, 15 Wall. 187, and other cases, seems to support the defendants' contention on this question, the later decisions by that court are not reconcilable with the broad proposition that in all cases the substitution of an equivalent will avoid infringement, provided it was not known at the date of the patent, using the word "known" in its ordinary sense. *Morley Sewing Mach. Co. v. Lancaster*, 129 U. S. 263, 9 Sup. Ct. 299; *Clough v. Barker*, 106 U. S. 166, 1 Sup. Ct. 188; *Machine Co. v. Murphy*, 97 U. S. 120. In the *Morley Case*, Mr. Justice Blatchford, speaking for the court, says:

"A difference in the particular devices used to accomplish a particular result in such a machine would always enable a defendant to escape the charge of infringement, provided such devices were new with the defendant in such a machine, because, as no machine for accomplishing the result existed before that of the plaintiff, the particular devices alleged to avoid infringement could not have existed or been known in such a machine prior to the plaintiff's invention."

In that case, the patent was for a machine for automatically sewing shank buttons to a fabric, and it was the first machine to accomplish this result. In the defendant's machine, the feeding and sewing mechanisms were new, and had been patented, yet the court held that it infringed the *Morley* patent. The feeding and sewing devices of the *Lancaster* machine, in the art of automatically sewing shank buttons to a fabric, were as unknown at the date of the *Morley* patent as a conductor made of powdered silver, at the date of the *Edison* patent, in the art of incandescent electric lighting.

In dealing with a pioneer invention which creates a new art, it hardly seems logical or reasonable to say that, because in the progress of such art some new substance or device has been discovered, which can act as a substitute for one of the elements of the patented invention, any one can appropriate the invention by the employment of such substitute. And, further, if equivalency signifies equivalency in the particular combination or invention, it is difficult to point out in this class of cases what known equivalents existed at the date of the patent, for the reason that the combination of elements in which the invention is embodied was first made known by the patentee. The doctrine of equivalents, as applied to primary inventions, rests upon a more satisfactory basis by the elimination of the qualification of age or time, and by holding those things to be equivalents which perform the same function in substantially the same way. The fundamental question is whether the alleged infringer makes use of the essence of the patented invention; not whether he has adopted a known equivalent, or made a patentable improvement on the invention.

The motion for preliminary injunction is granted.

EASTMAN CO. v. BLAIR CAMERA CO.

(Circuit Court, D. Massachusetts. June 1, 1894.)

No. 2,883.

1. PATENTS—ANTICIPATION—PHOTOGRAPHIC FILM HOLDERS.

The Houston patent, No. 248,179, for an improvement in photographic apparatus, consisting in connecting with one of the rollers connected with the sensitized slip within the camera a pointer, placed outside the camera, to indicate the revolutions of the roller and the length of the negatives, and attaching to the same roller a pin to perforate the edge of the strip at the spaces between the negatives, so that the division lines could be detected in a dark room, was not anticipated by previous cylindrical cloth-measuring machines, having no such device for marking lengths.

2. SAME.

The Walker and Eastman patent, No. 317,049, for a device to keep the sensitized strip in a photographic camera in proper tension, consisting in the insertion of a spring in the receiving reel to take up the slack of the film, or always draw it against the resistance of the spool, was not anticipated by such prior devices as the map rack described in the Mann patent of 1876.

3. SAME—CONSTRUCTION OF CLAIM.

In the Walker and Eastman patent, No. 317,049, for an improvement in photographic apparatus, claim 3 described the device as "acting to maintain the film in a tense condition during exposure." *Held*, that this meant, not that the tense condition was maintained only during the instant of exposure, but that the film should always be so acted upon that when exposure should take place it would be found in a tense condition.

This was a suit by the Eastman Company against the Blair Camera Company for infringement of a patent.

M. B. Philipp, for complainant.

John L. S. Roberts, for defendant.

COLT, Circuit Judge. The two patents in controversy in this case are for improvements in photographic apparatus. The first patent was granted to David H. Houston, October 11, 1881, and is No. 248,179; the second patent was granted to Walker and Eastman, May 5, 1885, and is No. 317,049.

In the old photographic camera, the plate upon which the image of an object was taken was made of glass covered on one side with a thin film of sensitive material. The film consisted of collodion, sensitized in a bath of nitrate of silver, and exposed in the camera while wet. This was known as the wet process. This form of apparatus was cumbersome and difficult to operate in the field. In 1880, Mr. Eastman, one of the inventors of the Walker and Eastman patent, commenced the manufacture of dry plates. These plates were coated with a film composed of an emulsion of gelatine and bromide of silver, and then dried, but they were open to the objections of all glass plates, namely, they were heavy and liable to break. It was sought to overcome these objections to the use of glass plates by the substitution of strips of sensitized paper supported on rollers.

A camera must be so constructed as to exclude the light, or, as commonly expressed, it must be a light-tight box. It is apparent that where a long strip of material was used it became necessary to devise some means to determine the position and movement of the strip in the camera. This was done by marking off the strip into lengths proper for exposure, before introduction into the camera, and by inserting a colored window in the box, through which the operator could observe the marks on the paper from the outside. A device of this type, which appeared in 1875, is known as "the Warnerke roll holder," and is described in Abney's *Treatise on Photography*, and other publications. It consisted of a light-tight box, containing two rollers and two rounded bars or guides, and the sensitized film was wound from one roller to the other over the exposing bed; one end of each roller projected through the side of the box, and was provided with a mill head and lock nut. The sensitized film was previously marked by black patches of paper, which could be seen through a colored glass window at the back of the holder. The defects in this form of construction were—First, it was difficult to mark the strip without injuring it; second, the colored glass window did not form a perfect protection to the entrance of white light into the box; third, it was difficult to observe the division lines on the strip through the window. In 1877, E. & H. T. Anthony & Co. made one roll holder after the Warnerke pattern, but slightly modified in structure. There is also found described in a London publication entitled "Notes and Queries," published in 1855, what is called "Captain Barr's dark slide for paper." In this apparatus, the paper used in connection with the rollers was in short lengths, secured to a band of calico, leaving intervals of about two inches between the lengths. The indicating device consisted of a short roller outside of the box, fitted to one of the inside rollers, on which was wound a tape of the exact length of the calico strip. There were numerous defects in this apparatus, and it does not appear to have ever gone into use.

Before the inventions of Houston, and Walker and Eastman, there were two problems which had to be met in the practical use of a long strip of film in a camera,—the sensitized strip must be properly marked, and it must be held in sufficient tension. These inventions solved these problems.

The Houston improvement consists in attaching to substantially the old Warnerke roll holder a device for marking automatically the sensitized material within the camera in such a manner as to form guides by which the operator can cut the film between successive exposures when taken into a dark room. This is accomplished by placing a pointer outside of the box, connected with one of the rollers, which indicates the revolutions of the roller, one revolution measuring half the length of the negative, or two revolutions the whole length. The same roller which carries the pointer also carries a pin which perforates the edge of the material at each revolution, and consequently every other perforation marks

the space between the negatives. By this device, something more is done than merely measure the length of film which passes between the rollers. The pointer outside of the box indicates accurately when the film has advanced sufficiently for each negative or exposure, at the same time the pin on the periphery of the roller marks the exposed length in such a way that the division line can be readily detected in a dark room. This was clearly an improvement over anything which existed in the prior art.

The defendant attacks the validity of this patent by the introduction of various old registering devices for measuring cloth and other materials. A type of this class of machines is found in the Dodson patents of January 20, 1880, and August 3, 1880, and it is upon these patents that the defendant chiefly relies. The machine of the Dodson patents is for measuring cloth or bagging. The material passes over one roller, and under another roller, then over a measuring cylinder, to a spindle upon which it is wound; the measuring cylinder has points on its periphery, and a tooth at one end of the cylinder outside of the frame, which works with a toothed registering wheel, and another tooth on the inside of the frame, which works a click spring; the cylinder is described as being exactly a yard in circumference, and provided with projecting points which enter the bagging and prevent it from slipping. By this device, the registering wheel operates to register the number of yards unwound from the roll, while the click spring enables the operator, by counting the clicks, to know how many yards have been unwound. In all the cloth-measuring and registering devices which existed in the art prior to the Houston patent, as disclosed by this record, there is not found the special feature of the Houston invention, namely, a projecting pin which spaces off and defines, for the purpose of cutting, a certain given length of the material. Some device of this kind was necessary in a camera using a strip of film, and, although such device may seem only a modification of old devices, yet, as the result accomplished is new and useful, I think it patentable.

On the question of the infringement of the first and second claims of the patent, I have no doubt; the defendant's device embodies the essential features of the Houston invention, and the changes which are made are merely structural.

The Walker and Eastman patent represents a still further advance in the art. The strip of film ready for exposure must always be kept in a condition of tension. As the camera may be left standing for days, it was found that the film was liable to contract or expand under different conditions of weather, and, further, in the old apparatus, the devices for holding the film in tension did not always work perfectly. The object of the Walker and Eastman patent was to remedy this defect. The inventors spent months of effort before they hit upon the device which is the subject-matter of their patent. The means employed by them were simple, but this fact does not detract from the merits of the invention. The improvement consists in the insertion of a spring in

the receiving reel, which operates to take up the slack end of the film, or to always draw the film against the resistance of the spool. The spool and the receiving reel, with their retarding mechanism, will, under the ordinary process of feeding the film along, hold it in tension; but this is not sufficient to answer all the conditions which arise in the use of the instrument. By the addition of the spring, this defect was overcome, and the film maintained in tension under all conditions. The fact that the Walker and Eastman device has gone into general use, both in this country and abroad, proves the utility of the invention; and, if the question of invention were in doubt, this circumstance should weigh strongly with the court in resolving that doubt in favor of the patentee. *Smith v. Dental Vulcanite Co.*, 93 U. S. 486, 495; *Consolidated Safety-Valve Co. v. Crosby Steam Gauge & Valve Co.*, 113 U. S. 157, 171, 5 Sup. Ct. 513; *Magowan v. Packing Co.*, 141 U. S. 332, 343, 12 Sup. Ct. 71; *Topliff v. Topliff*, 145 U. S. 156, 164, 12 Sup. Ct. 825.

The validity of this patent is attacked on the same line of defense as the Houston patent. I shall only refer to one of the prior patents which are introduced as anticipations. I confine myself to this because it comes closer to the patent in suit, and is chiefly relied upon by the defendant. This is the Mann patent, of August 8, 1876, for improvement in map racks. In that apparatus there are two rollers close together, and the map is wound from one roller upon the other. These rollers are geared together by either cog or friction wheels, so that on turning a crank the two rollers move in unison. There are also two additional guide rollers situated above and below the center rollers. The map to be displayed passes from the upper center roller, under and over the upper guide roller, then over and under the lower guide roller, back to the lower center roller; the lower guide roller is journaled in slides, which move in the framework, and springs are introduced above these slides, which cause the roller to move downward. An inspection of the Mann patent demonstrates that the organization of rollers, brakes, and springs is quite different from that found in the Walker and Eastman patent. In fact, there is nothing in the prior art which anticipates this invention.

The defendant's apparatus, though modified in some particulars, is clearly within this patent, and I am of opinion that it infringes the third, twenty-sixth, twenty-ninth, thirtieth, thirty-first, and thirty-second claims. The phrase "acting to maintain the film in a tense condition during exposure," in the third claim, does not mean, as contended by the defendant, that the tense condition is only maintained during the instant of exposure, but it should be construed as meaning that the film shall always be acted upon by such instrumentalities that, when exposure takes place, it will be found in a tense condition.

Decree for complainants.

FASSETT v. EWART MANUF'G CO.

(Circuit Court of Appeals, Seventh Circuit. May 31, 1894.)

No. 145.

1. PATENTS—DECISION OF PATENT OFFICE—ON INTERFERENCE.

A decision by the patent office in an interference proceeding is conclusive between the parties, even if wrong, when no steps have been taken to set it aside. 58 Fed. 360, affirmed.

2. SAME—SECOND PATENT TO SAME PATENTEE—MACHINE FOR COUPLING CHAIN LINKS.

The Fasset patent, No. 377,376, for a machine for coupling chain links by an endwise motion, and also by a sidewise motion, being substantially for a combination, with broader claims, of the machines described in patent No. 347,338, to the same patentee, and in application No. 174,962, filed by him, is void. 58 Fed. 360, affirmed. *Miller v. Manufacturing Co.*, 151 U. S. 186, 14 Sup. Ct. 310, followed.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

This was a suit by Nelson B. Fasset against the Ewart Manufacturing Company for infringement of a patent. The circuit court dismissed the bill. 58 Fed. 360. Complainant appealed.

The appellant filed his bill in the court below to restrain the infringement of letters patent 377,376, issued February 7, 1888, for "machine for coupling chain links." Prior to 1874, outdoor machinery was operated by leather or rubber belting. In that year William B. Ewart invented an attachable link metal belt to overcome the objections found to obtain with respect to leather and rubber belting. The novelty of the invention consisted in the form of the link, it being capable of being made into a chain of any desirable length by assembling or coupling the necessary number of links together by a side motion, the end bar of one link being forced into the hook of a companion link by forcing the link sidewise while standing at an acute angle to the link with which it is being coupled. This invention was patented on September 1, 1874, and its validity sustained in *Ewart Manuf'g Co. v. Bridgeport Malleable Iron Co.*, 31 Fed. 151. About 1881 the complainant invented a detachable chain link, which differed from the Ewart link in that it was so constructed that it could not be coupled with another link by a sidewise motion, but only by an endwise motion. A patent therefor seems to have been issued to him February 22, 1881, No. 237,967. Prior to 1882 these links were assembled or coupled by hand. During the winter of 1882-3, Mr. Fasset invented and constructed a machine for assembling the links together, and operated the same experimentally in the first half of the year 1883. This machine assembled the links of the drive chain together by an endwise thrust of the links. In January, 1884, one Eugene L. Howe constructed, and on the 6th day of October, 1884, applied for a patent for, a machine for assembling the links of a drive chain together by a sidewise thrust suitable to assemble the Ewart chain links; which machine was put in operation and publicly used by the appellee in January, 1884, and has been continued to the present time. On the 8th of April, 1884, the complainant, Mr. Fasset, filed a caveat in the patent office, which he renewed on April 4, 1885, for the term of one year. On the 6th of October, 1884, Mr. Howe filed his application in the patent office for a patent upon his machine, which resulted in the issuance to him, as assignor to the Ewart Manufacturing Company, the appellee, of letters patent No. 317,790, dated May 12, 1885. On the 21st of August, 1885, the complainant, Fasset, filed in the patent office an application, serial No. 174,961, which resulted in the issuance to him of the patent No. 347,338, dated August 17, 1886. This patent is known as case A. On the 21st of August, 1885, Mr. Fasset also filed in the patent office his application, serial No. 174,962, which is known as case B. On the 7th of September, 1886, an interference in the patent office was declared between the Howe patent, No. 317,790, and the Fasset application, case B., which resulted in a decision

by the examiner of interferences on February 21, 1889, in favor of Howe, which decision was affirmed by the examiner in chief on October 1, 1889, and by the commissioner of patents, upon a further appeal, on February 21, 1890. By this decision the commissioner awarded to Howe priority in invention of the subject-matter covered by the four claims of the Howe patent, and the first five claims of the Fasset case B. This decision has been acquiesced in by the complainant. Case A. was an application for a machine for coupling chain links by an endwise motion. It was an exact reproduction of Fasset's first machine, as shown by his model, with the exception that it is provided with a thrust bar, as in the Howe machine, instead of a sprocket wheel, for pushing or drawing the chain through the chain channel. This change was made in May or June, 1885, after the issuance of the patent to Howe, and its character is thus stated by Mr. Fasset: "The sprocket wheel and ratchet wheel attached together for feeding the assembled links forward through the machine were taken off, and a thrust bar substituted in their place for pushing the links forward in the machine after they were coupled."

The further facts touching the character of the invention and claims asserted are sufficiently stated in the report of the decision of this cause by the court below (*Fasset v. Manufacturing Co.*, 58 Fed. 360), to which reference may be made.

Banning & Banning, for appellant.

Kerr & Curtis and L. Hill (L. Hill, of counsel), for appellee.

Before JENKINS, Circuit Judge, and BAKER, District Judge.

JENKINS, Circuit Judge. We are of opinion that this case is ruled by the case of *Miller v. Manufacturing Co.*, 151 U. S. 186, 14 Sup. Ct. 310. There the patentee filed an application for an improvement in cultivators, consisting of a double-acting spring, the function of which was to depress the cultivators when inserted in the ground, and to lift them when raised above the dead point, the lifting power of the spring increasing as the plow beam rose. Two claims were made, one for the double action of the spring, and the other for the increasing lifting power of the spring as it rose. In anticipation of interference with other pending applications, the application was divided, with a view to obtain one patent for the lifting and depressing effect of the spring, and another for the lifting power of the spring increasing as the beams rise; the latter being sought upon the original application, and the former based upon a divisional application subsequently filed. The drawings and descriptions of the two applications were alike. The patent was allowed on the divisional application during the time that the original application remained in interference, and a patent was thereafter granted on the latter for the single effect of increasing the lifting power. The court, upon a review of the authorities, announced the conclusion reached upon the question of law involved, in the following language (page 198, 151 U. S., and page 310, 14 Sup. Ct.):

"The result of the foregoing and other authorities is that no patent can issue for an invention actually covered by a former patent, especially to the same patentee, although the terms of the claims may differ; that the second patent, although containing a broader claim, more general in its character than the specified claims contained in the prior patent, is also void; but that, where the second patent covers matter described in the prior patent essentially distinct and separable from the invention covered thereby, and claims made thereunder, its validity may be sustained. In the last class of cases, it must distinctly appear that the invention covered by the latter patent was a separate invention, distinctly different and independent from that covered by the

first patent; in other words, it must be something substantially different from that comprehended in the first patent. It must consist in something more than a mere distinction of the breadth or scope of the claims of each patent. If the case comes within the first or second of the above classes, the patent is absolutely void."

The court then observed (page 199, 151 U. S., and page 310, 14 Sup. Ct.), with respect to the patent there involved:

"It clearly appears from a comparison of the two patents, and their respective specifications and drawings, that the first function or object of the patent of 1879, relating to the lifting power of the spring, is identical with the sole object or function covered by the patent of 1881, and that the improved device and combination for the accomplishment of the lifting operation are identical in both patents. The invention covered by the first patent, as stated in the specification, consists in a spring which serves the double purpose of lifting or holding down the plows at will; and it is further stated that one spring may be adapted to serve all, or either one, or more, of the offices above enumerated. The patent of 1879 thus embraces both the lifting and the depressing effects or operations of the spring device, while that of 1881 seeks to cover only the increased lifting effect of the same device. The first patent clearly includes the second. No substantial distinction can be drawn between the two, which have the same element in combination, and the same spring arrangement and adjustment to accomplish precisely the same lifting effect, increasing as the beams are raised from their operative positions. The matter sought to be covered by the second patent is inseparably involved in the matter embraced in the former patent, and this, under the authorities, renders the second patent void. If the two patents in question had been granted to different parties, it admits of no question that the last would have been held an infringement of the first, for the reason that the patent of 1879 just as clearly includes, as a part of the invention, the increased lifting effect of the spring device, increasing as the beams are raised, as that disclosed in the patent of 1881."

And with respect to the claimed reservation in the first patent, the court said (page 201, 151 U. S., and page 310, 14 Sup. Ct.):

"This conclusion is in no way affected by the reservation, attempted to be made in the 1879 patent, of the 'broad idea, of a lifting spring which acts with increasing force as the beam rises,' for the reason that the broad idea sought to be reserved is embodied in identically the same mechanical device constituting the invention and covered by the first patent, which completely occupies all the ground that was reserved. The spring and its connecting apparatus is the same in each patent, and the claims of the first covered the double automatic action, upward or downward. There is nothing in the specification or claims to indicate that in the first patent the lifting action is in any degree slighter or weaker, as the beam rises, than in the second patent. On the contrary, both specifications clearly indicate that the spring device acts with increasing force in each patent as the beam rises. In addition to this, it distinctly appears that every claim of the 1881 patent could have been properly included and made a part of the claims of the 1879 patent. With the exception of the first broad claim of the 1881 patent, each of the other claims includes the spring device, with the limiting and qualifying words 'substantially as described,' and, by virtue of its reference to the specification, the lifting element of the spring device is shown to be the same in each patent. There is nothing in either patent, or the specification or claims thereof, to indicate that there is any greater or stronger lifting action in the one than in the other. It is thus shown that one and the same mechanical device, which covers the entire invention, is described in each of the patents; and the effort to secure a second patent on one part thereof, or on its function, after such part, or its action, had been clearly described and covered by a prior patent, cannot be sustained. To hold, under these circumstances, that the first and second patents, in respect to the lifting effect of the same spring device, present distinct inventions, or that both are valid for the same invention, would involve the drawing of distinctions too refined for the practical administration of the patent law."

Applying the principles thus authoritatively announced to the case in hand, we are unable to avoid the conclusion that the result reached by the court below was correct.

So far as respects the Howe patent, and the machines made and used by the defendant thereunder, it is clear that the decisions of the patent office in favor of the Howe patent have been acquiesced in by the complainant for such length of time as to work an abandonment of any claim to the invention therein involved. *Gandy v. Marble*, 122 U. S. 432, 7 Sup. Ct. 1290.

It is clear that the facts of this case bring it fully within the principle announced in *Miller v. Manufacturing Co.*, above referred to. Case C. described the same machine as was involved in case A. It contained an exact reproduction of the 10 figures of case A., and a literal copy of the descriptive part of the specification, and, in addition, two figures (11 and 12), taken from case B., illustrating the operation of the side-thrust motion. In other words, case A. describes a machine for coupling chain links by an endwise motion, case B. describes a machine for coupling the links by a sidewise motion, and case C.—being the patent here involved—covers machines for assembling chain links by an endwise motion and also by a sidewise motion. It is substantially the combination of case A. and of case B. The most that can be said for it is that—as asserted by Mr. Fassett himself—the claims in case C. are broader in their purport than those of case A. But it is only a second patent, and a broader patent, upon the principal subject-matter of case A. We are unable to distinguish this from the *Miller Case*. As was well asserted by the learned counsel for the appellee, in both cases there is a prior patent for the same machine, but with more limited claims; in both all the claims of the second or broader patent might have been predicated upon the earlier patent; in both the validity of the second patent was contested because of a reservation in the earlier patent; and in both the second patent, if valid, would have the effect of prolonging the term of monopoly of the machine for which the earlier patent was granted. We think the matter so clear that further consideration of the subject is not required.

The decree will be affirmed.

THE GUIDING STAR.

WILBOUR v. HEGLER et al.

(Circuit Court of Appeals, Sixth Circuit. May 8, 1894.)

No. 111.

1. CARRIERS—ACCEPTANCE OF GOODS—BILLS OF LADING.

The agent of a steamboat line signed a bill of lading for cotton as shipped "on board the good steamboat called —, or any other boat in the employ of same line," the name of steamboat being left blank. *Held*, that the rights of parties under it were not affected by Act Miss. March 16, 1886, making "every bill of lading acknowledging the receipt" of goods conclusive evidence, in the hands of bona fide holders, that the goods were actually received for transportation, as there was no acknowledgment of the receipt of any cotton, or its shipment on any named boat.

2. SAME.

Another bill of lading, in the same form, had the blank for the name of the boat filled with an abbreviation of the name of the steamboat line. *Held*, that the statute did not make this conclusive evidence of the receipt of the cotton by a particular boat of the line, in the absence of evidence that such abbreviation was intended to designate that boat, or was so understood by either party.

3. SHIPPING—BILLS OF LADING—AGENT OF STEAMBOAT LINE.

Several steamboats, associated under the name of the S. T. Line, ran regularly between the same points under an agreement as to rates and sailing days, but each kept its own earnings, and paid its own expenses. The masters of all the boats executed a writing authorizing a person named to sign bills of lading, and to represent their boats, as agent. *Held*, that bills of lading signed by such agent could not bind all the boats jointly, and thus create a maritime lien against them all for each shipment, without regard to whether one or the other carried the goods, for the masters had no power to grant such authority. 53 Fed. 936, affirmed.

4. SAME.

In bills of lading executed by said agent for cotton shipped by such line from an intermediate landing, no steamboat was designated. The custom was that the first boat of the line coming after goods had been received for shipment should take them, unless already fully loaded. After issue of the bills of lading, and before any boat of the line arrived, the cotton was destroyed by fire. The next boat of the line passed without stopping. *Held*, that the bills of lading created no maritime lien on such boat for the destruction of the cotton. 53 Fed. 936, affirmed.

Appeal from the District Court of the United States for the Southern District of Ohio.

This was a libel by Henry F. Bennitt against the steamer Guiding Star (J. D. Hegler and others, claimants) for the loss of certain cotton. The district court dismissed the libel. 53 Fed. 936. Bennitt having deceased, the suit was continued by Joshua Wilbour, his executor, who appealed from the decree.

F. G. Roelker and Joseph Wilby, for appellant.

Ramsey, Maxwell & Ramsey and Stephens, Lincoln & Smith (Chas. H. Stephens, of counsel), for appellees.

Before TAFT and LURTON, Circuit Judges, and BARR, District Judge.

BARR, District Judge. This is an appeal from the district court for the southern district of Ohio, dismissing the appellant's libel.

This suit is a proceeding in rem to enforce a claim against the steamer Guiding Star for the sum of \$17,351.94, the value of 238 bales of cotton which were burned at a landing on the Mississippi river, near Rosedale, in the state of Mississippi, in the early morning and during the day of January 26, 1890. This cotton was covered by two bills of lading, alleged to be the bills of lading of the Guiding Star, and dated January 15, 1890, and January 22, 1890, at Rosedale, Miss. The bill of lading dated January 15, 1890, is for 100 bales of cotton, and the other, dated January 22, 1890, is for 138 bales of cotton. These bills are on the forms used by a steamboat line called the Southern Transportation Line, and the Cincinnati, Hamilton & Dayton Railroad Company and its connecting railroad lines, and are signed by James Burke, agent. These forms provide for the delivery of the freight received by a steamer at Cincinnati,

Ohio, and then by the railroad companies to its destination. These bills of lading did not recite the receipt of the cotton on the Guiding Star, or any named steamboat, but in the one dated January 22, 1890, it was left blank, and in that dated January 15, 1890, it was filled "Sou. Trans. Co." The first part reads thus, viz.:

"Shipped in apparent good order and condition by W. P. McBath & Co. on account and risk of whom it may concern, on board the good steamboat called —, or any other boat in the employ of same line, the following packages or articles, marked and numbered, which are to be delivered, without delay, in like order, at the port of Cincinnati, Ohio; unavoidable dangers of the river, collision, explosion, and fire excepted," etc.

The bill of lading dated January 15th is of like tenor, except, instead of a blank for name of steamboat, "Sou. Trans. Co." is used.

The bill of lading dated January 15, 1890, was indorsed by W. P. McBath & Co. and attached to a sight draft of same date drawn by them on H. F. Bennitt, Norwich, Conn., for \$7,020.61; and the other bill of lading was indorsed and attached to a sight draft dated January 24, 1890, on the same party, for \$10,092.48. Both drafts, with the bills of lading attached, were received by the bank of Rosedale, Miss., and were afterwards accepted and paid by Bennitt, appellant's testator.

H. F. Bennitt, in the original libel, claimed this cotton to have been bought on his order, and for his account, and that it was at the time of its delivery to the steamboat and its nondelivery his property, and claimed a maritime lien on the Guiding Star for the full value of the cotton covered by bills of lading, for its nondelivery. He alleged these bills of lading were signed, issued, and delivered by the duly-authorized agent of the Guiding Star and its owner, associated together in the business of transportation, under the name of the Southern Transportation Company.

The answer put in issue the material allegations of the libel, and, in addition, alleged this cotton was at or prior to January 25, 1890, taken to the steamboat landing by W. P. McBath & Co., and there delivered to the owner of the landing, with a view of shipment on some steamboat, and while lying at said landing, and in the custody of the owners or agents of McBath & Co., the cotton was totally destroyed by fire. The claimant also alleged that, if said bills of lading should be held to be the bills of lading of the Guiding Star, the provisions of these bills exempted the boat from liability for loss by fire.

Subsequently, the libelant filed an amended libel, in which he pleaded an act of the state of Mississippi entitled "An act to define the liability of persons and corporations issuing bills of lading and warehouse receipts," the first section of which is as follows:

"That every bill of lading or instrument in the nature or stead thereof, acknowledging the receipt of cotton or other things, shall be conclusive evidence in the hands of every bona fide holder, whether by assignment, pledge or otherwise, as against the person or corporation issuing the same, that the cotton or other things have been actually received for transportation."

The libelant alleged he was the bona fide holder of said bills of lading, and that said contracts were entered into in the state of Mississippi, and with reference to the laws of said state. He also alleged carelessness and negligence on the part of the boat and her

officers, in leaving this cotton at the landing, uncovered, unguarded, and unprotected, and that they had made no provision or security against fire, and had no means at hand to extinguish the fire, and that in consequence of which the cotton was lost.

The claimant answered this amended libel, and substantially made same defenses as in original answer, but did not notice the allegation as to negligence in not protecting cotton at the landing.

There are several errors assigned, but the material questions are whether or not these bills of lading are the Guiding Star's, and created a maritime lien on that boat, and, if so, whether, under the evidence, the boat is exempt, under the provision of the bills of lading, for this loss by fire.

It appears from the testimony that James Burke was in 1890, and for some years previous, the general freight agent of the Cincinnati, Hamilton & Dayton Railroad, and its connecting railroad lines, and had jurisdiction of a large extent of country, and that he was paid by said company for acting as freight agent. The authority which he had to act as agent of the Southern Transportation line in 1890 was in writing, and is as follows, omitting headings:

"Cincinnati, Ohio, Sept. 15th, 1889.

"Jas. Burke, Esqr., Greenville, Miss.—Dear Sir: You are hereby authorized to sign the joint bills of lading in use between the Southern Transportation line and the C. H. & D., and to represent our boats as agents for such business.

"Yours, truly,

O. P. Shinkle, Master Str. Golden Rule.

"Lem Kotes, Str. Mary Houston.

"J. D. Hegler, for Str. Guiding Star.

"S. C. McIntyre, for Str. Sherlock.

"J. S. Carter, Str. U. P. Schenck.

At this time, and subsequently, these steamboats ran regularly from Cincinnati to New Orleans, La., and from New Orleans to Cincinnati. These boats had an agreement by which rates were maintained, and regular days of sailing from Cincinnati and New Orleans were fixed; but each boat kept its own earnings, and paid its own expenses, and there was no interest in or connection with the earnings or expenses of one boat with that of any other boat of the line. The Southern Transportation Line was neither a corporation nor partnership, nor, indeed, an association of boats, except for the purpose indicated herein. It was however, the custom of the boats of this line, in making their respective trips, for the first one that came along to stop at intermediate ports or landings where freight was deposited for shipment, to take such freight, provided that boat was not already fully loaded; and it is proven that the Guiding Star was the first boat of this line expected at this landing, and did actually pass after the cotton described in the bills had been removed to the landing. This removal was on the 25th of January, and the Guiding Star passed up the night of the 27th of January.

Neither of these bills of lading was signed by James Burke, personally, but the one dated January 15th was signed "James Burke, Agent," by F. L. McGowan, his clerk, and the other with Burke's name, by Davis, who was the cashier of the bank of Rosedale, and

owner of the cotton yard where this cotton was stored. The right to sign these bills is claimed by verbal authority from Burke, but this is denied, as to Davis, by him. If we assume that Burke was the general agent of the Guiding Star in this matter, and could delegate the authority to these parties, and did so, the question arises as to the effect of the Mississippi statute.

The supreme court of that state has construed that act as not being merely a rule of evidence, but designed to change the character and legal effect of the contract, as evidenced by a bill of lading, or other instrument in the nature or stead thereof. *Hazard v. Railroad Co.*, 67 Miss. 32, 7 South. 280. There is some difference in the definition of a "bill of lading," as given by different authorities. The definition given by Justice Clifford in the case of *The Delaware*, 14 Wall. 579, is:

"A written acknowledgment, signed by the master, that he has received the goods therein described from the shipper, to be transported, on the terms therein expressed, to the described place of destination, and there to be delivered to the consignee or parties therein designated."

The word "master," in this definition, will, of course, stand for any one authorized to bind the vessel or carrier. All of the definitions include and require an acknowledgment of the receipt of the goods or other article as part of the writing known as a "bill of lading." This is clearly required by the Mississippi act, else it can have no effect. It is the acknowledgment of the receipt of cotton or things which is made by this act conclusive evidence when the bill of lading, or other instrument of the nature or in the stead thereof, is in the hands of a bona fide holder. Neither of these bills of lading or instruments in writing acknowledges the receipt of this cotton by the Guiding Star.

A bill of lading in the usual form is a receipt for the goods or things shipped, and an agreement to carry and deliver the same as stipulated; and in the absence of any statute the receipt is merely prima facie evidence of the delivery of the goods, and may be modified and contradicted by parol evidence. But this statute, when it applies, was intended to change this, and make the acknowledgment of the receipt of the goods by the carrier to be conclusive evidence, if the bill of lading be in the hands of a bona fide holder. Whatever may be the right of a shipper or carrier, independently of a statute, to supply an omission in a bill of lading by parol evidence, or to change or contradict that part of the bill of lading which is a receipt for goods to be carried, that cannot be done when this statute is applied. The written acknowledgment must remain as it is written, and if there is no written acknowledgment of the receipt of the cotton or other things, then there is no acknowledgment to be made conclusive evidence under the statute.

There is no substantial difference in this respect between this act and the English act (18 & 19 Vict.). That act declares:

"Every bill of lading in the hands of a consignee or endorsee for valuable consideration representing goods to have been shipped on board a vessel shall be conclusive evidence of such shipment as against the master or other person signing same."

The act clearly contemplates the representation which is to be conclusive evidence is in writing, and a part of the bill of lading. The attention of the court is called by the learned counsel to the difference in the language of these acts, as to the persons against whom this representation or acknowledgment shall be conclusive evidence. The English act declares it "shall be conclusive * * * against the master or other person signing same;" and the Mississippi statute declares it "shall be conclusive evidence * * * against the person or corporation issuing same." It may be the latter act is somewhat broader in its terms than the English act; but this difference, if there be one, does not affect the present inquiry,—of whether or not the representation or acknowledgment must be in writing, and a part of the bill of lading.

If we are correct in our construction of this part of the Mississippi act, that act cannot affect the rights of the parties under the bill of lading dated January 22, 1890, as there is no acknowledgment of the receipt of any cotton, or its shipment on any named boat.

The next inquiry is whether and how the Mississippi act affects the rights of these litigants in regard to the cotton described in the bill of lading of January 15, 1890.

As we construe this act, it permits testimony to explain the words "Sou. Trans. Co." in this bill of lading, and also to show whose agent Burke was in this transaction, and his authority. It is unnecessary to decide whether "the person or corporation issuing the same," in the Mississippi act, includes persons and corporations who may indorse and deliver a bill of lading subsequent to its original signing and delivery. "Issuing," in this act, certainly means the person or corporation who signed the bill of lading, and first delivered it as a contract. In *Jessel v. Bath*, L. R. 2 Exch. 267, the court construed the English statute with strictness, and seemed to make the representations of a bill of lading conclusive evidence only against the person actually signing it. But in *Brown v. Coal Co.*, L. R. 10 C. P. 568, one of the judges indicated an opinion that the statute was not confined to the person who actually signed a bill of lading, but would include a signing by an authorized agent. There can be no doubt that "Sou. Trans. Co." was an abbreviation of, and intended to be, "Southern Transportation Co."

Assuming this bill of lading is thus read, we must make inquiry as to the authority of Burke, and this necessitates a construction of the writing of September 15, 1889. That paper authorized Burke, as far as the signers could give the authority, to sign joint bills of lading then in use between the Southern Transportation line and the Cincinnati, Hamilton & Dayton road, and to represent the boats of the line as agent for such business. There is no evidence as to the form of the bills of lading then used, but we may presume the forms used in these bills of lading were the same as the form in September, 1889. This authority, read by the light of this form, must mean either that Burke was given authority to sign these joint bills of lading, and bind all of the

five boats of the line jointly, or that he was given authority to bind each boat of the line separately, as he might indicate in the bill of lading. Either construction of Burke's authority precludes libellant recovering under the claim of a maritime lien.

If the authority be to bind all of the boats of the line, and thus create a maritime lien against them all for each shipment, without regard to whether one or another boat carried the freight, then there was no power in the masters, or masters and part owners, of these boats to grant such authority to an agent.

If, on the other hand, Burke was given authority to bind these boats separately by a bill of lading, and an acknowledgment under the Mississippi statute, he has not done this in the bill of lading of January 15th. There is no evidence that, when this bill of lading was delivered to McBath & Co., "Sou. Trans. Co." was intended to designate the Guiding Star as the boat to receive this cotton, or that it had been Burke's previous habit or custom to thus designate the Guiding Star, nor is there any evidence to prove that there was any agreement with McBath & Co. to ship this cotton on the Guiding Star when the bill of lading was delivered to them, or indeed at any other time. The testimony touching this point is that it was the custom for the first passing boat of this line, if not fully loaded, to stop and take freight at intermediate ports and landings, and the Guiding Star was the first boat of this line to pass this landing after the cotton was removed to the landing under a guaranty given by T. F. Davis, cashier of the Bank of Rosedale. That guaranty is in these words:

"Rosedale, Miss., Jan. 22, 1890.

"We guaranty to deliver to the C., H. & D. R. R., or their agents, on bank of the Mississippi river, at People's landing, Rosedale, three hundred and nine bales cotton (309) within seven days, or return Bs of Ls for same. Cotton marked as follows: O. L. D., 100; M. C. B., 21; H. O. X., 50; B. A. T. H., 138.

"T. F. Davis, C."

This cotton was delivered at the landing on the 25th of January, and was burned that night, and on the night of the 27th of January the Guiding Star passed up without stopping. It will be observed this delivery was to be to the Cincinnati, Hamilton & Dayton Railroad, or their agents, and was to be within seven days, or the bills of lading were to be returned. It happened this cotton was taken to the landing on the 25th of January; but if taken to the landing on the 28th or 29th of January, which would have been within the specified time, the Guiding Star would not have been the next boat of this line to arrive at this landing, and could not, of course, have taken this cotton on the night of the 27th of January. The guaranty was handed McGowan, and was taken by him, by the direction of Burke, from Davis, cashier of the Bank of Rosedale, who, from the face of the guaranty, had the bills of lading covering the cotton. If, therefore, the agreement or understanding was to ship this cotton on the Guiding Star, it is strange the guaranty was to deliver the cotton to the Cincinnati, Hamilton & Dayton Railroad Company, or its agents, and that seven days' time was given Davis within which to deliver

the cotton at landing. We conclude, as there is no evidence that "Sou. Trans. Co.," in this bill, was intended to designate the Guiding Star, or that it was so understood by either party, the acknowledgment of the receipt of this 100 bales of cotton in the bill of lading of January 15, 1890, is not conclusive evidence, under the statute, against the Guiding Star. If, however, the statute be applied against the shipper, this bill of lading is conclusive evidence in favor of the Guiding Star.

If the Mississippi statute be considered as not controlling the rights of the parties under these bills of lading, the inquiry arises, what is the liability of the Guiding Star under the general commercial and admiralty law?

Under these laws, parol evidence is allowed to explain, modify, and contradict the receipt part of a bill of lading. The letter of September 15, 1889, gave James Burke, as agent, authority to sign the bills of lading for the Cincinnati, Hamilton & Dayton Railroad and the boats of the Southern Transportation Line, and, as to a named boat and this railroad company, a joint bill of lading. Burke was already the general freight agent of the Cincinnati, Hamilton & Dayton Railroad Company; and this letter, we think, gave him authority to sign such bills of lading in the absence of the master or other officer of any of these boats, whose usual business it was to sign and deliver bills of lading. This authority thus given was limited by the authority which the master—and, in this instance, the master and part owner of the Guiding Star—could himself have exercised in the premises. It did not, however, give Burke authority to bind these boats jointly for cotton received for and shipped by one of them, nor to issue a general bill of lading for this transportation line, and thus make it the bill of lading for all of these boats. The cotton described in bill of lading dated January 15, 1890, was in the cotton yard of F. H. Davis when that bill was delivered to McBath & Co.'s agent, Smith. This bill does not, on its face, connect the Guiding Star with this cotton, more than it does any other of the four boats of this line. It is not proven that the Guiding Star was expected to be the next boat passing this landing, going north, after the date of the bill of lading. On the contrary, the presumption is, from the time intervening between the 15th and 27th of January, that the Guiding Star was not the next boat to arrive, or that did arrive, at that landing. There is no evidence that Mr. Burke or McGowan, who signed this bill of lading, agreed with McBath & Co., or any one representing that firm, that this 100 bales of cotton should be shipped on the Guiding Star. That is, we think, equally true of the cotton described in the bill of lading dated January 22, 1890. We do not find that any witness testifies that Burke, McGowan, or any one representing Burke, ever agreed with McBath & Co., or any one representing that firm, that the cotton described in the bill of lading dated January 22d should be shipped on the Guiding Star.

When the guaranty dated January 22, 1890, was received by McGowan, he testifies he delivered the cotton-yard receipts to

Davis, and accepted the guaranty of the Bank of Rosedale for all the cotton mentioned in it. This is Davis' evidence touching the agreement as to the delivery at the landing by him, viz.:

"Int. 2. Mr. Davis, you testified in a former deposition as to a guaranty given by you, as cashier, that the cotton would be delivered on the bank of the Mississippi river, at People's landing, to the C. H. & D. R. R., or their agents. Who was the agent to whom it was to be delivered? A. Well, I delivered it to them myself, as agent for them. They wanted Mr. McGowan, I think it was, I gave that guaranty to. McGowan wanted me, at first, to deliver the cotton to the boat. I told him I could not do anything like that, because the boat might not be here for three or four days, but that I would guaranty it delivered on the landing, where, of course, the landing keeper would be expected to take charge of it; he could write in the guaranty the C. H. & H., or rather, C. H. & D., which would include me. He said that would be all right, as all they wanted was to be certain that it would be delivered where their boats could handle it,—take it."

There is no other testimony tending to prove Mr. Davis was constituted the agent of Burke to receive this cotton at the landing, although both Burke's and McGowan's depositions were twice taken. The testimony of Davis himself and others clearly proves that he was not at the landing when this cotton was received there, nor had he a representative there, but that it was received, if by any one, by the agents of McBath & Co.,—the landing keepers. This statement of Davis proves no boat had been designated to take this cotton on January 22d, when the bill of lading was delivered and the guaranty given by Davis.

There is no evidence proving an intention to ship any of this cotton on the Guiding Star prior to its removal from the cotton yard of Davis, on January 25, 1890. At this time both bills of lading had been attached to sight drafts on Bennitt, and been sent forward for acceptance and payment. As the receipt and possession of this cotton at the landing are important, we quote upon this point the testimony of W. W. Smith and T. J. Ashby, both in the employ of McBath & Co., and all other witnesses who know anything about the matter:

"My name is W. W. Smith. 30 years of age. Resident Greenville, Miss. Occupation, cotton buyer. Employed by W. P. McBath & Co. in January, 1890. Int. 1. On the 25th day of January, 1890, did you have charge of 238 bales of cotton marked 'B. A. F. H.' and 'O. L. D.,' consigned to H. F. Bennitt, R. J., by W. P. McBath & Co.? A. I did. Int. 2. Where was the cotton on that day, and what was done with it? A. The cotton was in Davis & Co.'s cotton yard, in Rosedale, and transferred to People's landing, on the bank of Mississippi river. * * * Int. 4. Did you leave the cotton in charge of any one? A. I suppose it was in charge of the landing keeper. Int. 5. Who was the landing keeper? A. E. Carnes. Int. 6. Was he paid for the storage of the cotton? A. Yes; I paid him for the landing charges, etc. Int. 7. Was the steamboat Guiding Star there at the time? A. No, sir. Int. 8. Was the cotton merely left with the landing keeper as a warehouseman, whose charges you were to pay? A. When the cotton was deposited there, it was the understanding that I was to pay E. Carnes the charges on it. Int. 9. Did other steamboats besides the Guiding Star use this landing? A. Owing to the high water, it was then used for the landing for Rosedale. Int. 10. Was the cotton delivered to the steamboat Guiding Star? A. The cotton was delivered on the banks of the Mississippi river, as per contract, for shipment on the Guiding Star."

J. W. Ousler proves that he and E. Carnes were at the time in partnership in this landing, and that McBath & Co. paid the storage for this 238 bales of cotton.

Mr. Davis was asked on cross-examination by appellant's counsel:

"Int. 1. Did Mr. Burke instruct you to have the cotton delivered to any one in particular, on the landing, before issuing bills of lading, or merely to have it deposited there? A. He told me to issue bills of lading as soon as the cotton was hauled to the landing. Int. 2. Did Burke tell you by which steamer or line of steamers this cotton was to be shipped? A. He merely stated 'his line,' of which I do not know the name, or those of the individual boats."

T. J. Ashby stated he was in the employ of W. P. McBath & Co. in January, 1890, and was asked:

"Int. 3. What was done with this cotton? A. This cotton was transferred to the People's landing from Rosedale. Int. 4. Where were you when it was being transferred? A. I was at the landing receiving the cotton. Int. 5. What became of this cotton afterwards? A. It was burnt between 2 and 3 o'clock in the morning of the 26th. * * * Int. 10. Was the cotton simply placed on the ground? A. Yes, sir. Int. 11. Did you put it in charge of any one? A. No, sir; merely put in good shape, and supposed it was under bill of lading. * * * X-Int. 2. Did you exercise any control over it after placing it there? A. No; I went back to town, and had nothing more to do with it."

Although the depositions of Davis, McGowan, McBath, and Burke were taken, and some of them twice, none of them state any agreement to ship this cotton on the Guiding Star. The nearest to evidence of such an agreement is the statement of W. W. Smith, quoted above. McBath proves that he did not personally receive either of these bills of lading, but they were received by Smith; and we think his statement that this cotton was delivered on the banks of the Mississippi river, "as per contract for shipment on the Guiding Star," has, and can only have, reference to the bills of lading. There is no testimony of any other contract, or any evidence tending to prove any other.

When this cotton was removed from the cotton yard to the landing, neither Burke, nor any agent of his, was present, and there is no evidence that he, or any agent of his, knew of the removal until the next day, when they heard of the fire.

We conclude from the entire evidence that these bills of lading were not, in fact or law, delivered as the bills of lading of the Guiding Star, nor subsequently made so, and, further, that Burke, as agent, could not, under the existing facts, have legally given bills of lading to McBath & Co., so as to create a maritime lien on the Guiding Star for this cotton. See *The Freeman v. Buckingham*, 18 How. 182; *Pollard v. Vinton*, 105 U. S. 7; *Railway Co. v. Knight*, 122 U. S. 87, 7 Sup. Ct. 1132; *Friedlander v. Railway Co.*, 130 U. S. 423, 9 Sup. Ct. 570; *Grant v. Norway*, 10 C. B. 665.

This view renders it unnecessary for the court to consider the other questions presented and argued.

The judgment of the district court is affirmed.

MATTOON et al. v. REYNOLDS.

(Circuit Court, D. Connecticut. June 26, 1894.)

REMOVAL OF CAUSES—TIME OF APPLICATION—AMENDMENT STATING NEW CAUSE OF ACTION.

A suit between citizens of different states may be removed in due season after an amendment stating a new and different cause of action, in which the original suit is merged, although the time within which it might originally have been removed has expired.

This was a suit by C. B. Mattoon and others against H. P. Reynolds, brought in a court of the state of Connecticut, and removed therefrom by defendant. Plaintiffs moved to remand.

Wooster, Williams & Gagen and Webster & O'Neill, for plaintiffs.
Doolittle & Bennett, for defendant.

TOWNSEND, District Judge. This controversy is between citizens of different states. The original complaint, in the state court, alleged that certain notes were given without consideration, and asked for an injunction restraining the defendant from negotiating said notes. After the time had expired within which the cause might originally have been removed, the plaintiffs filed a new count, alleging fraud, and asking for equitable relief, or for a judgment for \$3,000 damages. In due season thereafter, the defendant removed the cause to this court.

The single question presented is whether, by the filing of the substituted complaint, the defendant acquired a right of removal. The determination of this question depends upon whether the amended complaint states a new and different cause of action, and one in which the original suit is merged. *Yarde v. Railroad Co.*, 57 Fed. 913; *Huskins v. Railroad Co.*, 37 Fed. 504; *Evans v. Dillingham*, 43 Fed. 177; *State of Texas v. Day Land & Cattle Co.*, 49 Fed. 593, 596. It is clear that in this case the second count presents a distinct cause of action,—fraud, calling for a distinct remedy at law; money, damages. The allegations contained in the first count and the relief therein prayed for are incorporated in the second count.

The motion to remand is denied.

STATE OF MISSOURI ex rel. PUBLIC SCHOOL FUND OF NEW MADRID COUNTY et al. v. LUCE et al.

(Circuit Court, E. D. Missouri, E. D. February 24, 1894.)

1. SCHOOL DISTRICTS—OFFICERS—AUTHORITY TO SUE—RATIFICATION.

Under Rev. St. Mo. §§ 8040-8042, making it the duty of the state board of education, when it shall be ascertained that the objects of the grant of school lands have been violated, to institute suits in the name of the state to prevent such violations, and authorizing the board to employ an attorney to prosecute such suits, an attorney appointed by the board cannot maintain a suit for such purpose without the direction of the board, based on its ascertaining the existence of the facts authorizing the institution of suit; and failure of the board to disaffirm the bringing of a suit by the attorney does not amount to a ratification.

2. SAME.

In such a suit, brought in the name of the state without authority of the board, in which the county also joins as complainant, after a compromise between the county and the defendants, founded on a valuable consideration, and a dismissal thereupon of the suit on the part of the county, no subsequent ratification by the board could operate against the defendants to sustain the suit.

This was a suit in the names of the state of Missouri, on the relation of the public school fund of New Madrid county, and of that county, against Elmira C. Luce and others, to cancel certain contracts between the county and defendants relating to school lands, and to set aside certain conveyances of such lands. The suit was brought in a court of the state, and removed to the United States circuit court. Subsequently the county and defendants entered into a compromise, and the suit was dismissed on the part of the county. Thereupon defendants moved to dismiss.

Phillips & Walker and J. E. McKeighan, for complainants.

Clarence Brown, R. B. Oliver, and Geo. D. Reynolds, for defendants.

PHILIPS, District Judge. There can be no question of the right of New Madrid county to have this suit discontinued, in so far as it is concerned. The action in its name was instituted upon its order, and it had the right to withdraw from the litigation at will, especially so, the defendants consenting. This must be conceded, for, as the action stands, the county is exposed to the liability for costs and counsel fees.

The only debatable question is as to the authority of Henry N. Phillips and his associates to prosecute this action in the name of the state, to the use of the public school fund of the said county. With the county out of the case, to give the complainants a legal footing in court, it must be held that the remaining complainant can alone proceed with this action. The original bill was manifestly not framed on this theory. The institution of suit, following closely after the order of the county court, together with the framework of the bill, quite clearly indicate that the pleader regarded it rather as an action to the use and benefit of the county. The extrinsic evidence, as well as the face of the original bill, shows that the introduction of the "state ex rel." into the caption was after completion of the draft of the bill; and the bill contains no averment of the authorization thereto by the state board of education. The bill or suit sought to have certain contracts between the county and defendants declared invalid, for want of consideration and authority on the part of the county to make such contracts. Certainly such action would require the presence therein of the parties to the contract sought to be vacated. The bill furthermore proceeded upon the theory that the title in fee to the lands in question was of right in the county, and it sought to have certain conveyances thereof, made by the county, annulled and set aside as casting a cloud on the county's title. And, as further proof that the action was framed upon the theory

that the county was the real party in interest, the petition contains a count in ejectment beginning thus: "Plaintiff [not plaintiffs] states that on the 3d day of May, 1887, it was lawfully entitled to the possession of the land." In this form the case was removed from the state court to this court. As the double action could not be proceeded with in this jurisdiction, the complainants filed here what is termed "a reformed bill," omitting the count in ejectment, and recasting the form of the averments, giving more color to a proceeding in the name of the state, and distinctly averring that the action was authorized by the state board of education, as provided in sections 8040 to 8042 of the Revised Statutes of the state of Missouri.

I decline to express any opinion as to whether the state board of education can proceed in this case to complete the objects of this suit without the presence of the county, or whether it is legally permissible to so reform the bill, after removal from the state court, as is attempted in this cause. It is competent for the defendants to challenge the authority of the attorneys to prosecute this case in the name of the party or parties thereto, and, if such attorneys have instituted this suit on behalf of the state without authority therefor from the imputed client, the court will dismiss the case. *Keith v. Wilson*, 6 Mo. 435; *Weeks, Attys. at Law*, §§ 200-214; *Turner v. Caruthers*, 17 Cal. 433; *McKiernan v. Patrick*, 4 How. (Miss.) 333.

Section 8039, Rev. St. Mo., vests the supervision of instruction in the public schools in a board of education, composed of certain state officers, with power of general supervision over the entire educational interests of the state; "to direct the investment of all moneys received by the state to be applied to the capital of any fund for educational purposes; to see that all funds are applied to such branch of the educational interest of the state as by grant, gift, devise or law, they were originally intended." Then follow sections 8040 and 8041. While having for their general object the same purpose—the protection and conservation of the property interests of the public schools—they yet pertain to separate matters. Section 8040 has special reference to the lands set apart for school purposes, and makes it the duty of the board of education to look after the violations of the objects of the grant of swamp and other school lands, the perversion of any funds arising therefrom, and the misuse of such lands and money contrary to the objects of the grant. And it makes it the duty of the board of education to institute suits in the name of the state, in behalf of the public schools of the county in which such lands lie, to prevent such violations, perversions, and misuse. Section 8041 pertains solely to the duty of the board—

"To ascertain from all the counties of the state what disposition has been made of the state school fund drawn by the counties from the state yearly, how much thereof has been transferred to the school townships; and when any such fund, or any part thereof, has been diverted from its lawful use, it shall be their duty in like manner as in the last section provided, to institute suit for and collect the same, and return it to its legitimate channel."

Then follows section 8042, which is the only section of the statute providing for the employment of an attorney by the board of education, as follows:

"The state board of education shall have power to employ a competent attorney in each congressional district, to prosecute the suits mentioned in the preceding section, and who, for such services, shall be allowed the following per cent. as fees."

This section, after providing for certain per cents on all moneys recovered by such attorney, provides that:

"Where lands are recovered by suit instituted by such attorneys, they shall be allowed such sums for their services as may be deemed reasonable by the county court of the county in which the lands recovered are situated, to be paid out of the county treasury; but if said county court shall neglect or refuse to allow reasonable compensation for the services of said attorneys in prosecuting suits for the recovery of lands as above set forth, then such attorneys may bring suit in the circuit court of the proper county, against the county the court of which so refuses or neglects to allow compensation, and the amount thus recovered shall stand as a judgment against the county in which said lands are located upon which suit was brought."

Section 8040 only authorized the institution of such suits "when in any case it shall be ascertained that the objects of the grant have been violated," etc., meaning, of course, when so ascertained by the board of education. This becomes still more apparent from the following clause in said section 8042:

"And it shall be the further duty of said attorneys to examine the record and papers relating to school lands and funds in the counties of the district for which they are appointed, and report the condition of the same to the state board of education."

This is one of the means by which the state board is to ascertain the existence of the jurisdictional facts which authorize them to direct the institution of suits. The legislature intrusted this matter to the wise discretion of the board of education, composed of the governor, secretary of state, attorney general, and superintendent of education. They could not delegate this trust to any one else. *City of St. Louis v. Clemens*, 43 Mo. 395; *City of Kansas v. Flanagan*, 69 Mo. 22. They could not, without first ascertaining to their satisfaction the existence of the facts which would authorize the institution of suits, empower the attorney, ad libitum, to embark the state in such litigation, with its liability for costs, and imposing upon the counties the liability for fees.

The attorney, H. N. Phillips, presented at the hearing of this motion a resolution of the board of education, adopted in 1885, appointing him such attorney, and unqualifiedly authorizing him to institute suits at his discretion. That such authorization was without warrant of law is beyond question. But no action was taken in this case by said attorney under said attempted authority. The board at a later date, in 1889, adopted another resolution, authorizing said attorney to investigate matters within the purview of the statute within said district, and which said resolution conformed to the provisions of sections 8040 and 8042, requiring him to report to the board his discoveries respecting such lands

and funds. And, as evidence of the construction placed by said attorney upon his power of attorney, the minutes kept by said board show that he afterwards made reports thereto touching lands in other counties, and that he had made claim for compensation for his per diems therefor.

Thus matters stood until the 2d day of December, 1893, when the defendants interposed the motion in this case to dismiss this action upon the grounds that the county court had compromised and adjusted this controversy with the defendants, and ordered the dismissal of this suit on its part (which the evidence shows it had so ordered), and for the further reason that the suit was prosecuted by the said Phillips and his associates, in the name of the state, without the authorization of the board or the state. And on the 18th day of December, 1893, the attorney general of the state interposed by motion, as attorney general of the state, and ex officio member of the state board of education, and as *amicus curiae*, asking to strike out the name of the board of education to said action, for the reason that the board had not authorized the same. Pending this motion, said Phillips made application to the said board of education for direct authority to proceed in its name in this behalf, the result of which was that he obtained from the board a resolution simply requesting the attorney general to withdraw so much of his said motion as asked to strike the said board of education from said bill. In and of itself, looking to the language of the resolution, this amounts to nothing. If the board in fact desired to ratify the unauthorized action of the attorney, and to authorize the prosecution of this suit, why did it not say so directly in plain terms, when that was the very authority the attorney was seeking? There can be but one reasonable conclusion from this equivocal action of the board, and that is, it was unwilling to affirmatively assume the responsibility of the suit, but was willing simply to remain passive. This does not meet the requirements of the statute which empowers the board to authorize suits to be brought. It can do so only after it has ascertained the facts enumerated in section 8040, which ascertainment is a condition precedent to its right to take affirmative action, and it should be made, in this controversy, to affirmatively appear, by his claiming authority from the board, that the board had to its satisfaction ascertained the facts to exist alleged in this bill, or that it had at least directed suit to be brought, from which an inference might arise that it had made the precedent ascertainment.

In this view of the clear intent and spirit of the statute, I cannot accede to the suggestion of one of the learned counsel for complainants that the mere failure of the board to affirmatively disaffirm the action of the attorney amounts in law to a ratification. This board is a creature of the statute. As such it possesses only such powers as the statute expressly confers upon it, or such as are implied, to enable it to carry out its declared functions. Being the mere instrumentality of the state to carry out and effectuate the public policy of the state, it is not competent for it to create estoppels and ratifications, like an individual *sui juris*, merely by

its nonaction as "a looker on in Vienna." The language of Judge Denio, in *Peterson v. Mayor, etc.*, 17 N. Y. 449, may be aptly applied in this connection:

"Where a statute * * * has prescribed certain formalities as conditions to the performance of any description of corporate business, the proper functionaries must act, and the designated forms must be observed, and generally no act of recognition can supply a defect in these respects."

Even if it were capable of creating a ratification by such methods, another serious question would arise as to its right to do so against the defendants to this suit. The record evidence in this case shows that, after the removal of this case from the circuit court of New Madrid county to this jurisdiction, the said county and the defendants entered into a compromise, founded upon a valuable consideration, so far as the parties thereto are concerned, by which this suit was ordered to be dismissed on the part of the county, and that, acting upon the faith thereof, the defendants paid the said county large sums of money for state and county taxes, claimed by the county to be due from the defendants, on the lands in controversy, and entered into, upon the faith thereof, other important contracts with the county. As matters then stood, there was in fact no authority from the state board of education for the institution and prosecution of this suit, and the defendants were then entitled to have this action dismissed, because authorized to do so by the county, and for the want of any authority from the board of education to the attorney to institute or prosecute the suit. No subsequent ratification by the board of education could impart a retroactive operation to its resolution, to the prejudice of the action taken by the defendants, on the existing status of the case. A ratification partakes of the nature of an estoppel, and, like the doctrine of relation, a fiction of the law, it is never permitted to operate to the injury and prejudice of parties whose rights attached before the act of ratification or estoppel. The right of the state board of education cannot be materially affected by the dismissal of this action. If it wishes to litigate the subject-matter of this bill of complaint, let it take the proper action looking thereto, and say so directly.

The motion to dismiss this suit is sustained.

DOMESTIC & FOREIGN MISSIONARY SOC. OF PROTESTANT EPISCOPAL CHURCH IN UNITED STATES OF AMERICA v. GAITHER et al.

(Circuit Court, D. Maryland. June 18, 1894.)

1. EQUITY—JURISDICTION—BILL TO RECOVER LEGACY.

A bill by a legatee against an executor, to recover a legacy claimed by him to be void under the state law, is within the equitable jurisdiction of the federal courts.

2. WILLS—CONSTRUCTION—CERTAINTY AS TO BENEFICIARY.

A bequest of a certain sum to an incorporated missionary society whose whole mission work is divided into two branches, domestic and foreign, is not rendered void for uncertainty of beneficiary or purposes by the addition of a direction to apply it to domestic missions, as such legacy is not

to be considered as held upon any trust, but to be expended by the corporation in its regular domestic mission work, as distinguished from its foreign mission work.

This was a suit against executors to recover a legacy bequeathed thereby to complainant.

Campbell W. Pinkney, for plaintiff.

Wm. S. Bryan, Jr., Edward N. Rich, and George R. Gaither, Jr., for defendants.

MORRIS, District Judge. This is a bill in equity filed by the Domestic & Foreign Missionary Society of the Protestant Episcopal Church in the United States of America, a corporation of the state of New York, against the executors of the will of Hannah B. Gaither, late of Baltimore (who are citizens of Maryland), to recover a legacy of \$5,000 bequeathed by said will to the said corporation.

On behalf of the defendants it has been suggested that a federal court of equity, being prohibited from taking jurisdiction of a case where there is a plain, adequate, and complete remedy at law, cannot take jurisdiction of this case. A bill by a legatee against an executor to recover a legacy, because of the inadequacy in most cases of the remedy at law, is firmly established as one of the cases proper for equitable relief, and the jurisdiction of courts of equity in such cases is constantly maintained, and the right to sue at law is denied, by decisions in both state and federal courts. 1 Story, Eq. Jur. § 591; 3 Pom. Eq. Jur. § 1127; *Mayer v. Foulkrod*, 4 Wash. C. C. 349, Fed. Cas. No. 9,341; *Pratt v. Northam*, 5 Mason, 95, Fed. Cas. No. 11,376; *Coates v. Mackie*, 43 Md. 127. There may be an adequate remedy at law when the executor has promised to pay the legacy, but that is not this case.

The objection of the executors to the payment of this legacy is that it is void under the rule of law in Maryland, as established by its highest court with regard to bequests for the benefit of beneficiaries who are uncertain and indefinite. If this contention can be maintained, it is not to be questioned that the law of Maryland, if so established, is the law which must be administered by this court. *Meade v. Beale*, Taney, 339, Fed. Cas. No. 9,371. The bequest is as follows:

"I give and bequeath to the Domestic & Foreign Missionary Society of the Protestant Episcopal Church in the United States of America, and their successors and assigns, the sum of \$5,000, and I request and desire that the said sum of \$5,000 be applied to domestic missions."

It is conceded that the corporation intended by the testatrix, and designated in her will by its proper corporate title, is the corporation now suing, and that it was incorporated by a legislative act of the state of New York passed May 13, 1846. It was constituted a body corporate "for the purpose of conducting general missionary operations in all lands," with power to take gifts and bequests for the objects above stated, or any purpose connected with such objects, and with power to the general convention of the Protestant Episcopal Church in the United States to make rules

and regulations, and amend the constitution of the corporation as it might deem proper to promote the purposes for which it was incorporated.

The contention of the defendant is, first, that by the words appended to the gift, viz. "I request and desire that the said sum of \$5,000 be applied to domestic missions," the testatrix must be held to have meant domestic missions generally, just as if she had given the bequest to an individual, with the request that it be applied to domestic missions. If this were the fair interpretation of the words, the bequest would have to be held a trust so indefinite as not to be enforceable, and therefore void in Maryland. But I do not take this to be the fair meaning of the words used by the testatrix. The legatee was a corporation which, as its corporate name indicates and as its charter provides, has for its immediate object two purposes,—one domestic, the other foreign, missions. The proof establishes that it has for many years carried on missionary work extensively in both these fields. It is conceded that if the bequest had been simply to the corporation by its corporate name, without request as to the application of the gift, it would have been valid; and it seems to me that the reasonable meaning of the words "to be applied to domestic missions" is not that the gift is to be applied to domestic missions generally, but to the domestic missions operated by that corporation, or, in effect, to its domestic missions as distinguished from its foreign missions.

It is, however, earnestly contended on behalf of the defendants that even if the wording of the bequest may be read as if the testatrix had said, "I request and desire that said sum be applied to said corporation's domestic missions," still the legacy must be held void under the Maryland decisions, as being a bequest to the corporation to be held by it for a designated purpose, which purpose is so indefinite and uncertain that there is no cestui que trust who could enforce it. The case principally relied upon to support this contention is *Church Extension v. Smith*, 56 Md. 362. In that case, a clause of the will was as follows:

"To the Church Extension of the Methodist Episcopal Church, incorporated by the legislature of Pennsylvania, the sum of \$10,000, to be used as part of the perpetual loan fund of said society, and to bear the name of the 'Durham Loan Fund.'"

By its charter it was provided:

"That the said corporation shall be also competent to act as trustee in respect to any devise or bequest pertaining to the objects of said corporation, and devises and bequests of real or personal property may be made directly to said corporation or in trust for any of the purposes comprehended in the general purposes of said society; and such trusts may continue for such time as may be necessary to accomplish the purposes for which they may be created."

By the agreed statement of facts it appeared:

"That by a rule adopted by the corporation before the making of the testatrix's will, and which was still in force, any one donating \$5,000 or more to the loan fund may designate the name by which said contribution shall be known. The said loan fund is set apart to be loaned to necessitous churches of the Methodist Episcopal Church erected from time to time within the

limits of the United States and its territories, and the beneficiaries and recipients thereof are such of said churches as the committee in charge of said fund, for the time being, may in their discretion select."

It was contended by counsel opposing the validity of this bequest that:

"When the testatrix, therefore, gave this bequest, it is manifest she did not intend it to be used for the general purposes of the corporation, but that it should forever be kept apart and used for a class, as well defined as any indefinite class can be; and to emphasize this trust she earmarked it by the name of the 'Durham Loan Fund.'"

This was the conclusion arrived at by the court of appeals of Maryland. On page 397 the court, speaking by Chief Justice Bar-
tol, said:

"It thus appears that the legacy is not given to the corporation for its own use. It cannot, according to the terms of the will, be used for its general purposes; but the testatrix, by directing that it shall be held as a part of the loan fund, has constituted the corporation a trustee, charged with the duty of employing the fund only for the benefit of necessitous Methodist churches in the United States. These are the real beneficiaries for whose use the legacy is given. It seems to us very clear that such a trust is so indefinite that it could not be enforced. According to the uniform course of decisions in this state, a trust cannot be upheld unless it be of such a nature that the cestuis que trustent are defined, and capable of enforcing its execution by proceedings in a court of chancery."

It appears, therefore, that the decision of the court of appeals was controlled by the fact, found by the court, that the testatrix had constituted the corporation a trustee, and had charged it with the duty of employing the fund for the use and benefit of necessitous Methodist churches, and that this was not one of the general purposes of the corporation, but was a trust so indefinite that it could not be enforced. That the court would not have held the gift void if the fund had been given for one of the general purposes of the corporation is made apparent by the subsequent decision of the same court in the case of Baptist Church v. Shively, 67 Md. 493, 10 Atl. 244. In this latter case the bequest was as follows:

"I give and bequeath to the Eutaw Place Baptist Church of Baltimore City the sum of \$1,000; the income, interest, and proceeds thereof to be applied to the Sunday school belonging to or attached to said church."

As to this bequest, the court, speaking by Chief Justice Alvey, said:

"If the bequest had simply been to the church, without reference to the Sunday school, there could have been no question of its validity, and the church could have applied the fund to any purpose, and to promote any object within the sphere of its corporate powers and functions as a religious body. But it is contended that the Sunday school is an unincorporated body, independent of the church, and, therefore, without legal entity, and the bequest to the church is in trust for this undefined and uncertain body of individuals that fluctuates from time to time without legal succession, and consequently the bequest is void because of this uncertainty and want of legal identification of the objects to be benefited by the bequest. In this contention we do not concur. * * * The Sunday school, as such, is not an incorporated body it is true; but it is shown to be an integral part of the church organization, and therefore embraced within the scope of the corporate functions and work of the church."

Also, in *Halsey v. Convention*, 75 Md. 275, 23 Atl. 781, it was held by the court of appeals with regard to the convention of the Protestant Episcopal Church of the Diocese of Maryland, a body corporate having power to take and hold property for church or parish schools, that a devise to it for the purpose of founding a church school for boys was valid.

In the case in hand it is shown by proof that the whole work for which the complainant corporation was organized, and which it in fact carries on, is mission work, divided into two branches,—domestic and foreign. It carries on its work through the agencies which, in accordance with its constitution, it has established; and when money is given to it, with the request or direction that it be used for domestic missions, it is used in support of that department, and money given for foreign missions is used in support of that department, and the money given without any request is divided equally between the two. It would seem, therefore, that money given to the corporation as this legacy was is not to be held by it upon any trust, but is to be expended by it in the missionary work which it carries on within the United States. It carries on its missions and missionary works through the instrumentality of boards, committees, treasurers, bishops, clergymen, and agents; being a corporation, it can only act through its officers and agents, but the work is its own immediate and special work. This is not a case in which there is a trust or trustee or *cestui que trust*. It is a direct expenditure by a corporation for the very object for which it was created. It is therefore not within the ruling of the court of appeals of Maryland in the case of *Church Extension v. Smith*, 56 Md. 362, and is even stronger in its facts than the case of *Baptist Church v. Shively*, 67 Md. 493, 10 Atl. 244, in which that court sustained the validity of the bequest as being for one of the corporate uses of the donee. In the Case of *Look* (Sup.) 7 N. Y. Supp. 298, it was held that a bequest to the American Bible Society "to be used for the promulgation of the "Holy Bible," was a gift limited to the very use for which the donee was incorporated, and not a trust for an indefinite beneficiary, and was valid. *Wetmore v. Parker*, 52 N. Y. 458.

Decree in favor of complainant for \$5,000, and costs, with interest from date of the decree.

STIMSON LAND CO. v. RAWSON et al.

(Circuit Court, D. Washington, N. D. July 5, 1894.)

No. 156.

1. PUBLIC LANDS—ANNULMENT OF ENTRY—LAND OFFICE.

A decision by an officer of the executive branch of the government, cancelling an entry after it has been allowed and the land paid for, and before the legal title has passed from the government, is not binding on the courts if supported only by a general conclusion that fraud has been committed, and that the entry was not made in good faith, with intent on the part of the entryman to take the land for his exclusive use and benefit.

2. SAME—SUIT TO DETERMINE ADVERSE CLAIMS.

In a suit to determine adverse claims to lands conveyed to defendant by patents from the United States, to entitle complainant to a decree equiva-

lent to a conveyance of title, as prayed for in his bill, the validity of the entries on which his claim is founded must be established by affirmative evidence; and an answer by defendant denying the validity of such entries, and alleging their cancellation and a subsequent entry by defendant, and issuance of a patent thereon, may be treated as a negative plea, denying the equities of the bill.

This was a suit by the Stimson Land Company, a corporation, against Alonzo Rawson, Jr., and others, for the purpose of determining adverse claims to the title to lands conveyed by patents from the United States. Complainant filed exceptions to the defendants' answer.

C. K. Jenner, for complainant.

John B. Allen, for defendants.

HANFORD, District Judge. The case, as stated in the brief filed in behalf of the complainant, is as follows:

"The bill of complaint, as amended, alleges that said plaintiff is the owner of the lands described therein, deraigning title thereto from the government of the United States, through the pre-emption entry of one Charles M. Park, and the timber-land entry of one James D. Hannegan; alleging in said bill of complaint that at the date of said entries, and prior thereto, the land entered under said pre-emption entry was surveyed public lands of the United States of America, and subject to entry and purchase, under section 2259 of the Revised Statutes of the United States; that said land was then and there of the class and character subject to entry and purchase under the pre-emption laws of the United States; that on the 12th day of July, A. D. 1884, said Charles M. Park, having theretofore complied with all the requirements contained in the Revised Statutes of the United States regarding the entry of public lands and acquiring title to the same under said pre-emption laws, so as to enable him to pay for said land and claim a patent from the United States therefor, did on said 12th day of July, 1884, at the United States land office, in Olympia, Washington Territory, purchase said lands from the United States, and pay to the receiver of said land office the sum of two hundred (200) dollars in lawful money of the United States, said sum being the purchase price for said lands fixed by law; that, upon the payment of said sum, said receiver then and there made, executed, and delivered to said Charles M. Park a certificate or a receipt therefor, a copy of which is set forth in said bill. Said bill also alleges that on the 3d day of July, A. D. 1884, one James D. Hannegan, having theretofore complied with all the requirements contained in the act of congress of June 3, 1878, entitled 'An act for the sale of timber lands in the states of California, Oregon, Nevada, and in Washington Territory,' so as to enable him to pay for the lands described therein and claim a patent from the United States therefor, did on said day, at the United States land office, in Olympia, Washington Territory, purchase said lands from the United States, and paid to the receiver of said land office the sum of four hundred (400) dollars in lawful money of the United States, that sum being the purchase price for said lands; and that, upon the payment of the said sum, said receiver then and there made, executed, and delivered to said James D. Hannegan a certificate or receipt therefor, a copy of which is set forth in said bill."

A demurrer to said amended bill of complaint has been considered and overruled, and the defendants have answered, denying the equities of the bill; that is to say, they deny that the grantors of the complainant ever complied with the laws of the United States, so as to become entitled to the lands in dispute, and deny that, by any fraudulent or unfair means, any agent of the land department of the United States procured or caused false testi-

mony to be taken, whereby the decision of the land department as to the validity of the several entries made, as alleged in the complaint, was in any manner affected. And, as a further defense, the answer alleges affirmatively that pre-emption cash entry No. 8,707, by Charles M. Park, was made by said Park fraudulently, with intent to cheat and wrong the government of the United States, and not in good faith to appropriate the land embraced in said entry to his own exclusive use and benefit; that after said entry in the local land office, upon testimony taken before the register and receiver of the land office for the district in which the land is situated, after due notice to said Park and to his vendees, through whom the complainant deraigns title, and upon a hearing before the commissioner of the general land office, it was found and determined by the said commissioner that the said entry was fraudulently made by said Park, and not made in good faith, to appropriate said land to his own exclusive use and benefit; and that, upon an appeal taken from said decision by the plaintiff's grantors, the secretary of the interior affirmed said decision; and afterwards, pursuant to the order and direction of the commissioner of the general land office, said entry was canceled, and the land declared to be open for settlement and entry, under the public land laws of the United States. The answer also contains similar averments with reference to the timber-land entry alleged to have been made by James D. Hannegan; and it is further averred that, after the cancellation of said entries, Alonzo Rawson, Jr., took said land as a homestead, and, by full compliance with the laws of the United States, acquired a perfect right to said land, and to have a patent therefor, and thereafter a patent was duly issued, whereby the United States granted and conveyed said land to him; and afterwards, by warranty deed, said Alonzo Rawson, Jr., did sell convey, and warrant the said land to the defendant Howard E. Henderson, who is a bona fide purchaser.

Counsel for the complainant contends that, notwithstanding the denials and averments of this answer, the equities of the bill are admitted, and that a decree should be rendered in the complainant's favor, declaring the complainant to be the true equitable owner of the land, by reason of the prior entries made by its grantors, and the failure of the defendants to show that said prior entries have been invalidated by any decision or adjudication of any court or tribunal having lawful authority and jurisdiction to vacate or set aside entries which have been allowed in the local land office, for causes not appearing upon the face of the record in the land office.

The decisions of the supreme court of the United States establish the following propositions: When land has been sold by the United States, and the purchase money paid, it becomes segregated from the body of the public lands, and is no longer the property of the government, but is the property of the purchaser. *Carroll v. Safford*, 3 How. 460; *Witherspoon v. Duncan*, 4 Wall. 210; *Wirth v. Branson*, 98 U. S. 118; *Simmons v. Wagner*, 101 U. S. 260. After a sale, until the patent is issued, the government holds the mere legal

title in trust for the purchaser; and, in case of a resale, the second purchaser would take the title charged with the trust. *Carroll v. Safford*, *supra*; *Lindsey v. Hawes*, 2 Black, 554. When the right to a patent becomes perfect, the full equitable title passes to the purchaser, with all the benefits, immunities, and burdens of ownership. *Benson Mining & Smelting Co. v. Alta Mining & Smelting Co.*, 145 U. S. 428, 12 Sup. Ct. 877. A contract for the purchase of public land is complete when the certificate of entry has been executed and delivered. *Witherspoon v. Duncan*, *supra*. A patent certificate protects the purchaser's rights as fully as a patent. *Carroll v. Safford*, *supra*. A vested right to a patent for public land is equivalent to a patent issued. *Stark v. Starrs*, 6 Wall. 402. The execution and delivery of a patent after the right to it has become complete are mere ministerial acts of the officers charged with that duty. *Simmons v. Wagner*, *supra*. Officers of the land department of the government are agents of the law. They cannot act beyond its provisions, nor make any disposition of land not sanctioned by law. *Cunningham v. Ashley*, 14 How. 377. A patent obtained fraudulently or unlawfully cannot be annulled by an officer of the executive branch of the government (*U. S. v. Stone*, 2 Wall. 525; *Moore v. Robbins*, 96 U. S. 530), and the same principle protects a grantee of public land by an act of congress, after his rights have been passed upon, and a record made in the general land office showing that, by full compliance with the requirements of the act, the grant has taken effect, and the granted land has been identified and segregated from the body of the public domain (*Noble v. Railroad Co.*, 147 U. S. 165, 13 Sup. Ct. 271). When the government seeks the aid of a court of competent jurisdiction to set aside a patent obtained by fraud, the general principles of equity must be applied. In such a case the government must allege and prove specifically facts sufficient to invalidate the patent, and the patentee is entitled to protection to the same extent as the holder of a conveyance of title from an individual. *Maxwell Land-Grant Case*, 121 U. S. 325, 7 Sup. Ct. 1015; *U. S. v. San Jacinto Tin Co.*, 125 U. S. 273, 8 Sup. Ct. 850; *U. S. v. Budd*, 144 U. S. 154, 12 Sup. Ct. 575. These rules, if not modified by other principles applicable to the facts of a particular case, lead to the conclusion that when a sale or entry of public land which is at the time subject to such sale or entry, has been perfected, and a patent certificate issued, and no irregularity appears on the face of the land-office record, the purchaser or entryman acquires a vested interest in the land as owner, and the sale or entry cannot be canceled, nor can the land be restored to the public domain, without proceeding according to the course of equity in a court of competent jurisdiction; the person having such a vested interest being protected by the guaranty contained in the fifth and fourteenth amendments to the constitution of the United States.

The decisions also establish the following propositions: The secretary of the interior, as head of the land department, is invested with supervisory power to control the public business relating to public lands, and may set aside any entry, survey, certificate, or decision allowed, made, issued, or rendered by officers or agents of the

government, subordinate to him; and under his direction, and subject to his ultimate determinations, the commissioner of the general land office has like supervising power. *Barnard v. Ashley*, 18 How. 43; *Magwire v. Tyler*, 1 Black, 195; *Harkness v. Underhill*, Id. 316; *Snyder v. Sickles*, 98 U. S. 203; *Buena Vista Co. v. Iowa Falls & S. C. R. Co.*, 112 U. S. 165, 5 Sup. Ct. 84; *Lee v. Johnson*, 116 U. S. 48, 6 Sup. Ct. 249; *Williams v. U. S.*, 138 U. S. 514, 11 Sup. Ct. 457; *Knight v. Association*, 142 U. S. 161, 12 Sup. Ct. 258; *McDaid v. Territory*, 150 U. S. 209, 14 Sup. Ct. 59; *Barden v. Railroad Co.*, 14 Sup. Ct. 1030. In the exercise of his power to supervise proceedings for securing titles to public lands, the secretary of the interior is not limited by any prescribed forms or rules of procedure. If a fatal defect in the proceedings be discovered, or any new fact sufficient to invalidate an entry be ascertained, and brought to his attention in any manner, instead of allowing the proceedings to become consummated, on applying to a court for relief, he may, by a direct order, at any time before the legal title passes from the government, set aside any such defective proceedings or annul any such unlawful entry. *Lee v. Johnson*, 116 U. S. 48-52, 6 Sup. Ct. 249; *Knight v. Association*, 142 U. S. 161-176, 12 Sup. Ct. 258. In proceedings to acquire a title to public land under the laws of the United States, the power of the land department ceases when the last official act necessary to transfer the title to the successful claimant has been performed. *U. S. v. Schurz*, 102 U. S. 378. The patent is the instrument which, under the land laws, passes the title of the United States. It is the government conveyance. Until the execution and recording of a patent, the fee remains in the United States, and the power of the land department to control proceedings to acquire a title to public land continues. *Wilcox v. Jackson*, 13 Pet. 498; *Gibson v. Chouteau*, 13 Wall. 92, 102; *U. S. v. Schurz*, 102 U. S. 378, 396. Exclusive jurisdiction to ascertain the facts upon which rights of claimants to public lands depend is devolved upon the land department; and the decisions of the secretary as to all questions of fact in these matters are conclusive upon the parties, and binding upon the courts, unless vitiated by fraud or imposition. The courts cannot interfere with the title of a patentee upon the ground of a mistake or error of the officers of the land department in drawing wrong conclusions from testimony. *Johnson v. Towsley*, 13 Wall. 72; *Shepley v. Cowan*, 91 U. S. 330, 340; *Moore v. Robbins*, 96 U. S. 530, 535; *Marquez v. Frisbie*, 101 U. S. 473, 476; *Quinby v. Conlan*, 104 U. S. 420, 426; *Smelting Co. v. Kemp*, Id. 636, 640; *Steel v. Refining Co.*, 106 U. S. 447, 450, 1 Sup. Ct. 389; *Baldwin v. Stark*, 107 U. S. 463, 465, 2 Sup. Ct. 473; *Lee v. Johnson*, 116 U. S. 48-51, 6 Sup. Ct. 249; *Barden v. Railroad Co.*, *supra*.

These decisions logically lead to the conclusion that after a person has made an entry of public land under a law authorizing the same, and completed on his part all that the law requires him to do to perfect his right, the commissioner of the general land office or the secretary may receive and consider additional evidence, and if, from such evidence, said officers erroneously make findings adverse to the claimant as to a material fact, he may be defeated, and left

remediless. These two conclusions, drawn from the decisions of the supreme court, are the basis for the opposing contentions of the parties to this suit. In making a decision, therefore, the court must assume the apparently difficult task of reconciling the decisions, and deducing from all of them a just rule applicable to the case in hand. After making allowance for the distinguishing facts of each case, I think all the decisions cited may be reconciled with *Cornelius v. Kessel*, 128 U. S. 456, 9 Sup. Ct. 122, in which the supreme court, by Mr. Justice Field, pronounces as follows:

"The power of supervision possessed by the commissioner of the general land office over the acts of the registers and receivers of the local land offices in the disposition of the public lands authorizes him to correct and annul entries of land allowed by them. * * * But the power of supervision and correction is not an unlimited or an arbitrary power. It can be exerted only when the entry was made upon false testimony, or without authority of law. It cannot be exercised so as to deprive any person of land lawfully entered and paid for."

From this and the other decisions cited, I think the following may be fairly deduced as a general rule: After an entry has been allowed, and the land paid for, and before the legal title has passed from the government, the secretary of the interior still has power to annul the same, if it be in fact an unlawful entry, for reasons appearing on the face of the record, as made up and certified in the local land office, or otherwise, and to determine finally all questions of fact involved in the case; but the general principles of equity must govern the actions of every officer and department of the government affecting private rights, and it is essential to the valid exercise of such power for any cause arising from facts not shown by the record of the proceedings prior to the issuance of the patent certificate that notice and an opportunity to rebut any new evidence shall be given to the party in interest, and the secretary or commissioner must make of record findings of specific facts contradicting the evidence upon which the entry was allowed in a material point. *Stimson v. Clarke*, 45 Fed. 760; *Lewis v. Shaw*, 57 Fed. 516. A decision by an officer of the executive branch of the government pronouncing a forfeiture of private property cannot be binding upon the courts if supported only by a general conclusion, as in this case, that fraud has been committed, and that an entry of public land was not made in good faith, with intent on the part of the entryman to take the land for his exclusive use and benefit. Tested by this rule, the action of the land department in canceling the entries of Park and Hannegan, as set forth in the affirmative plea contained in this answer, was unauthorized and unlawful. To this extent I agree with counsel for the complainant; but I consider his position untenable in so far as he claims that the denials of averments of the bill fail to raise a material issue. The patent to Rawson is valid as a conveyance of the legal title, and gives to the holder a status as a party in interest and successor to the rights of the government, entitling him to contest a claim to the land, by whomsoever asserted. The answer and the patent certainly support each other, and would overcome the *prima facie* case in favor of the complainant, made by the issuance of patent certificates to its grantors, even had there

been no attempt to cancel said certificates. To prevail in a controversy with the holder of a patent, the complainant must aver and prove every fact necessary to make out a perfect case, and establish actual ownership by an equitable title superior to the legal title. *Lee v. Johnson*, supra; *Mill Co. v. Brown*, 54 Fed. 987; *Id.*, 59 Fed. 35, 7 C. C. A. 643. Sections 2450 and 2451 of the Revised Statutes provide that the commissioner of the general land office shall decide all cases of suspended entries of public lands upon principles of equity, and in accordance with regulations to be prescribed by the secretary of the treasury, the attorney general, and the commissioner of the general land office, and to adjudge in what cases patents shall issue, and that every such adjudication shall be approved by the secretary of the treasury and the attorney general, acting as a board, and shall operate to divest the United States of title, without prejudice to the rights of conflicting claimants. It may be that the commissioner is bound by this statute to submit his decisions for approval to said board, notwithstanding the apparent failure hitherto of the land department and of the supreme court to give any effect to its provisions. If that be true, the most that can be urged in behalf of the complainant is that the cancellation of the entries under which it claims title was not a valid exercise of power. Nevertheless, to obtain a decree which will be equivalent to a conveyance of title, as prayed for in the bill, the validity of the entries upon which the claim is founded must be established by affirmative evidence taken in accordance with the rules of the court. By disregarding, as I shall, the decisions of the commissioner of the general land office, and of the secretary of the interior, affecting the land in controversy, the complainant will have the full benefit of the last clause of section 2451; that is to say, said decisions will in fact be without prejudice to the rights which may be claimed under the Park and Hannegan entries. This answer is something of a departure from good form in equity pleading; but I will treat it as a negative plea, containing averments denying the equities of the bill. So considered, it is not insufficient, and the exceptions must therefore be overruled.

BICKNELL et al. v. AUSTIN MIN. CO.

(Circuit Court, D. Nevada. July 2, 1894.)

No. 570.

MINING LEASE—EXECUTION BY SUPERINTENDENT—RATIFICATION.

Where a mining lease executed in the name of a corporation by its superintendent was turned over to defendant as successor in the ownership of the mine, and defendant, with knowledge as to how the lease was executed, allowed the lessee to work the mine for several months, and received the lessor's share of the proceeds, defendant will be deemed to have ratified the lease, and will not be allowed to question its validity because not executed under seal.

Action in trespass by John Bicknell and others against the Austin Mining Company. Judgment for plaintiffs.

James F. Dennis and Trenmor Coffin, for plaintiffs.
J. L. Wines and O. A. Murdock, for defendant.

HAWLEY, District Judge (orally). This is an action of trespass for forcibly depriving plaintiffs of the use and occupation of certain tailings and sluice boxes, and preventing them from working and enjoying the same, to their damage in the alleged sum of \$20,000. The cause was tried before the court without a jury. Plaintiffs' title to the bed of tailings, and right to use and work the same, is derived by virtue of a certain written lease, which is in the words and figures as follows:

"Austin, Nev., May 20, 1890. The Manhattan Mining & Red. Co. hereby leases to John Bicknell, Dan Bowen, and George Dale the tailings of the old quartz mill, up to the point where the tailings leave the mill, provided these can be worked as closely to the mill without in any way disturbing the foundations or buildings. The following are the terms and conditions: The Manhattan M. & Red. Co. are to retain thirty per cent. of the gross proceeds of this washing, and the lessees are to do all pumping and labor, and to defray all expenses that may be necessary for the prosecution of this work.

"The Man. M. & Red. Co.,

"By C. A. Pratt, Supt.

"John Bicknell.

"G. W. Dale.

"D. W. Bowen."

At the time this lease was executed, the Manhattan Mining & Reduction Company was a corporation engaged in the business of mining, milling, and reducing ores, and was the owner of certain mines, mill, and reduction works, and of the tailings mentioned in the lease. C. A. Pratt was the superintendent of the corporation. The defendant, the Austin Mining Company, is a corporation, and claims to be the successor in interest to the property formerly owned by the Manhattan Mining & Reduction Company. In the summer of 1890, after the execution of the lease, plaintiffs went into possession of the tailings, and took out about \$12,000 in amalgam and quicksilver, which was divided between the parties, in the ratio expressed in the lease. In 1891, James Hutchinson succeeded C. A. Pratt as superintendent. In the meantime a flood came in the cañon or ravine where the tailings were deposited, which destroyed plaintiffs' pipes, that were laid for the purpose of getting a supply of water to work the tailings; and at Hutchinson's urgent request, he being in need of money, and by mutual agreement, plaintiffs stopped work, and some of them commenced working for him, cleaning up under the pan mill, where about 134 flasks of quicksilver and a bar of bullion were taken out. At Hutchinson's request, they again stopped working the tailings, and went into his employ, running the concentrators, at \$4 per day, which was more than the usual wages at that time, being induced to make this change by the statement of Hutchinson to them that "it makes no difference to you, because your lease is good, and your ground is still left you, and I need the money for the company." Plaintiffs were working at the concentrator when Mr. Farnsworth, manager of defendant, succeeded Hutchinson in the possession of the prop-

erty. Shortly after Farnsworth took possession, the plaintiffs renewed work upon the tailings, and continued working under their lease as long as they could, until late in the fall of 1891. The amount taken out by them that year was about \$3,800. In the spring of 1892 they bought about 600 feet of sluice boxes in the bed of the ravine, and commenced making a deep cut below the point where the tailings were deposited, so that they could hydraulic the tailings, instead of shoveling them, as they had previously done. Mr. Bicknell said:

"During the years 1890 and 1891 we done our work by shoveling, and in lots of places we had to have a scaffold built up five or six feet high, and, our sluices being still above that, we had to shovel our dirt twice, and if we attempted to work anywhere near down to bed rock it was exceedingly disadvantageous."

Plaintiffs were engaged about five months in running the cut, and took out during the year 1892 about \$1,000, nearly all of which they obtained in a few days after finishing the cut. Thereafter controversies arose as to the validity of the lease, and of plaintiffs' right to work the tailings, and in January, 1893, Farnsworth ordered plaintiffs to take up their sluices and quit work, which they declined to do, and thereafter, under Farnsworth's directions, 600 feet of plaintiffs' sluice boxes were torn up and thrown upon the bank of the ravine, and plaintiffs were ousted from the possession of the tailings, and deprived, by the acts of defendant's servants, from working the same.

1. When the lease was offered in evidence, defendant objected thereto upon the ground that no authority was shown for its execution; that it was not under the seal of the corporation; that its execution was not the act of the corporation, and does not bind it, or its successor in interest; that, in any event, it amounts to nothing more than a permission to plaintiffs to go upon the premises and work the tailings at the will of the corporation, and could be terminated at any time. In support of these objections, defendant relies upon certain general principles, which are admitted to be true, to the effect that an agent of a corporation, appointed for the purpose of superintending and carrying on its business, has no authority, by virtue of such agency, to sell or dispose of the property of the corporation (*Vescelius v. Martin* [Colo. Sup.] 18 Pac. 338; *Despatch Line of Packets v. Bellamy Manuf'g Co.*, 12 N. H. 205; *Smith v. Stephenson*, 45 Iowa, 645); that the authority of such an agent cannot be enlarged by the unauthorized representations of an agent (*Law v. Stokes*, 32 N. J. Law, 249; *Bickford v. Menier*, 107 N. Y. 490, 14 N. E. 438); and that a deed of the corporate property must be under seal, and authorized by the corporate power of the corporation (*Gen. St. Nev.* § 806; *Gashwiler v. Willis*, 33 Cal. 11; *Saffield v. Reclamation Co.*, 94 Cal. 546, 29 Pac. 1105). But these authorities, and the principles announced therein, fall short of being conclusive as to the power of Mr. Pratt to execute the lease in question. Although no express or corporate power is shown, it clearly appears from the evidence that he exercised the power of giving leases to miners, similar to this lease, to work certain portions of the

mines owned by the corporation, for certain percentages or royalties of the ore taken out. This tribute system prevailed in the Austin mining district, and the right of the superintendent of the corporation to execute such contracts and agreements does not appear to have been ever questioned until some time after defendant took possession of the property. With full knowledge of all the facts, the corporation consented to and ratified the acts of the superintendent, and received from the plaintiffs the fruits of their labor to the extent mentioned in the lease. This lease, with others of a similar character, was turned over to the defendant, and Mr. Farnsworth, as its superintendent or managing agent, while denying the validity of the lease, received the corporation's proportion of the quicksilver and amalgam taken out by plaintiffs, and turned over to them their proportion, as nominated in the bond. It is also shown by the testimony that Mr. Farnsworth, acting for the defendant, had bought the right of certain miners holding a tribute lease to certain mining ground for a specified sum of money. Under all the facts, circumstances, conditions, and surroundings, my opinion is that the objections urged to the validity of the lease, or its admissibility in evidence, are untenable. It may be that the corporation would be bound by the act of its superintendent, upon the ground, often recognized by the courts, that the authority of the agent to execute such leases was necessary and essential to the execution and performance of the business of the corporation (*Sacalaris v. Railroad Co.*, 18 Nev. 155, 1 Pac. 835, and authorities there cited), for it is, perhaps, within the common knowledge of courts in the mining communities of this state, especially at Austin, that the superintendent of a mining corporation is authorized to conduct its ordinary business transactions, which may include the execution of a lease to portions of its mining ground, to be worked under the tribute system which there prevails. But it is unnecessary to invoke that principle in this case, because it clearly appears that the Manhattan corporation held out to the miners with whom it dealt that its superintendent had the power and authority to execute leases of the kind and character of that given to the plaintiffs, and, therefore, plaintiffs had the right to believe that such authority had been given; and having, for such a period of time, continued work, in good faith relying upon such authority, it would work great injury and hardship to the plaintiffs, and upon this ground the authority of the superintendent to execute this lease should be sustained. *Story*, Ag. § 127; *Jacobson v. Poindexter*, 42 Ark. 97; *Banks v. Everest*, 35 Kan. 687, 12 Pac. 141; *Walsh v. Insurance Co.*, 73 N. Y. 5; *Insurance Co. v. McCain*, 96 U. S. 86; *Pursley v. Morrison*, 7 Ind. 356. The court in *Walsh v. Insurance Co.*, recognizing this principle, said:

"The authority of an agent is not only that conferred upon him by his commission, but, also, as to third persons, that which he is held out as possessing. The principal is often bound by the act of his agent in excess or abuse of his actual authority; but this is only true between the principal and third persons who, believing, and having a right to believe, that the agent was acting within, and not exceeding, his authority, would sustain loss if the act was not considered that of the principal."

Arriving at this conclusion, it is unnecessary to further discuss the question as to the ratification by the principal of the act of its agent in executing the lease, or to cite authorities upon that point.

2. Defendant contends that a verbal agreement was entered into between Farnsworth, the agent of defendant, and the plaintiffs, whereby plaintiffs agreed to work the tailings only at such places as Farnsworth might designate, and to surrender the lease at his will and pleasure. Upon this point there is a direct conflict of evidence. I find the weight and preponderance thereof to be that no such agreement was ever entered into between the parties.

3. The only remaining question necessary to be noticed is as to the amount of damages which plaintiffs are entitled to recover. The testimony upon this point is, in many respects, vague, indefinite, uncertain, and unsatisfactory. The real value of the tailings could not be definitely ascertained until worked out. The plaintiffs were working them for the quicksilver and amalgam contained therein. The ground was spotted. In some places the tailings would not pay the expense of working; other places were rich. All the ground had to be worked over, as the quicksilver was found principally on the bed rock and in the lowest places. The estimates made of the value of the tailings upon the part of the plaintiffs varied from \$20,000 to \$60,000. Upon the part of defendant, it was to the effect that the tailings had no value for the quicksilver and amalgam only, and that the silver in the tailings could not be extracted without having an extensive plant to work the same. It would serve no useful purpose to give even a summary of the evidence. It is enough to say that, upon a careful consideration and review of all the testimony, it clearly appears to my mind that the tailings were of considerable value, and that plaintiffs, if they had been unmolested in the working thereof, would have realized a profit therefrom over and above the actual expenses incurred in working the same. The plaintiffs, and the other witnesses introduced in their behalf, had been acquainted with the premises for over 20 years. Their opportunities of determining the value of the tailings were superior to the knowledge of defendant. None of its witnesses had worked the tailings, and most of them had resided at Austin but a short time. It is improbable, to say the least, that plaintiffs, with the knowledge they had, would have incurred the expense in doing the dead work of running the cut if the tailings were of no value, as testified to by defendant's witnesses. They were allowed to do this part of the work without protest, and it was only after they had reached a point where the working of the tailings proved to be profitable that objection to their working was made. The amount of quicksilver and amalgam that plaintiffs had previously taken out in former years, when unmolested, under the disadvantage of shoveling the tailings, tends very strongly to show that they could have realized a greater profit by the improved method furnished by running the deep cut, and hydraulicking, instead of shoveling, the large body of tailings. These and other matters of minor importance, testified to by the witnesses, have convinced me that plaintiffs' interests in the tailings, under the lease, were of considerable value. There was

much testimony tending to show that plaintiffs had worked out several places where the tailings were of greatest value. Weighing all the testimony as to the value of the tailings, the difficulties and expense of procuring water and of working the tailings, the portions worked out, excluding all testimony as to the plaintiffs' being thrown out of employment by the wrongful act of defendant, and confining the measure of damages to the profits which plaintiffs might or would have realized if they had not been ousted from the possession, and prevented from working the same, I assess the damages at \$3,750. Let judgment be entered in favor of plaintiffs for that amount, and for costs.

MCCARTY v. NEW YORK, L. E. & W. R. CO.

(Circuit Court, S. D. New York. July 2, 1894.)

DEATH BY WRONGFUL ACT—WHO MAY SUE—JURISDICTION OF FEDERAL COURTS.

Under a state statute giving a right of action for damages for death caused by wrongful act to the personal representative of the deceased, for the exclusive benefit of the widow and next of kin, an administrator, appointed in and a citizen of the state, may maintain such an action for the death of the intestate, against a citizen of another state, in a United States circuit court in that state.

This was an action by Mary McCarty, administratrix of Michael McCarty, deceased, against the New York, Lake Erie & Western Railroad Company for damages for the death of said Michael McCarty. Defendant demurred to the complaint.

A. G. Vanderpoel, for plaintiff.

F. B. Jennings, for defendant.

WHEELER, District Judge. The plaintiff is a citizen of New Jersey, and, as administratrix, appointed there, the personal representative of Michael McCarty, a citizen of New Jersey, whose death is alleged to have been caused in New Jersey by the wrongful act of the defendant, a corporation, and, as such corporation, a citizen, of New York. The action is given to the personal representative by a statute of New Jersey which provides that in it "the jury may give such damages as they shall deem fair and just with reference to the pecuniary injury resulting from such death of the wife and next of kin," and that "the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin." Revision, p. 294, § 2. The defendant, by demurrer, raises the question whether the plaintiff can, on the right acquired by being appointed administratrix in New Jersey, maintain this action in this court out of New Jersey. This right of recovery did not arise in the life of the intestate, and could not ever accrue to him; the recovery is not for anything that ever was any part of his estate; the amount recovered, if any, will belong to the widow and next of kin, and can never be any part of the assets of the estate. The words "personal representative," in the statute, mean the administrator. *Dennick v. Railroad Co.*, 103 U. S.

11. The administration of estates is strictly local, but this suit is not any part of such administration. The plaintiff, by becoming administratrix, became the person to whom the right of action was given. The administration merely designated the person; the statute gives the right of recovery. A mortgage of land in New York authorized the mortgagee, of Vermont, his executors, administrators, or assigns, to sell; a sale by any executor in Vermont was good, because the letters there merely designated the person to execute the power. *Doolittle v. Lewis*, 7 Johns. Ch. 45. An administrator in another jurisdiction would have the right to sue there, under this statute, when there was no administrator in New Jersey. *Dennick v. Railroad Co.*, supra. But this does not show that an administrator in New Jersey, who had acquired the right of recovery, might not sue elsewhere. In that case, Mr. Justice Miller, in delivering the opinion of the court, said:

"Whenever, by either the common law or the statute law of a state, a right of action has become fixed, and a legal liability incurred, that liability may be enforced, and the right of action pursued, in any court which has jurisdiction of such matters, and can obtain jurisdiction of the parties."

The same right exists as to any cause of action accruing to an administrator concerning even assets of the estate.

"So, too, where the title to property in possession, and even in choses in action of a negotiable character, becomes perfected, under the administration, in one state or country, any action requisite to vindicate and enforce such title may be maintained without recourse to any local administration." 2 Redf. Wills, c. 1, § 2.

After the plaintiff had become administratrix in New Jersey, and this cause of action had accrued to her there, it could not again accrue to any other administrator elsewhere; and she would be the only person who could sue upon it anywhere. As the requisite diversity of citizenship exists, she is entitled to sue in this court.

Demurrer overruled, with leave to withdraw it, and answer over by August rule day.

THE DRESDEN.

UNITUS et ux. v. THE DRESDEN.

(District Court, D. Maryland. July 10, 1894.)

1. NEGLIGENCE—INDEPENDENT CONTRACTORS—LOADING PASSENGERS' BAGGAGE ON SHIP.

Stevedores bringing passengers' baggage on board a steamship, and placing it where requested by passengers for their convenience, are not exercising an independent employment, but are performing a duty which rests on the ship, and it is the duty of the ship's officers to see that risk of accident to persons on board is avoided.

2. SAME.

The use, for lowering baggage into a steamship, of the same companion way used by passengers and their friends in passing up and down, where the ship has more than one that could be so used, is want of care for which

the ship is liable to such a person injured by the fall of a trunk, caused by its handle breaking while being so lowered.

This was a libel by Matthew Unitus and Aggie Unitus, his wife, against the steamship Dresden for personal injuries.

William Colton, for libellants.

Thomas W. Hall, for respondent.

MORRIS, District Judge. The libellant, Aggie Unitus, went aboard the steamship Dresden just before her hour of sailing from Baltimore for Bremen, to bid good-bye to a friend who was about to make a voyage on her as a steerage passenger. The libellant, by request of her friend, had brought her some clothing and some food for the voyage. They, together with two other friends, went below, to place the articles in the steerage, and were returning up one of the forward companion ways to the deck, when the libellant was struck by a trunk which had fallen down the companion way. She was knocked down and injured, and she now seeks compensation by this libel in rem against the steamship.

It is not denied that friends of passengers about to sail were permitted to be aboard, and that, if the libellant was injured through the negligence of those in charge of the steamer, she can maintain this libel. The testimony on behalf of the steamship tends to prove that the trunk was being carried from the wharf to the steerage by a stevedore, and that he had it on the top step of the companion way, waiting for two stevedores who were below to come and take it from him, when the top strap or handle by which he was holding it broke, and it fell against the libellant, who had just started up the steps.

The proof on behalf of the steamer establishes that the loading of the steamer, both as to her cargo and the baggage of her passengers, was not attended to by her seamen, but was done by a firm of stevedores under a contract. By the contract the firm of stevedores was paid a certain rate per ton for the cargo, and for handling the baggage was paid a certain rate per day for each man furnished. It is contended under these circumstances that for the negligence of the stevedore which caused the accident the stevedore who made the contract could be held liable, and, it not being the act of any of the ship's employes, the ship is not liable. It is quite true that when stevedores have made a contract to load or unload a ship, and are exercising a well-known, distinct, and independent employment, and are not under the immediate supervision and control of those in charge of the ship, it has been held that they are contractors, and are not employes, and that the ship is not liable. *Linton v. Smith*, 8 Gray, 147. But in handling the baggage of passengers, bringing it on board from the wharf, and placing it in the steerage berth compartment, where the passengers may request to have it placed so as to be convenient for their use during the voyage, in doing such acts as these the stevedores are not exercising an independent employment. They are performing a duty to the passengers which rests upon the ship. It is of a personal

kind, requiring the supervision of the ship's officers. It is the duty of the ship's officers to see it so performed that risk of accident to persons on board is avoided.

In this case there were two or three companion ways to the steerage, which could be used, and it would seem to have been want of care not to prevent the stevedores from using the same one for lowering baggage which was being used by the passengers and their friends in passing up and down. I think the steamship is liable.

As to the extent of the libellant's injury, the testimony is very conflicting, and the court has not had the benefit of some testimony which the libellant could have obtained, and which would have been of weight. The appearance of the libellant indicates that she is in good health, but she complains of pains in her head, and general nervous disturbance. The fact that in a day or two after the accident a suit was entered claiming large damages for permanent injuries, which could not then have been more than apprehended, indicates some disposition to exaggerate the damages. The libellant speaks only the Polish language, and it is difficult to question her precisely as to her sufferings. A physician who examined her for the purpose of testifying in her behalf at this trial considers her general health as seriously affected, but a physician to whose office she went just after she came off the ship, and who visited her twice afterwards, makes very light of her injury. I shall award \$750.

TEXAS & P. RY. CO. v. WILLIAMS.

(Circuit Court of Appeals, Fifth Circuit. April 24, 1894.)

No. 175.

1. MASTER AND SERVANT—ASSAULT BY RAILWAY CONDUCTOR—SCOPE OF EMPLOYMENT.

In an action against a railway company for an assault committed by its conductor, there is no question to be submitted to the jury as to whether such conductor was acting beyond the scope of his employment, when his own testimony shows that such assault was committed in resenting an insult which he had provoked by his language and conduct while acting as conductor.

2. SAME—PLEADING AND PROOF.

Under allegations that plaintiff was knocked and kicked from defendant's railway train by its conductor, he may recover on proof that the conductor alarmed him to such an extent that he jumped off the train; forcing him off the train in an unlawful manner being the gravamen of the complaint.

In Error to the Circuit Court of the United States for the Northern District of Texas.

This was a suit for personal injuries, brought by Louis Williams, defendant in error, against the plaintiff in error, in which he alleged that he was a section hand in the service of plaintiff in error, and while riding on one of the regular passenger trains from Dallas to his place of work, by permission of the road master, he was assaulted and beaten and kicked from the train by the company's conductor in charge. The case being removed from the state

court where it was commenced to the circuit court of the United States for the northern district of Texas, and brought to trial, the jury found a verdict for the plaintiff in the sum of \$1,562, damages.

The facts of the case, as testified to by the conductor and found in the record, as far as necessary to decide the questions arising herein, are these: Williams, the plaintiff below, upon being found without a ticket in a car of one of defendant's trains soon after leaving Dallas, was asked for his fare, and replied that he was being passed down on the train by the road master, who was on board. The conductor, Nicely, made inquiry of the road master, pointing out Williams to him, but the road master denied having given Williams any permission to ride free. Upon this the conductor again demanded the fare, telling Williams that he would have to pay, when Williams replied that he had no money, and could not pay his fare, whereupon the conductor told him to get out at the next stop, and stay off. The language of Nicely, the conductor, in testifying in regard to the subsequent assault, is: "We got to talking then, and finally he intimated that the road master had lied. I told him not to call the road master a liar, and he rather intimated that I was lying myself. He said, if the road master said he did not tell him to get on, he lied. I told him not to call me a liar, and he intimated that, if I or any one else said the road master did not tell him to get on there, they lied. I struck him three or four times with my left hand, and may have hit him once or twice with my right hand, but my right arm was in a bad condition, and I could not use it well." After this the testimony shows that Williams declared that he would not stand it, getting up from his seat. The conductor, knowing Williams to be a much larger and more powerful man than he, took a knife from his pocket, and told him he would have to stand it, for, if he put his hand on him, he would cut his throat. At this Williams rushed through the door, out upon the platform, and jumped from the moving train. Upon cross-examination, Nicely explains more fully what occurred at the time when, in his direct examination, he states, "We got to talking." He says: "When I went back in there, after talking to the road master, I do not remember the exact words that passed between us. I may have said he was a damned lie. I do not know that I told him in addition that he was a d—d black son of a bitch. It is not a fact that I did not say anything about fare when I went back there after talking to the road master. I asked him for his fare, and gave him all the opportunities a man wanted to pay it. He told me he did not have any money. * * * As to whether I cursed him before he insulted me, I may have used some strong language in talking to him. Sometimes I swear, and I may have sworn on this occasion, but, after I struck him, there was not much said." The testimony on behalf of the plaintiff is not in the record, but, in the bill of exceptions, it is admitted that it "tended strongly to sustain all the allegations in his petition."

Upon the trial, the charge of the court in which it is claimed the court erred was: "If plaintiff was a trespasser on defendant's train, and had no right to be there, and the conductor demanded his fare, and he declined to pay it, then the conductor had the right to stop the car, and to put plaintiff off, using no more force than was necessary for that purpose; but if the plaintiff intimated to the conductor that the road master and the conductor were lying in the matter of the pass which plaintiff claimed the road master had promised him, and thereupon the conductor beat plaintiff over the head with his fist and ticket punch, and cursed and abused him, and afterwards drew his pocket knife, and alarmed plaintiff to such an extent that he jumped off the car while the train was in motion, at its usual rate of speed, at that place, then you will find for the plaintiff reasonable compensation for the bodily injuries he received from such assault and battery from the conductor and his fall from the cars, when he jumped off." This charge was excepted to, and the court requested to charge: "You are instructed that if you believe from the evidence that plaintiff was upon the train at the time in question not by authority of the road master, and that he had time to tender his fare before he was ejected from or jumped from the train, which fact you will determine from the evidence, and you further find from the evidence that the assault committed by the conductor upon the plaintiff was made solely by

said conductor to resent a real or fancied insult, and that the action of the conductor was actuated solely thereby, you will find for the defendant,"—which charge the court refused to give. Giving the charge given, and refusing that asked, were excepted to, and have been assigned as error.

T. J. Freeman, for plaintiff in error.

M. M. Parks, for defendant in error.

Before McCORMICK, Circuit Judge, and LOCKE and TOULMIN, District Judges.

LOCKE, District Judge (after stating the facts). There is no doubt about the law, contended for in this case, that, if the servant of the defendant in the court below (plaintiff in error) committed an assault while acting within the scope of his employment, the company is liable, but, if not so acting, it is not. *Railroad Co. v. Hanning*, 15 Wall. 649; *Railroad Co. v. Derby*, 14 How. 468. The difficulty is in making application of such principle to the facts as proven, and the only question for our examination is whether such facts raised a question as to whether or not he was so acting sufficient to submit to the jury. Where there is such question, it is one of fact, and should be so submitted (*Redding v. Railroad Co.*, 3 S. C. 1); but here the trial court did not consider the testimony justified such submission. The position of the conductor made it his duty to collect the fare from those he found on the train without tickets, passes, or recognized right to ride, and in doing this, or attempting to do this, or in meeting any exigency or emergency naturally and necessarily growing out of this duty, his conduct, or the course he pursued in performing it, would be within the scope of his employment. The testimony here shows that he approached Williams for his fare, but was informed that he was being passed by the road master, but, upon being told by that party that he had not given Williams permission to ride, he went back to Williams, and again demanded his fare, and, in doing this, he admits that he may have used strong language, may have sworn, and said that he was a "damned lie." How far this was proven by the testimony of the plaintiff, which was before the court, the record does not disclose, and we can only determine what preceded the assault by the admission of Nicely himself. He was at that time acting within the scope of his employment, and when his abuse was answered by something which implied the same insult he had been heaping upon Williams, and which had naturally been drawn out by his own language and conduct, we do not consider that it can be properly claimed that he immediately abandoned his employment as conductor, and commenced an attack solely in his personal capacity. If, as is claimed, he was resenting a fancied insult as a man, it plainly appears from his own testimony that it was one which he had provoked as conductor, and we consider that such character should reasonably be held to cover the whole transaction, and that the entire evidence, when properly considered, cannot reasonably raise a question whether he was not acting beyond the scope of his employment, which should have been submitted to the jury. In

instructing the jury that, if they found that the conductor alarmed the plaintiff to such an extent that he jumped off the car, they should find for the plaintiff, although the allegations of the petition were that he was knocked and kicked from the train, we consider that the judge charged upon the evidence before him, and that the variance between allegata and probata was immaterial. It was not such as could mislead or surprise the adverse party. *McClelland v. Smith*, 3 Tex. 210; *May v. Pollard*, 28 Tex. 677; and *Wiebusch v. Taylor*, 64 Tex. 53. Forcing the plaintiff off the train in a wrongful manner was the gravamen of the complaint, and, whether it were done with the hand, the foot, or threats of bodily injury, the effect was the same. The judgment of the circuit court is therefore affirmed, with costs.

In re SPOFFORD.

(Circuit Court, S. D. New York. May 22, 1894.)

1. WITNESS—COMPELLING ATTENDANCE BEFORE MASTER OUTSIDE JURISDICTION OF COURT.

On the appointment by a circuit court, in a suit in equity, of a master to take testimony in another district, a subpoena to appear and testify before him was issued by the circuit court for that district, and served on a witness therein, who appeared, but refused to be sworn. *Held*, that the witness was punishable for contempt by the court issuing the subpoena.

2. CONTEMPT — PUNISHMENT — REVIEW OF ORDER BY CIRCUIT COURT OF APPEALS.

Where a witness declines to be sworn, in order to present objections which his counsel might reasonably have supposed well founded, an order punishing him for contempt therefor may be in the alternative, or, if peremptory and final, its operation may be stayed until an appeal can be heard and determined by the circuit court of appeals, if that court has jurisdiction of such an appeal.

An order made in the suit of the Farmers' Loan & Trust Company against the Northern Pacific Railway Company, pending in the circuit court of the United States for the eastern district of Wisconsin, directed that testimony be taken before a master, with leave to take such testimony outside the district. Pursuant to such order, the master appointed proceeded to take testimony at New York City. A petition was presented on behalf of defendants to the circuit court for the southern district of New York for subpoenas to testify. Such subpoenas were issued, and one of them was served on Charles A. Spofford, requiring him to appear before the master, and to testify. Mr. Spofford appeared, but refused to be sworn. An order was obtained in the southern district requiring said Spofford to show cause why he should not be attached and punished as for contempt of court, in failing to obey the command of the subpoena.

Wheeler H. Peckham, for petitioners.
Root & Clarke, opposed.

LACOMBE, Circuit Judge. Although still of the opinion heretofore expressed in *Arnold v. Chesebrough*, 35 Fed. 16, the weight of authority in the circuit courts is so strongly the other way that I feel constrained to grant this motion. *Railroad Co. v. Drew*, 3 Woods, 691, Fed. Cas. No. 17,434; *In re Steward*, 29 Fed. 813; *Johnson Steel Street-Rail Co. v. North Branch Steel Co.*, 48 Fed. 191; *In re Allis*, 44 Fed. 217.

As the witness has been in no sense contumacious, but has declined to be sworn or to produce the books only in order to present objections which his counsel not unreasonably supposed to be well founded, the order may be in the alternative. It will, however, be made peremptory and final, if witness' counsel so desire; and in that case I shall, by a subsequent order, stay its operation until appeal can be heard and determined by the circuit court of appeals. The supreme court has, it is true, repeatedly held that it could not, either by appeal or writ of error, review the action of a circuit court, inflicting fine or imprisonment for a contempt (*Ex parte Kearney*, 7 Wheat, 38; *New Orleans v. Steamship Co.*, 20 Wall. 387; *Hayes v. Fischer*, 102 U. S. 121), on the expressed ground that no appellate jurisdiction in such cases had been conferred upon it by the laws of the United States. The old common-law rule, however,—that the order of a court, whose decisions on all other questions are reviewable, is sacred, and not be inquired into, when it inflicts punishment for contempt,—seems abhorrent to the sense of natural justice. It puts the property and personal liberty of one individual practically at the mercy of another, who, being human, may presumably act, upon occasions, mistakenly, or from prejudice or passion. And it may well be that the circuit court of appeals may find in the broad grant of appellate jurisdiction to review final decisions of the circuit courts "in all cases other than those [where jurisdiction to review is conferred on the supreme court]," which is contained in section 6 of the act of 1891, sufficient warrant for holding that final orders, such as the one here moved for, may be by it examined into, reversed, or otherwise determined. The case at bar certainly presents interesting questions as to the power of a circuit court to take testimony in equity causes outside of its own jurisdiction, and upon issues other than such as are raised by the pleadings, which have never yet been passed upon by an appellate tribunal.

VULCAN IRON WORKS v. SMITH et al.¹

(Circuit Court of Appeals, Ninth Circuit. May 28, 1894.)

No. 111.

1. PATENTS—ANTICIPATION—BAND-SAW MILLS.

In the Smith patent, No. 442,645, for an improvement in band-saw mills, claim 1 of which is for the combination with the band wheels and main supporting frame or column of an integral standard carrying the front bearings of the upper and lower band-wheel shafts, the standard being attached to the front side of the main frame or column between the band

¹ Rehearing pending.

wheels, the essential feature covered by this claim is the outside support for the front bearings of the band-wheel shafts, which, as constructed, permits the removal and replacement of the band saw without difficulty or derangement of the machinery; and the claim was not anticipated by previous patents, none of which covered the combination in the same form, although its elements were found in them.

2. SAME—LIMITATION OF CLAIM—PRIOR STATE OF ART—INFRINGEMENT.

As there was no invention in combining such elements found in previous patents, nor in overcoming their defects by merely increasing the strength of the parts, the claim cannot be construed broadly to cover the use of an integral outer standard attached to the main column between the band wheels, but must be limited to the construction shown of such outer support in the form of a single casting, as expressed in the application, stating the object to be to lessen the number of parts usually considered necessary; and hence that claim is not infringed by a combination in which the outside support is made of two parts, although they are bolted together so as to present the effect and produce the result of a single casting; and claims 2, 3, and 4, each of which merely adds to the combination of claim 1 an element found in previous patents, not involving invention, are not infringed by like combinations having the outside support so constructed. 57 Fed. 934, reversed.

3. SAME.

Claims 5, 6, and 10 of the patent, covering the straining device whereby the saw is kept at the proper tension, all the elements of which, except the mechanism supporting the knife-edged bearings of the rock shaft, are found in previous patents, is limited by such pre-existing devices, and hence is not infringed by the straining device of the Koefod patent, No. 468,303, the differences in the supporting mechanism being greater than the changes made by the Smith patent in adapting the previous devices. 57 Fed. 934, reversed.

Appeal from the Circuit Court of the United States for the Northern District of California.

This was a suit by Smith, Myers, and Schnier against the Vulcan Iron Works of San Francisco for infringement of a patent. The circuit court rendered an interlocutory decree for complainants. 57 Fed. 934. Defendant appealed.

Wm. F. Booth and John A. Wright, for appellant.

J. H. Miller and M. M. Estee, for appellees.

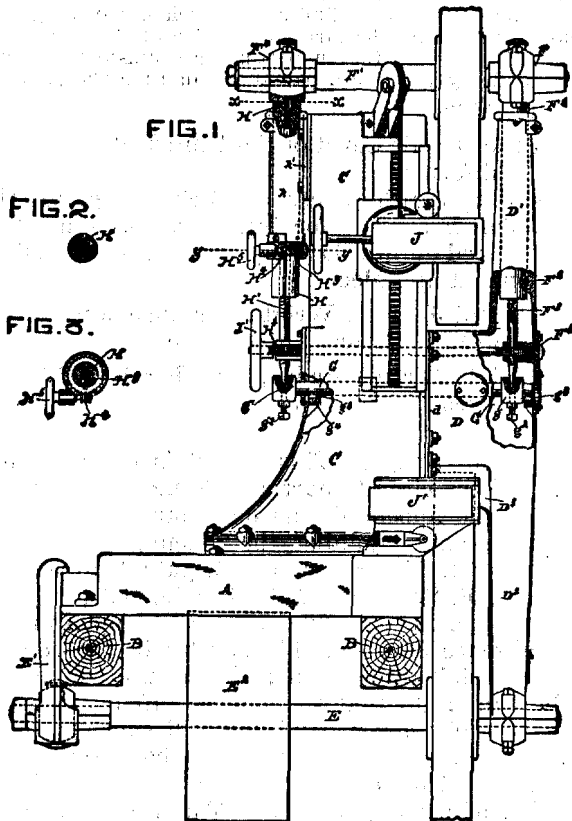
Before GILBERT, Circuit Judge, and KNOWLES and HAWLEY, District Judges.

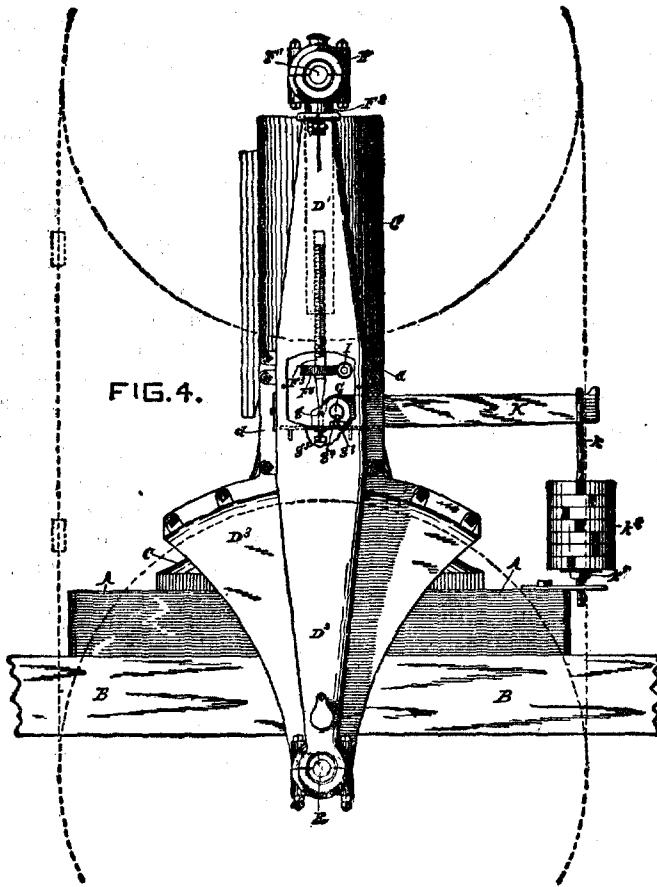
GILBERT, Circuit Judge. This appeal is taken from an interlocutory decree of the circuit court adjudging the patent sued upon to be valid, and the appellant, the defendant therein, to have infringed the same, and enjoining the defendant from further infringing. 57 Fed. 934. The complainant's patent is No. 442,645, and was granted to S. R. Smith on December 16, 1890, for an improvement in band-saw mills. The defenses relied upon on the appeal are: (1) The absence of patentable novelty in the combination of the claims of complainant's patent; (2) the want of patentable invention in the same; (3) that there is no infringement by the defendant. The complainant's band-saw mill consists of an endless band saw, stretched over and revolving about two large wheels, which are separated from each other by a space sufficient to admit of the operation of sawing lumber. The wheels are called the

upper band wheel and the lower band wheel. The frame of the mill, as shown in the patent, Fig. 1, consists of a base plate, A, an upright column, C, a horizontal portion, D, extending from the column, between the two band saws, and sustaining an upright arm, D¹, upon the outer side of the vertical plane of the band wheels, and a similar arm, D², extending downward; the object of both of which arms is to furnish outer bearings respectively for the upper and lower band wheels; the inner bearings being attached to the upright column, C, and both the upper bearings being placed in tubes set in the column, C, and in the outer arm, D¹. The first claim of the patent is as follows:

"In a band-saw mill, the combination, with the band wheels and main supporting frame or column, of an integral standard carrying the front bearings of the upper and lower band-wheel shafts; said standard being attached to the front side of said main frame or column between said band wheels, substantially as hereinbefore set forth."

It is urged that this claim is anticipated by the English patent to William Newbury, No. 3,105, issued in 1808; by the United States patent to W. F. Parish, No. 388,069, of August 21, 1888; by the





patent to C. Meiner No. 246,330, of August 30, 1881; and by the patent to De Witt C. Prescott, No. 369,881, of September 13, 1887. The essential feature of the complainant's invention, as covered by the first claim, is obviously the outside support. The outside support, as constructed in his patent, in combination with the other elements, permits the removal and replacement of the band saw from and upon its carrying wheels without difficulty, and without derangement of the machinery. We fail to find the combination in this form in any of the other patents. In none of them is there a combination of a main column with an integral standard attached to the same at a point between the band wheels and at no other point. In the Newbury patent the band saws are supported between two equal columns, connected, it is true, at a point between the wheels, but neither of which is an outside standard, or so constructed as to permit the placing or removal of the band saw without disturbing the position of the machine. The same is true of the Parish patent. In the Meiner patent is found, per-

haps, the nearest approach to the complainant's invention, as covered by this claim, and, if the outer standard in that patent were so constructed as to be operated without its attachment at the upper and lower ends by screws connecting the same with the frame which incloses the whole machine, it would be clearly an anticipation of the complainant's claim for an integral outer standard, but in the use of those connecting screws a dissimilarity appears which, though slight, is, in our judgment, sufficient to defeat the defense of anticipation, and, although it is apparent that the Meiner mill might be so constructed that the connection of the ends of the outer standard with the main frame might be wholly unnecessary and superfluous, yet there is no intimation in the patent that the machine was by the inventor intended to be used or constructed in any manner other than that indicated in his specifications. The Prescott patent also lacks one of the essential elements of the complainant's first claim. Instead of an integral outer standard attached to the main column between the band wheels, it has two distinct outer standards or arms for carrying the outer bearings of the band wheels, the lower of which is attached to the column, but the upper is fixed to a column which is telescoped over the main column, and is moved vertically thereupon by means of a jack screw.

It is next contended that the first claim lacks patentable invention,—that the combination of elements produces no new and useful result. When the prior patents are considered, it is evident that the deviations made by the complainant from the devices that preceded him are but slight. In the Prescott patent he found the main column, in connection with band wheels and standards for carrying the outer bearings of the band wheels attached to the main column at points between the wheels, so constructed as to permit the convenient removal and replacement of the band saw, the lower standard integral and immovable, the upper movable vertically, its position and tension being controlled by a jack screw resting upon the upper portion of the lower standard, and connecting the two. In the Meiner patent he found a main supporting frame or column in connection with band-saw wheels, and an integral outer standard carrying the front bearings of the band-wheel shafts, and attached firmly by a connecting piece to the main frame at a point between the band wheels. The fact that the ends of the outer standard were capable of further connection with the main frame by movable bolts or screws renders it none the less an integral outer support. If, therefore, the complainant's first claim is to be regarded as covering broadly the combination with band wheels and a main supporting frame or column of an integral outer standard attached to the main column between the band wheels, it will be seen that he found those elements in the prior patents, and that he has taken the single main column of the Prescott patent and the integral outer standard of the Meiner patent, and has combined them in a machine which may be conceded to be neat, compact, and strong. But this was not invention. *Burt v. Evory*,

133 U. S. 349, 10 Sup. Ct. 394; *Trimmer Co. v. Stevens*, 137 U. S. 423, 11 Sup. Ct. 150; *Setter Co. v. Keith*, 139 U. S. 530, 11 Sup. Ct. 621; *Ryan v. Hard*, 145 U. S. 241, 12 Sup. Ct. 919; *Derby v. Thompson*, 146 U. S. 476, 13 Sup. Ct. 181.

It is urged that there was a defect in both those prior patents which the complainant has overcome, and that therein he has displayed invention. The defect is said to be the insufficiency of the outer supports of the band wheels to sustain the strain of the band saw, and the tendency to draw the wheels out of alignment. To correct this evil it was necessary that the outer standard should be made more firm and rigid. This the complainant has accomplished by increasing the strength of that part. If this is all that he has done, it is manifest that he has displayed no invention. If the prior machines were defective for want of strength or firmness, the remedy was too obvious to permit of discussion. It may be seen from a simple inspection of both the Prescott and the Meiner patents that machines made under either might have been so constructed as to absolutely overcome the defect referred to. In each the outer supports might have been made so firm and strong as to hold the band wheels in true alignment, no matter what the strain of the band saw. It is argued, further, that there must be invention in the complainant's machine from the fact that it produces more lumber per diem than any that preceded it. But the increased speed of the complainant's mill is due, not to the introduction of a new element into his combination, or to a new combination of known elements; it is attributable solely to the superior strength and firmness of the supporting column of the band wheels. It requires no reasoning to prove that, if the Prescott mill and the Meiner mill are constructed with equal strength and rigidity, they will run with the same speed and accomplish the same result with the complainant's mill. But, if there is in the complainant's combination invention sufficient to sustain the first claim of his patent, it is limited to the construction of the integral outer support in the form of a single casting, attached directly to the main frame or column, and his sole invention is expressed in his application where its object is said to be "also to lessen the number of parts usually considered necessary in this class of devices." By referring to the proceedings in the patent office had upon the filing of his application, it will be seen that the allowance of the first claim, after the same had been twice rejected, was based upon this view of his invention,—that his outer support or standard was a single casting attached to the main column with no intervening part, and that thereby the number of parts was lessened. In considering the question of infringement, the court must be guided by the construction so given to the plaintiff's invention. The evidence proves that the defendant has made band-saw mills in imitation of the complainant's machine, and which closely resemble it. But the defendant's outer support for the band wheels is not made in a single casting. It consists of two castings, firmly bolted together and to the main column at a point

between the band wheels. If the complainant were entitled to have his first claim so construed as to cover, in the broad sense of the word, the use of an integral outer standard, clearly the defendant's device would be an infringement, for that element of the combination as used by the defendant is none the less integral by reason of the fact that it is made of two parts so securely bolted together as to present the effect and produce the result of a single casting. But the complainant's invention being limited, as we have seen, by the prior state of the art, if not by the express words of his application, to the use of a single casting, the conclusion necessarily follows that the defendant has not infringed this claim of the patent. *Roemer v. Headley*, 132 U. S. 313, 10 Sup. Ct. 98; *Snow v. Railway Co.*, 121 U. S. 617, 7 Sup. Ct. 1343; *Hoff v. Manufacturing Co.*, 139 U. S. 326, 11 Sup. Ct. 580; *Derby v. Thompson*, 146 U. S. 476, 13 Sup. Ct. 181.

The second claim adds to the combination enumerated in the first the hollow supporting column in the outer standard, and the hollow castings attached to the main column opposite the same, to furnish supports for the bearings of the upper and lower band-wheel shafts. This claim combines with the first claim the element of hollow main standards and hollow outer standards, whereas, by the first claim, the standards may be either hollow or solid. The hollow standards are found both in the Parish patent and the Prescott patent, and in both are used for the same purpose as in the complainant's patent. There is, therefore, no invention in the combination of that element with those that compose the first claim. The complainant can only claim the hollow standards in combination with the use of an outer standard made of a single casting, and attached directly to the main column, and it follows that, if the defendant has not infringed the first claim, it has likewise not infringed the second. The same is true as to the third claim, which covers the use of an outer standard having a flanged, horizontal portion, to be secured to the main supporting frame, and vertical arms cast in one piece, with the central portion bored to receive the adjustable bearings of the upper band-wheel shaft. Claim 4 is as follows:

"(4) The combination of the base plate, A, cast in a single piece, the column, C, having a flanged base to be secured to the said base, A, the front support for the band-wheel shafts consisting of the castings, D, D¹, D², and shield, D³, together forming a supporting frame for band-saw mills, substantially as hereinbefore set forth."

The effect of this claim is to add to the elements already had under consideration the use of a base plate, which is a broad, heavy casting, a flange upon the base of the main column for the purpose of attaching the same to the base plate, and a shield above the lower band wheel. All of these elements are found in the prior patents. In the Prescott patent, the base plate, A, is used; in the same patent, as well as in the patent to Brophy, No. 261,579, of date July 25, 1882, and in the patent to Stephens, No. 322,465, of December 15, 1885, are found the flanged base of the main column. In the Hinkley patent, No. 348,280, of August

21, 1886, the lower band wheel is protected by a shield. The prior state of the art, therefore, leaves the complainant's invention, as formulated in the fourth claim, to the use with the other elements of a shield to the lower band wheel, made in a single casting, with an outer standard, as the same is described in the first claim. This claim the defendant, for the reasons above set forth, has not infringed.

The remainder of the assignments of error concern what is known in the complainant's patent as the straining device, referred to and described in claims 5, 6, and 10. The object of the straining device in a band-saw mill is to maintain a constant strain upon the band saw, thereby holding the same to its place upon the band wheels, and securing, by its proper tension, accuracy of work. In the complainant's patent, the shafts of the upper band wheels have their bearings on top of vertical columns or trunnions, movable vertically within the bore of the standards. These trunnions terminate below in screw shafts, which rest in the ends of short arms extending from a single rock shaft. By the turning of the rock shaft the trunnions are raised and lowered, carrying with them the upper band wheel. In order to hold the rock shaft under a constant tendency to turn, and to hold the trunnions up, and press the upper band wheel against the saw, a lever is secured to the rock shaft, and weights are imposed upon the lever. The rock shaft itself turns upon "knife edges," which are let into the shaft upon the lower side at either end, and these rest upon brackets projecting inwardly from the outer walls, respectively, of the outer standard and the main column. The claims are as follows:

"(5) In a band-saw mill, the combination of the supporting frame, the vertically adjusted bearings for the upper band-wheel shaft, mounted in said frame, the transverse shaft, G, mounted on knife-edge bearings, in said frame, and having arms, g, g', secured upon said shaft to support the bearings of said upper band-wheel shaft, and the weighted lever, K, secured upon said shaft between the knife-edge bearings to counterpoise the bearings of the upper band-wheel shaft, and provide a sensitive automatic adjustment for the same, whereby the saw is kept at the proper tension, substantially as hereinbefore set forth."

Claim 6 adds to the combination in claim 5, in substance, the following: (1) The knife-edge bearings let into the rock shaft; (2) the supporting plates, g⁴, resting on the brackets in the main frame; (3) that the short arms of the rock shaft have steps in their outer ends; (4) the hardened steel adjustment screws passing through said steps; (5) that the adjustable bearings of the upper band wheel rest upon these screws; (6) the rod, k, suspending the weights; (7) the cap nut, k, supporting the weights; (8) the movable weights. Claim 10 is as follows:

"(10) In a band-saw mill the combination of the column, C, brackets projecting from said column, a rock shaft having knife-edge bearings resting upon said brackets, a weighted lever, and two arms, g, g', screwed upon said rock shaft with the band-wheel shaft, and the boxes and rods supporting the boxes, said rods resting upon the arms, g, g', substantially as shown and described."

Straining devices are found in most of the band-saw mills which preceded the complainant's invention. In the Parish patent the

vertically adjustable bearings of the upper band-wheel shaft are mounted as in the complainant's combination, and are supported upon rods, the lower ends of which connect with pivoted levers, the inner ends of which connect again with hanging rods, the lower ends of which connect with the arms of a rock shaft, with a central lever carrying a weight. Here are all the elements of the complainant's straining device, with the exception of the knife-edge bearings of the rock shaft and the mechanism necessary for the support of the same. In the Parish patent the rock shaft turns upon round journals. The use of the knife-edge bearing, however, is found in the straining device of the Prescott patent. There one of the rods which support the bearings of the band wheel is knife-edged below, and rests upon a pivoted lever, which supports the weights, and the advantage of the sensitiveness of the knife-edge bearing is distinctly claimed by Prescott in his application for patent. With these patents before him, the complainant combined the elements of his straining device. He mounted the rock shaft upon knife-edge bearings let into the shaft at either end, placed the upright rods which support the bearings upon steps let into the outer ends of short arms or levers attached to the rock shaft, and supported his knife-edge bearings upon brackets. Notwithstanding the prior state of the art, this combination, we think, displays invention. But the question arises whether the defendant has infringed this feature of the complainant's patent. The defendant has used the straining device patented to G. T. Koefoed on February 2, 1892, letters patent No. 468,303. In the Koefoed patent the supporting columns of the band-wheel bearings rest upon a transverse bar, which the complainant denominates a rock shaft, but which the defendant calls a straining lever. The lower ends of the supporting columns are knife edged, and rest directly upon the straining lever, and not upon arms projecting therefrom, as in the complainant's device. The straining lever itself, instead of turning upon knife-edge bearings let into the same, is constructed with short arms projecting laterally, and these arms rest upon knife-edge bearings placed, not in the arms, but let into supporting brackets below the same, which brackets project from the inner walls of the main frame and the outer standard. We are of the opinion that the Koefoed patent so far departs from the specific features which constitute the complainant's invention that it does not infringe the same. If the complainant's device were a pioneer invention, or if it introduced for the first time the use of a rock shaft on knife-edge bearings, or any other essential element of the combination, it would be entitled to a broader construction; but, narrowed as it is by the known and patented devices antecedent to it, the court is compelled to more strictly construe its claims. The Koefoed device goes further than to make merely formal changes in the complainant's patent. Its deviations therefrom do not consist in the mere transposition of parts, the placing of knife-edge bearings upon one part instead of another, the making a rock shaft in the form of a bar instead of a cylinder, but it introduces such change in the construction of the

parts as to avoid the elements of the complainant's invention, limited, as we have found the same to be, by the pre-existing devices. The defendant has not used a "shaft with arms, g, g¹," nor a shaft with knife-edge bearings, either let into the same or into the supporting mechanism of the same. He has used a shaft without the arms, g, g¹, for the support of the upper band-wheel bearings, and has not made the shaft to turn upon knife-edge bearings in the shaft, or beneath the same, but has connected it with knife-edge bearings by arms extending laterally therefrom. These differences, slight as they may be, are, in our judgment, as great as the changes which the complainant made in adapting the former devices, and are sufficient to relieve the defendant of the charge of infringement. The decree is therefore reversed, at the cost of the appellee.

TUTTLE v. CLAFLIN et al.

(Circuit Court, S. D. New York. March 15, 1894.)

PATENTS—INFRINGEMENT—ACCOUNTING FOR PROFITS.

Combinations covered by claims of complainant's patent for a frilling and crimping machine were used, with additional features, by defendants, in roller-plaiting machines, producing large quantities of plaitings finished for use as trimmings. On an accounting of profits from the infringement, there was no satisfactory proof that the finished product could be produced by complainant's machines: and it appeared that, while such plaitings could be made by hand, the process was tedious and expensive, and the product inferior and unmerchable, and they had not been so made before the introduction of the roller-plaiting machines. *Held*, that defendants should not be held liable for profits to the amount of the difference between the cost of making the plaitings by machine and the cost—30 to 50 times greater—of making them by hand; the burden being on complainant to show that the profits were entirely due to his patented combinations, and that the cost price of hand-made plaitings was a fair measure of comparison.

This was a suit by Theodore A. Tuttle, trustee, against John Claflin, executor, and others, for infringement of a patent. The patent was sustained, and held to be infringed, and an accounting ordered. 19 Fed. 599. Defendants filed exceptions to the master's report on the accounting.

Benjamin F. Lee, for complainant.
Edmund Wetmore, for defendants.

COXE, District Judge. This action is based on letters patent No. 37,033, granted to Crosby and Kellogg, December 2, 1862, for an improvement in machines for frilling and crimping. The bill was filed August 1, 1878, 15 years and 8 months after the date of the patent. In March, 1884, the patent was sustained by this court (Tuttle v. Claflin, 19 Fed. 599), and the second and fourth claims were held to be valid and infringed. These claims are as follows:

"(2) In combination, a crimper and a smoother, substantially such as described, and acting, substantially as specified, to hold the crimps to an edge."

"(4) In combination with a crimper substantially such as specified, a spring

acting to force said crimper upon the goods while crimping them and relaxing its pressure while the crimper is retreating, substantially in the manner and for the purpose specified."

The second claim is the broader of the two, the fourth claim being for a more limited combination.

On the 24th of August, 1893, the master filed his report, in which he found no damages against the defendants, but reported the sum of \$76,215.85 "as the profits, gains and advantages which the said defendants have derived, received or become entitled to by reason of their infringement." The master proceeded upon the theory that the entire profit of the large roller plating machines used by the defendants was due to the combinations of the claims just quoted, and that the defendants had saved the difference between one-half a cent a yard, the cost when the machines were used, and the cost of making the same number of yards by hand, which was estimated to be 15 cents per yard for linen plaitings and 25 cents per yard for woolen plaitings. In other words, that it cost the defendants \$2,419.55 to plait 483,910 yards of goods on the machines; that if they had not used the machines they would have had the same number of yards plaited by hand at a cost of \$78,635.40, and that they had, therefore, saved the difference (\$76,215.85), and should pay it to the complainant. The comparison was not with the next best trimming, but with the same trimming made in the next best way, or in the way which the master found to be the next best.

On the 26th of August, 1893, the defendants filed exceptions disputing the correctness of all the master's conclusions as to the profits derived by them. The exceptions present several questions of minor importance, the broad, fundamental question being whether the complainant is entitled to recover \$76,215.85 as profits from the defendants.

The testimony establishes two propositions—First, the combinations of the second and fourth claims of the Crosby and Kellogg patent would not produce the finished product of the infringing machines used by the defendants; and, second, if machines and products were identical, the comparison instituted by the master between the cost of making the plaitings by defendants' machines and the cost of making them by hand was not, upon the facts of this case, the proper rule of computation.

The invention is an ingenious device, designed originally for a sewing-machine attachment and intended to do the same general character of work as the Arnold ruffler, but it was distinctly an advance over the Arnold machine. It is entirely clear, however, that the mechanisms covered by the second and fourth claims did not and could not produce a commercial plaiting like those made on the defendants' machines, viz. a spaced and ironed wide plaiting ready for use as a trimming for ladies' gowns. The defendants' machines took the frills produced by the combinations of the claims, and by making the plaits uniform and ironing them down originated something which caught the market and produced the demand. In 1867 James Orr, of Glasgow, invented a roller-plaiting machine which seems to have created the demand for trimmings of this kind. At

least there is no satisfactory proof that for six years and more after the Crosby and Kellogg invention their machine, as patented, ever did or ever could make a yard of trimming like that made by the defendants' machines. It was to these machines, organized and perfected long after the Crosby and Kellogg invention, and containing as they did the condensed ingenuity of several prior structures, that the art was indebted for the trimming so fashionable during the period in question. Surely the features added to the machines by Orr, Griffith and Fanning, and particularly the ironing feature by which a perfectly symmetrical finish is imparted to the plaitings, must have contributed something to their value. To assert that the whole value is due to the Crosby and Kellogg invention is erroneous. The complainant is not entitled to appropriate the additional value imparted to the plaitings by those features of the infringing machines not found in the second and fourth claims.

But admitting that the machines used by the defendants were precisely the machines of the claims and nothing more, still the comparison instituted by the master between the cost of plaitings made on them and the cost of hand-made plaitings was, it is thought, founded upon mistaken premises. The punishment inflicted upon the defendants is out of all proportion to their fault. They have been adjudged to pay a very large sum of money upon the theory that they have made that sum or saved that sum by the use of the complainant's machine. The proof fails to satisfy the court of the soundness of this view.

Assuming, as we must, that the defendants would have acted in accordance with the ordinary rules which govern human conduct, it is hardly probable that they would have ordered nearly half a million yards of plaiting at such a ruinous cost. Surely there is no presumption that they would have done so. The witness best fitted to speak on this subject, the defendants' superintendent, says that they would not. The presumption was greater that the defendants would have given up the use of this trimming altogether, or would have adopted some substitute, rather than that they would have resorted to a method which common sense would reject both because of its enormous expense and also because of its inefficiency. Not only were plaitings made by hand too expensive, but they were so poorly done that it is doubtful whether the defendants could have used them at any price in competition with the machine-made plaitings. If this were an art in which hand-made plaitings had been used before to any appreciable degree as articles of commerce, and machine-made plaitings had superseded them, there would be more reason for asserting that the defendants would have continued to use the old method if they were prevented from adopting the new. But here there was no old method. The Crosby and Kellogg machine had been in existence for six years and had created no demand for kilt plaitings. Such plaitings could, of course, be made by hand, but the process was tedious and expensive and the product inferior and unmerchantable. It is fair to say that, in a commercial sense, kilt plaitings were not made by hand prior to the introduction of the roller-plaiting machines. The infringing ma-

chines made the demand. They created the market. There is nothing but conjecture to show that the defendants would have resorted to the hand-made method. First, it was so expensive as to be practically prohibitory, and, second, it was impossible to make a marketable plaiting by hand,—one that could compete successfully with the machine-made plaitings.

But the matter should not be left to presumption. The burden was upon the complainant to establish the affirmative of both these propositions—First, that the profits were entirely due to the combination of the claims; and, second, that the cost price of hand-made plaitings was a fair measure of comparison. He has done neither.

Various illustrations will occur to any one familiar with patents where ingenious labor-saving machines have created an art which otherwise would not have existed. Take the paper-bag industry, for instance. Is it a fair assumption that a manufacturer who found himself precluded from using the patented machines, which turn out bags by the thousands, would attempt to supply the market with hand-made bags? A machine will sometimes make in a second an article which never was made before and which can be made by hand only after hours of painstaking toil by a skilled artisan. The machine will supply hundreds of millions of these articles annually to commerce at a price merely nominal. To make the same articles by hand, though physically and experimentally possible, is practically and commercially out of the question. The time, labor and money required would preclude such an attempt. An article costing a dollar cannot compete successfully with a better article costing a mill, and no rational being would attempt such a competition. And yet, if the doctrine of the report is pushed to its logical conclusion, the owners of patents for comparatively unimportant inventions will be able to levy an enormous tribute upon infringers, resulting in fabulous but unmerited wealth to the former and bankruptcy to the latter.

With the highest respect for the opinion of the learned master, the court is unable to agree with the conclusions reached by him.

The exceptions, so far as they relate to the questions discussed, must be sustained.

INTERIOR CONDUIT & INSULATION CO. v. EUREKA ELECTRIC CO.

(Circuit Court, S. D. New York. April 21, 1894.)

PATENTS—LIMITATION BY PRIOR STATE OF ART—ELECTRIC WIRING.

In the Johnson and Greenfield patent, No. 401,498, for improvements in wiring structures for electric lighting, claim 1, for the combination of a pipe of insulating material, a pair of wires insulated from each other and in close proximity within the pipe, each forming one side of an electric lighting circuit, and a safety catch interpolated in the circuit, and claim 3, for the combination of the same elements, having the wires twisted together, even if such combination involves invention, all the elements being old, in view of the prior use of similar devices and combinations, can be upheld only if limited to a complete system of pipes extending continuously through the building, as described and shown; and they are not infringed by structures which do not employ such a system.

This was a suit by the Interior Conduit and Insulation Company against the Eureka Electric Company for infringement of a patent.

R. N. Dyer and D. H. Driscoll, for complainant.

Francis Forbes and C. E. Mitchell, for defendant.

COXE, District Judge. This is an infringement action based upon letters patent No. 401,498, granted to Johnson and Greenfield, April 16, 1889, for improvements in wiring structures for electric lighting. The object of the patentees was to provide buildings with wires for electric lighting which can be readily removed and replaced by other wires. A second object was to furnish protection from fire. There are four sheets of drawings and a description which enters minutely into details, but the improvement in controversy may be stated briefly to consist in placing a pair of wires,—each wire forming one side of an electric lighting circuit,—into a pipe made of insulating material; a safety catch being interpolated in said circuit.

The first and third claims are the only ones involved. They are as follows:

"(1) In house wiring for electric light, the combination of a pipe of insulating material, a pair of wires insulated from each other and placed in close proximity to each other within said pipe, and each forming one side of an electric lighting circuit, and a safety catch interpolated in said circuit, substantially as set forth."

"(3) In house wiring for electric light, the combination of a pipe of insulating material, a pair of insulated wires twisted together within said pipe, each wire forming one side of an electric lighting circuit, and a safety catch interpolated in said circuit, substantially as set forth."

The defenses are lack of novelty and invention, noninfringement, defective title and the absence of an oath from the amended specification.

The combination of the claims is limited to the following elements in house wiring for electric lights: First. A pipe of insulating material. Second. A pair of wires insulated from each other, and placed in close proximity to each other within said pipe, and each forming one side of an electric lighting circuit. Third. A safety catch interpolated within said circuit. The third claim is like the first, only it is still further limited to a pair of wires twisted together. In the specification as originally filed, the patentees claimed the invention without reference to the material of which the pipes were constructed. Indeed, metal pipes were used by them prior to the application. They also assert in the specification as filed that, instead of one tube with two wires, two tubes containing one wire each may be used without departing from the spirit of the invention. The application was rejected upon several references, the examiner holding that the applicants had merely adopted the well-known underground system for use in buildings, and that it was not new to run electrical wires through pipes under the plaster of buildings. The applicants thereafter amended, the principal change being the limitation of the claims to pipes made of insulating material. The application was again rejected on the

Martin patent No. 286,940, which shows paper tubes for conveying electric wires, the examiner observing that "the mere fact that the pipes are of insulating material is not patentable." He also pointed out that safety catches were old. The specification was again amended, and thereafter the patent issued. The complainant's brief concedes:

"That each of the elements of the combination claimed in claims 1 and 3 of the patent in suit was individually old. The insulating tube was old, the twin conductor was old and the safety catches were old."

Again, the brief says:

"Thus, the patents in evidence show that the character of paper tube set forth in the complainant's patent was not in itself new, but could be produced by any one skilled in the art."

The question then is, did it involve invention to place the old twin wires in the old insulating tube and interpolate a safety catch in the circuit?

If there were nothing more of the prior art shown than is contained in the foregoing admissions, there might be difficulty in reaching a correct answer, but it further appears that the following devices and combinations were old:

First. Short lengths of insulating tubing were used in this art in the walls and partitions of buildings.

Second. Zinc and wooden tubing was used in the side walls of buildings with single wires. Twin wires had been run through the tubes of chandeliers, and through zinc tubes five or six feet long in the walls of buildings. Safety catches had been used in connection with a circuit formed by two wires drawn through the pipe of a chandelier.

Third. Complainant's brief sums up the distinguishing merits of the alleged invention as follows:

"Such, then, being the admitted facts, it is apparent that the invention of Johnson and Greenfield resides in the peculiar way of utilizing the general knowledge that electric wires in close proximity tend to a short circuit, which general knowledge was availed of before by separating the conductors so as to avoid this short circuiting. Now, the peculiar way in which Johnson and Greenfield availed themselves of this general knowledge is by combining the three known elements, which were never before combined, so as to bring about the short circuiting of the wires to quicken the action of the safety catch."

But it would seem that all this was clearly disclosed by Mr. Johnson himself in his patent No. 359,726, granted in March, 1887. The specification says:

"I have discovered, however, that by bringing the conductors close together, and so arranging and constructing them that any imperfection of the insulation will immediately establish an arc between the conductors themselves of such low resistance as to amount to a practical short circuit, the safety catches will be invariably fused and the circuit broken before damage can occur.
* * * It will be seen that there can be no contact of the inner conductor with any external object except through the outer conductor. The breaking down of the insulation separating the conductors will with certainty produce an arc of such low resistance as to effect a short circuit between the conductors, instantly fusing the safety catch or safety catches protecting the particular conductors, and breaking the circuit, or the two conductors, being in such close proximity, will be soldered together by the fusion of the lead covering, which evidently will form a short circuit between them."

Fourth. In 1876, Edward A. Hill obtained a patent, No. 176,784, in which occurs the following statement:

"I propose to provide a series of tubes or pipes broken at each turning, and at intervals along their lengths, by open spaces, to afford access to the bundle of several wires which are run through said tubes. These tubes or pipes are laid throughout the building, preferably supported by the lathing before the plastering is applied."

Fifth. In 1883, John F. Martin obtained a patent, No. 275,399, the object of the invention being "to provide a noncombustible and fire-proof conductor for electric light and other wires to be conveyed through buildings." This is accomplished by providing tubes of paper with an insulating lining.

Sixth. In 1884, Henry Edmunds obtained a patent, No. 291,170, in which he describes the inconvenience of passing the conductors through long lengths of pipe, and obviates this alleged difficulty by placing two insulated wires in a metallic case.

Seventh. The patent granted in 1884, to Jonathan H. Vail, No. 308,713, shows two insulated wires twisted precisely as shown in the patent at bar, and inclosed in pipes of lead with safety catches interpolated in the circuits. In short, if for the lead pipe, which is a poor conductor, were substituted a pipe of insulating material, the Vail combination would be almost the exact counterpart of the combination of the claims.

Eighth. The record also shows that systems approximating the system of the patent were well known in underground wiring.

Enough has been said to demonstrate the proposition that this patent rests upon an exceedingly vague and shadowy foundation. What did these patentees do? Grant that they were the first to place the old twin wires into a tube made of insulating material, it certainly did not require invention to do this. One of the patentees, when asked whose idea it was to use this tubing, said: "We both recognized intuitively the necessity for such material if we were to evolve a perfected conduit system for electric wiring." In other words, the idea of using the old insulating pipe would come spontaneously to any skilled electrician. But, as before shown, they were not the first to use a nonconducting tube in this way.

I have examined the patent with care to discover what new idea it has contributed to the art, and am compelled to think that the art of electric lighting would have lost nothing tangible if the statements of the patent had never been made public. I cannot resist the conclusion that many of the marvelous attributes ascribed to the patent are afterthoughts, which find their origin largely in ardent and ingenious expert imagination. It may be doubted whether the patentees themselves were conscious, when they put the old wires in the old pipes, that they had made a discovery which cured all the defects of the past and was to lay a heavy tribute upon all electrical wiring in the future. What they did do seems most simple to the ordinary layman. Both were accomplished electricians. Mr. Greenfield had had large experience in wiring buildings. In 1883, he had wired the Mills building by drawing insulating wires through zinc tubes. Mr. Johnson had a cottage at Greenwich which he

wished to have wired. He consulted Mr. Greenfield on the subject, and the latter describes what occurred at the supreme moment when the invention had its birth:

"Mr. Johnson asked me if I couldn't wire that cottage in a way so that the wires could be got at and repaired, if necessary, without tearing up any of the building, and I told him, 'Yes;' I thought that I could put in a system of tubing which could be used for race ways, if properly constructed, making a continuous channel; and he said, 'Greenfield, go ahead and do it,' which I did."

Most assuredly he did it: What else could he do? He had done substantially the same thing before in the Mills building, and he utilized his knowledge to suit the changed condition precisely as any other skilled electrician would have done after he was told what was wanted. The attempt to magnify this apparently simple exploit into an invention of surpassing excellence can be accomplished only by the substitution of theories based upon the imagination for facts based upon the evidence.

If a construction broad enough to cover the defendant's structures is placed upon the claims, they must be held invalid. If limited to a complete system of pipes extending continuously through the building "from supply to consumption," as shown in Fig. 1 of the patent, the claims may be upheld. But the defendant does not employ such a system, and in no event is the third claim infringed for the reason that the defendant does not use a pair of wires twisted together.

It follows that the bill must be dismissed.

SHAW v. ANDREWS et al.

(Circuit Court, S. D. New York. July 10, 1894.)

1. **CONTRACTS—CONTEMPORANEOUS CONSTRUCTION BY PARTIES.**

Evidence of the opinion of the parties to a contract as to its meaning, not carried into effect by any act, does not show such a contemporaneous construction as should govern its interpretation.

2. **PATENTS—ASSIGNMENT FOR SHARE IN PROFITS OF ASSIGNEE.**

An agreement for assignment of a patent, including claims for infringement and royalties, provided for the collection of royalties and suing of infringers by the assignees, and that they should manage the patent as they might deem best for the interest of all parties; that the assignor should be paid one-fourth of the net proceeds of the business; and also fixed a basis for prices of royalties. *Held*, that the assignor was entitled to share in the profits of the assignees from their own use of the patent, as well as in the royalties therefor.

In Equity. This was a suit by Jehyleman Shaw against William D. Andrews and others for an accounting for a share of royalties and profits under an assignment of a patent.

Thomas M. Wyatt, for plaintiff.

William Man, for defendants.

WHEELER, District Judge. The defendants were the owners of the patent to Green for driven or tube wells. *Eames v. Andrews*, 122 U. S. 40, 7 Sup. Ct. 1073. The plaintiff was the owner of patent

No. 101,774, dated April 12, 1870, for an improvement on such wells by connecting several together. On August 16, 1881, they entered into a written agreement that the plaintiff should assign his patent, including all claims for infringement and royalties remaining unpaid, to the defendants, and that they should "proceed to demand royalties from parties infringing, and endeavor to secure recognition of the said letters patent, and so manage the same as they may deem best for the interest of all parties concerned, and to bring suit or suits in the United States courts against parties infringing, for the purpose of establishing and sustaining the validity of said letters patent, if it appears to them to be good policy so to do; * * * advance the necessary means for conducting the said business and prosecuting any suits they may so bring, assuming and paying all the costs and expenses, and looking to the proceeds of the business for their remuneration;" "that all costs, charges, and expenses of whatever nature or kind incurred for and in the prosecution of the business aforesaid shall be first paid out of the proceeds, after which," the plaintiff should be paid quarterly one-fourth of the net proceeds, and the remaining three-fourths should belong to the defendants; that the "general basis for prices of royalties shall be for first-class wells, of two inches internal diameter, twenty-five dollars per tube, with such discounts for wells of less capacity, or wells used for fire purposes alone, for condensing or other special purposes, or for inferior water, as may be considered just and proper by" the defendants; and that the defendants should make no charges for their personal services. The plaintiff accordingly assigned his patent to the defendants, who collected royalties from various sources, and themselves put in water systems of tube wells for the city of Brooklyn and other places, using the devices of the plaintiff's patent, for which they received large sums. They have accounted to the plaintiff for all the royalties collected of other persons according to the agreement, and have overpaid him what would be due for royalties at \$25 each on the tubes of these systems put in by them, but have not accounted for the profits, if any, arising to them from the use of the plaintiff's invention patented in the patent assigned to them in putting in these systems. This suit is brought for an account of the whole. None is necessary unless the plaintiff is entitled to share in those profits. All appear at first, and while the systems were being put in, to have referred to the plaintiff's right as being to a share in the royalty on these tubes, and not in these profits. But no agreement to so treat them appears to have been made. No change in the course of business is shown to have been made by the defendants because of this treatment of his right by the plaintiff. The defendants did not make quarterly payments on that nor any basis according to the contract, and no settlement between the parties on that basis has been effected. This is relied upon in behalf of the defendants as such a contemporaneous construction of the contract in this respect that it should govern. But this view of the contract does not seem to have been carried far enough to amount to any practical construction. It remained in opinion, instead of being carried into effect by act.

The defendants insist, also, that they were, by the terms of the contract itself, to deal only with infringements and royalties, and that the plaintiff had no interest in the patent left to him beyond his one-fourth share in what might be realized from royalties, as such, and from infringements. The collection of royalties and suing of infringers were alone expressly provided for as things to be done by the defendants; but, in addition, they were generally to "so manage the same"—that is, the patent—as they might deem best for the interest of all. These water systems could not be put in but under, or by infringement of, this patent. As they held it, they could not be infringers of it, and putting in the systems by them while they so held it must have been under it, and a part of their management of it. This seems to be a part "of the business aforesaid," one-fourth of the net proceeds of which was to be paid to the plaintiff.

Let a decree be entered for an account.

NEW DEPARTURE BELL CO. v. HARDWARE SPECIALTY CO.

(Circuit Court, D. New Jersey. June 5, 1894.)

PATENTS—CROSS BILL IN SUIT FOR INFRINGEMENT.

In a suit to restrain infringement of certain patents, a cross bill alleged that defendant owned prior patents, which complainant infringed, and prayed an injunction and account. It also alleged that the patents of complainant and defendant were interfering patents, and prayed that complainant's patents be declared void; and it prayed that damages for the alleged infringements be set off. *Held*, that the cross bill must be stricken out, on motion, as not germane to the subject of the original bill.

This was a suit by the New Departure Bell Company against the Hardware Specialty Company for infringement of patents. Defendant answered the bill, and also filed a cross bill. Complainant moved to strike out the cross bill.

J. J. Jennings, for the motion.

J. C. Clayton, opposed.

GREEN, District Judge. The original bill of complaint was filed to enjoin the infringement by the defendant of letters patent No. 456,056, dated July 14, 1891, and letters patent No. 471,982, dated March 29, 1892. The defendant has duly answered the bill of complaint, setting up various defenses to the suit; and it has also filed a cross bill, in which it is alleged that it also owns certain patents, which antedate the patents of the complainant, and which the complainant is guilty of infringing, and prays an injunction and account. It also alleges that the patents of the complainant and of itself are interfering patents, and prays, under the statute in such case made and provided, that there may be a decree declaring the patents of the complainant void for the whole territory of the United States, and, finally, that whatever damages it may receive against the complainant because of its infringement of the last-named patents may be set off against any damages which the complainant may recover against it for its alleged infringement. The cross bill also

prays that the complainant may be enjoined from prosecuting other actions against customers of the defendant for alleged infringement.

It is apparent, upon this statement of the allegations of the cross bill, and the scope of the relief sought, that it cannot be maintained as a cross bill. A cross bill must be in all respects germane to the subject-matter of the original bill. It is a bill brought by the defendant against the complainant touching and concerning only and exactly the same subject-matter with which the original bill concerns itself, and in which the defendant seeks affirmative relief which cannot be obtained by answer. So strictly has this restriction been applied that it is customary to refuse a decree upon new and distinct matters introduced by a cross bill which were not embraced in the original bill of complaint. Nor is this difficulty avoided by the contention that the allegation of interfering patents is based upon matters germane to the subject-matter of the original bill. It is not necessary to discuss the question whether they are or not. It is enough to say that the statute relied upon contemplates only such a suit in equity as presents but a single issue,—that of priority between the alleged interfering patents. This matter is *res adjudicata* in this circuit. *Lockwood v. Cleaveland*, 6 Fed. 721.

The motion to strike out the cross bill is granted, without prejudice to the right of the defendant to raise by original bill the issues stated in cross bill.

GEORGE FROST CO. et al. v. SILVERMANN et al.

(Circuit Court, W. D. Pennsylvania. May 31, 1894.)

No. 25.

1. PATENTS—INFRINGEMENT—ADJUSTABLE GARTERS.

A patent for a stocking supporter consisting of a strip of elastic webbing extending partially around the limb, and having its two ends connected by a loop of cord, which renders freely through its connections with the ends of the webbing, and to which is attached a clasp to hold the garment to be supported, is infringed by a device which differs only in the substitution of a chain loop for the loop of cord, and in allowing the clasp to render freely on the loop, instead of being rigidly fixed thereto, as in the patent.

2. SAME.

The Brown patent, No. 210,666, for an improvement in stocking supporters, construed, and held valid and infringed.

This was a suit by the George Frost Company and Mary G. Brown against William Silvermann and others for infringement of patents. Complainants moved for a preliminary injunction.

Frederick P. Fish, for complainants.

H. A. Seymour, for defendants.

ACHESON, Circuit Judge. The plaintiffs sue for infringement of letters patent No. 210,666, dated December 10, 1878, granted to F. Barton Brown, for an improvement in stocking supporters. The patent shows and describes a garter consisting of a strip of elastic webbing extending partially around the limb, and having its two ends connected by a loop of cord which renders freely through its

connections with the ends of the webbing, and attached to the loop is a clasp to hold the garment to be supported; the loop forming a connection between the clasp and the band of webbing, and a rendering, self-adjusting connection between the ends of the webbing. The garter thus easily and automatically accommodates itself to varying lengths of stockings, and to differences in the size and length of limbs of the wearers, and is free from any slip-noose action, to impede the circulation or produce discomfort. In the specification the patentee states:

"The gist of my invention consists in the use of the cord, C, as a means for connecting together the two ends of the webbing, A, and also for connecting the clasp, E (or other device for holding the stocking or sleeve), with the webbing, A; the cord, C, constituting a flexible, rendering connection between the ends of the webbing, A."

The claim is as follows:

"The webbing, A, and clasp, E, in combination with the cord, C; the cord, C, adapted, not only to connect together the ends of the webbing, A, but also to connect the clasp, E, with the webbing, A, all as described."

None of the earlier patents or exhibits illustrative of the prior art shows the self-adjusting qualities of the garter of the patent in suit. In construction and principle of operation, the complainants' garter was new. It has met with extraordinary public favor. The complainants' annual sales of the article probably exceed the sales by all other manufacturers of all other kinds of garters put together. The proof of public acquiescence in the validity of the patent is unusually strong, and furnishes a firm basis for a preliminary injunction. *Blount v. Societe Anonyme du Filtre*, 3 C. C. A. 455, 53 Fed. 98, 102. There is no serious dispute as to the facts of the case. It only remains, then, to inquire whether the defendants infringe.

In form of construction and mode of operation, the defendants' garter is identical with the garter shown and described in the patent in suit. We find in the two garters substantially the same elements, combined in the like manner, and producing the same result. The only differences are that, instead of a fibrous cord for connecting the two ends of the webbing, the defendants have substituted a metallic chain, composed of bead-like links flexibly connected with one another, and their clasp is free to render upon this loop of chain, whereas in the patent drawing the clasp seems to be rigidly fixed to the ends of the cord. The latter feature, however, does not enter into the claim of the patent, and it is wholly immaterial to the desired result whether the clasp is rigidly attached to the loop, or renders thereon. It is very doubtful whether this formal variation in the manner of attaching the clasp to the loop is any improvement, but, even if it be so, the defendants do not thereby avoid infringement. Now, cords and chains, as appears from the proofs (and as, indeed, is commonly known), are interchangeable mechanical equivalents for a great variety of purposes. The change from a fibrous cord to a flexible chain affects neither the form of construction, the mode of operation, nor the result. The chain loop performs the exact function that the cord loop does, and in precisely the same way. This is, I think, a plain case of equiv-

alency. The gist of the invention, as defined in the specification of the patent, is found in the defendants' garter.

In *Winans v. Denmead*, 15 How. 330, 342, the supreme court declared:

"It is generally true, when a patentee describes a machine, and then claims it as described, that he is understood to intend to claim, and does by law actually cover, not only the precise forms he has described, but all other forms which embody his invention; it being a familiar rule that to copy the principle or mode of operation described is an infringement, although such copy should be totally unlike the original, in form or proportions."

In the late case of *Hoyt v. Horne*, 145 U. S. 302, 308, 12 Sup. Ct. 922, this doctrine was so applied as to condemn, as an infringement, a machine which departed from the letter of the claim in substituting a vertical for a horizontal device. In *Machine Co. v. Murphy*, 97 U. S. 120, 125, it is said that the—

"Authorities concur that the substantial equivalent of a thing, in the sense of the patent law, is the same as the thing itself; so that if two devices do the same work in substantially the same way, and accomplish substantially the same result, they are the same, even though they differ in name, form, or shape."

These authorities quite justify our conclusion that the defendants' substitution of a chain for the cord does not take their garter out of the scope of the Brown patent.

A preliminary injunction will be allowed.

ECLIPSE MANUF'G CO. v. HOLLAND.

(Circuit Court, N. D. New York. July 20, 1894.)

1. DESIGN PATENTS—LIMITATION BY PRIOR ART.

After one has painted a design, another cannot have a valid patent for merely embossing the same design upon a similar object.

2. SAME—INFRINGEMENT.

The Prentice design patent, No. 17,270, for a design for radiators, if valid at all, in view of prior designs, must be limited to the precise drawing shown, and, being so limited, is not infringed by a radiator differing in size, shape, and depth, so that an ordinary purchaser, looking for the specific design of the patent, could hardly be deceived.

This was a suit by the Eclipse Manufacturing Company against Holland for infringement of a design patent. On final hearing.

P. C. Dyrenforth, for complainant.

E. S. Jenney and George H. Lothrop, for defendant.

COXE, District Judge. This is an equity action based upon letters patent No. 17,270, granted to Leon H. Prentice April 19, 1887, for a design for a radiator. The patent has been three times before the courts. On demurrer and final hearing in the northern district of Illinois and on motion for an injunction in the eastern district of Michigan. In the Illinois case the material portions of the patent, and of the patent law, are set out in full and facts are stated which bear more or less directly upon the present contro-

versy. All this it will be unnecessary to repeat. When the patent was first before the court the learned judge in overruling the demurrer said:

"The patent now under consideration is for a design by which the surface of a radiator is to be divided by a horizontal line into two rectangular spaces, and one of them—that is, either the upper or lower of these spaces—ornamented with figures, which may be produced by embossing or depressing upon the surface, or perhaps by painting. This certainly strikes me at first impression as a very close, if not doubtful, patent. I cannot, however, say from my own knowledge, or from any familiarity with radiators in common use, that it is not new. * * * As to the point that this patent is void because it does not describe the kind of figures, I can only say that I, at present, am of opinion that if this patentee was the first to invent or produce an ornamental radiator, that is, the first to design a radiator with an upper or lower rectangular space ornamented by figures of any kind upon it, then he may be entitled to a patent for such a design. It may not have required a very high order of genius or inventive talent to have conceived and produced such a design, or if it was new, if it originated with him, then I cannot on this demurrer say his patent is invalid. I have nothing at present before me from which I can say that it did not require study, thought and inventive talent to produce this design." *Eclipse Manuf'g Co. v. Adkins*, 36 Fed. 554.

When the cause came on for final hearing it was, so far as the prior art was concerned, in the same condition as on demurrer. No evidence, certainly no legal evidence, was introduced which in any way limited the field of invention. So far as appeared Prentice was the first to ornament a radiator as described. No one before him had done anything which affected his design in the remotest degree. Naturally, therefore, the patent was sustained and a broad construction was placed upon it. The court says:

"It will be seen that this patent is not for any specific form of ornamentation. It does not describe what the ornamentation shall consist of further than to say in the specifications that the patentee prefers 'embossed or depressed ornamentation,' but what kind of ornamentation it shall be, whether a Greek pattern of lines, or a leaf, or a vine, or scroll, or any other embossed or sunken figures, is not indicated. The sole scope of the patent is the idea of ornamenting the upper or lower portion of the pipes of a radiator to a uniform height, so that it will present ornamented and plain parallelograms, in contrast. As to the claim that Prentice was not the first to conceive the idea of thus ornamenting a radiator, there is no proof on the part of the defendant which shows that any person had preceded him in this field. * * * It will be noticed that Mr. Prentice does not claim to have been the inventor of the radiator or the radiator pipes. He simply claims his patent for the idea of ornamenting a portion of the pipes, instead of leaving them entirely with plain surfaces, and for putting this ornamentation of uniform height on each pipe, so that the radiator would show an ornamented parallelogram and a plain parallelogram, in contrast. * * * I am of the opinion that the design covered by this patent comes within the first clause of section 4929, Rev. St., as a 'manufacture,' rather than within the third clause as an 'original impression, ornament,' etc., as is insisted by the complainant's counsel. * * * I am of opinion that the patent should be upheld, and there can be no doubt, from an inspection of the defendants' radiators, which are introduced in evidence, that the defendants infringe the patent by ornamenting their radiators for a uniform distance from the top downward, so as to show an ornamented rectangular parallelogram, and an unornamented rectangular parallelogram, one above the other." 44 Fed. 280.

Were the case here on the same proof I should not hesitate to follow this decision, first, because it is entitled to great weight as an

authority; and, second, because I think it was right. A different conclusion would have been at variance with the proofs then before the court. When the motion for a preliminary injunction came on for hearing in the Michigan district the defendant presented several prior structures which, concededly, limit the theater of invention and render a broad construction of the patent untenable. The proof now is substantially similar to that presented in the Michigan cause. The anticipating devices relied on are the same. That case comes much nearer, therefore, to being a precedent than the Illinois case. The decision refusing the injunction was delivered orally and has not been reported. There is some disagreement between counsel as to the ground upon which the court based the decision. There is no question, however, that the court expressed grave doubt as to the validity of the patent. There is no doubt that the motion was denied.

It now appears that the form of the radiator was old, the same being shown in the patent to Rodier and in the Billings and Thompson exhibits. It was old at the date of the patent to cast radiator pipes with embossed ornamentation thereon. The Adams radiator (1880) is composed of three sections of uniform height with embossed figures on the upper field and with the lower field, comparatively, plain. Shackleton (1881) shows the idea of ornamenting an upper triangular section of a radiator. The Billings radiator (1884) is divided by paint into rectangular sections, the lower section being ornamented at its upper edge. The Thompson radiator (1886) shows a lower rectangle and two triangular sections above it. These are also made by painting. The general conformation of both the Billings and Thompson radiators is almost precisely similar to the Prentice radiator. The patent to Arci and Chapman (1884) shows a steam radiator made like a pillar, the shaft being plain and the capital ornamented. When the pipes are assembled in the radiator there must be an ornamented field above a comparatively plain field. All of these present clearly the contrast between upper and lower rectangles. Thompson and Billings show this contrast by painting the sections in different colors, Adams, Arci and Shackleton show it chiefly by embossed work, or similar ornamentation, cast into the iron. The foregoing are the best references offered by the defendant. As I understand the complainant's brief and the position taken by its expert it is admitted that if the construction placed upon the patent in the Adkins Case is adhered to the patent is void in view of what now appears of the prior art. But it is contended that the patent may be upheld if confined to the precise design shown in the drawing. It is argued that it should be held to cover a loop radiator, "having ornamented figures formed in the iron extending over the crowns and down both ways for a uniform distance, leaving a plain field below." Assuming such a construction admissible, it remains to be seen whether the patent can be upheld even if so limited. The Billings radiator unquestionably presents two contrasting rectangular surfaces. It is true that neither of these surfaces is embossed. The contrast is presented by painting and not embossing. But this conception

of contrasting two rectangles is plainly the underlying idea of the Prentice patent. The court was clearly correct in holding, in the Adkins Case, that "the scope of the patent is the idea of ornamenting the upper or lower portion of the pipes of a radiator to a uniform height, so that it will present ornamented and plain parallelograms in contrast." The Billings radiator certainly does this. It is thus described by the defendant's expert:

"The nearest approach to a radiator answering each of those requirements is the Billings radiator, which is made up of the same sort of loops, arranged the same way, and which has its end loops ornamented alike on the front and rear member of each, and in which the top ornamentation extends on the end loops down both sides for a uniform distance, with plain fields below, but the top ornamentation is not figured ornamentation in relief."

Can there be any doubt that the Billings radiator contains the fundamental idea of the Prentice patent? The question then, bluntly stated, is this: After one person has painted a design can another have a patent who simply embosses the old design upon a similar object? Manifestly not. There can be no doubt, after reading the patent, that Prentice believed that his invention consisted chiefly in this feature of contrasting rectangles, the one ornamented, the other plain. It is evident that he regarded the transposition of the rectangles and the character and form of the ornamentation as mere incidents which would naturally occur to any one skilled in the art after the supposed new departure in the decoration of radiators had been disclosed by him. In other words, he would have maintained, had the Billings radiator been made after his own, that it infringed his patent. He would have insisted that as he had pointed out the principal idea underlying the design it required no inventive talent to paint on the lower section of the radiator what he had shown as embossed on the upper section. If the Prentice radiator would suggest the Billings radiator why is not the converse true? How can it be said that it required an exercise of the inventive faculty to emboss the patterns on the Billings radiator as they now appear, or to transpose the lower pattern to the crown of the radiator, emboss it there, and leave the lower section plain? Would not the substitution of embossing for painting, and vice versa, occur to any one interested in the art? Would not an ordinary decorator, having seen the Billings radiator, together with the exhibits showing embossed work in connection with this art, know enough to produce the Prentice radiator?

In *Smith v. Saddle Co.*, 148 U. S. 674, 13 Sup. Ct. 768, the court, at page 679, 148 U. S., and page 768, 13 Sup. Ct., says:

"The exercise of the inventive or origination faculty is required, and a person cannot be permitted to select an existing form and simply put it to a new use any more than he can be permitted to take a patent for a mere double use of a machine. If, however, the selection and adaptation of an existing form is more than the exercise of the imitative faculty and the result is in effect a new creation the design may be patentable."

It is plain that the patent if it can be upheld must be confined to the design precisely as it is shown in the drawing, and so con-

strued the defendant does not infringe. His radiator differs in size, shape and depth. It is more open, it has "a large pipe-like effect at the top" and it is round at the bottom instead of being "sawed off" like the Prentice radiator. The shape of the loops is different, the embossed pattern is different and the bottom, instead of being left plain is ornamented like the top. Instead of two contrasting fields there are three—an upper and a lower ornamented section and a plain section between them. An ordinary purchaser, looking for the specific design of the Prentice patent, could hardly be deceived.

The bill is dismissed.

THE NORMANNIA.

BEERS v. HAMBURG-AMERICAN PACKET CO.¹

(District Court, S. D. New York. June 21, 1894.)

1. CARRIERS OF PASSENGERS—CONTRACT OF CARRIAGE—STEERAGE PASSENGERS.
The mere taking of steerage passengers from an infected port, on a regular passenger steamship accustomed to carry steerage, is no breach of the ship's contract of carriage with a cabin passenger, or a breach of any duty that the ship owes to him.
2. SAME—INFORMATION RESPECTING VOYAGE—MISREPRESENTATIONS.
While a shipowner may not be bound to give information in respect to a future voyage to one who has already contracted for a passage, yet, if he does give information, knowing that the passenger will act thereon, he is bound to give it honestly, and without deceit.
3. SAME—MISREPRESENTATIONS—ACTION BASED ON—ADMIRALTY—JURISDICTION.
An action based upon false representations in regard to a voyage is within the jurisdiction of the admiralty, though such representations were made on land, before the voyage was begun, and after the contract of carriage was entered into, when they were made with reference to the contract of carriage, and for the purpose of inducing the shipper to carry out his contract, and when the damages alleged to have arisen from them occurred upon the sea, in the course of maritime transportation. Whether such false representation would sustain a suit in rem, quære.
4. SAME—FALSE REPRESENTATIONS BY AGENT—SCOPE OF EMPLOYMENT—LIABILITY OF PRINCIPAL—PUNITIVE DAMAGES—ACTUAL DAMAGES.
Libelant, who had purchased a passage on the steamship *Normannia*, a Hamburg steamship, but who, owing to the subsequent outbreak of cholera at Hamburg, had determined to forfeit his passage in case the ship was to carry steerage passengers, made inquiries of the London agents of the ship as to whether the *Normannia* would carry steerage on the voyage in question. The London agents promised to inquire of the home office of the company at Hamburg, but did not do so; but, on receipt of a telegram from the home office, peculiarly worded, and ambiguous, informed libelant that no steerage passengers would be carried. The court found, on the evidence, that the defendant company had no intention to deceive their agents or others by this telegram, but that the agents made an unwarranted use of it, and in other respects did not deal frankly or honestly with libelant, but intentionally suppressed certain facts in regard to the steerage passengers, of which the *Normannia* in fact carried 500. Cholera broke out among them and among the crew during the voyage, with the result that the vessel was quarantined on arrival at New York, and libelant was put to inconvenience and suffering, to recover for which this suit was brought. *Held*, that the intent of the company not to deceive freed it from liability for punitive damages, which libelant claimed in addition to his actual damages,

¹ Reported by E. G. Benedict, Esq., of the New York bar.

but that the company was responsible for the false representations of its agents, given in the line of their employment; and, as these representations were made to libelant, an intending passenger, in relation to a contemplated voyage, and were within the scope of the agents' authority, their deceit rendered the company liable for libelant's actual damages.

5. SAME—TORT—DAMAGES—PROXIMATE—CONNECTION—PRESENCE OF STEERAGE PASSENGERS.

The *Normannia*, as a vessel from an infected port, and as having cholera among her crew, would have been quarantined the same length of time, whether steerage passengers were aboard or not; and hence the respondent urged that libelant had suffered no damage from any misrepresentations. Libelant claimed that, but for the deception, he would not have been on board at all, and hence would have escaped the quarantining and its consequences. *Held* that, while to recover damages for a tort they must be proximately and naturally connected with and flow from it, yet, as cholera did in fact appear among the steerage passengers, and the detention of the ship was due to that fact at least as much as to cholera among the crew, the libelant's damage did happen in part from the subject-matter of the deceit, which was sufficient to render the respondent liable.

6. SAME—REMOTE DAMAGES—LIABILITY.

After the *Normannia* had been quarantined, the health authorities of the state removed the cabin passengers to another steamer, and afterwards to a temporary quarantine station, in the expectation of improving their condition. In both of these places the passengers suffered the greatest discomfort. *Held*, that such damage could not in this case be charged against the respondent, because the removal of the passengers was not the *Normannia's* act, and also because the incidents which followed the removal were not produced by the steerage passengers, nor were they the natural results of the removal, but arose from wholly independent and fortuitous causes.

7. SAME—DAMAGES.

On all the facts of this case, *held*, that libelant should recover against respondent as his actual damages the sum of \$500, from which should be deducted \$100 as the price of his passage ticket, which would have been lost had the libelant not returned on the *Normannia*.

This was a libel by Alfred B. Beers against the steamship *Normannia*, her engines, etc., and the Hamburg-American Packet Company, owner.

Benedict & Benedict, for libelant.

Wheeler, Cortis & Godkin, for defendant.

BROWN, District Judge. The above libel was filed against the steamship *Normannia* in rem, and against the Hamburg-American Packet Company, her owner, in personam. The libel alleges false representations made to the libelant by the company's agents in London just prior to his embarkation on the *Normannia* on August 27, 1892, and at the time of the outbreak of cholera at Hamburg; that the libelant, who had previously bought a first-cabin ticket for passage by the *Normannia* from Southampton to New York, but who desired to surrender it in case she carried steerage passengers, through fear of contagion and quarantine, was induced to take passage on the *Normannia* at Southampton on August 27th, on the agents' assurance that no steerage passengers were on board; whereas in fact she had 500 steerage passengers, who had embarked at Hamburg on the 25th; that in consequence of the presence of the steerage passengers, and of the outbreak of cholera among them,

the libellant was detained at quarantine 13 days, and subjected to much suffering, sickness, and subsequent loss of time, for which suitable damages are claimed.

The libel also alleges various breaches of duty in the performance of the contract of carriage, viz., in receiving steerage passengers on board at Hamburg; in not properly inspecting and purifying them; in not providing sufficient medical attendance; in not properly dealing with those attacked with cholera on the voyage; in not taking proper precautions against the spread of the disease on board, and in not properly providing and caring for the condition and treatment of passengers who were not attacked, after the arrival of the ship in New York.

1. For faults in the execution of the contract of carriage, and the damages accruing therefrom, a privilege upon the ship arises by the general maritime law; and such a privilege is also specially given by the German Code, art. 452, § 2; *Id.* art. 757, § 9. But none of the alleged breaches of contract are sustained by the evidence, except the bare fact that the *Normannia* took steerage passengers; and the circumstances show manifestly that this was neither a breach of the libellant's contract of carriage, nor a breach of any duty that the *Normannia* owed to him. For it had long been the custom of the *Normannia* and other fast steamers of the line, to carry steerage passengers, as the libellant knew, or is presumed to have known. The libellant's contract of carriage had been made in the ordinary course of business, by the purchase of his ticket some time before the outbreak of cholera at Hamburg. When the ticket was purchased there were no representations, and no expectation, that steerage passengers would be excluded from the ship. Contracts for the carriage of steerage passengers on the *Normannia* had been previously made as usual; they had come to Hamburg accordingly; and their legal right to transportation was precisely the same as that of the libellant. It was doubtless the duty of the owners, upon the outbreak of cholera at the port of departure, to take all known precautionary measures for the purification of the ship, and to prevent from embarking all persons, whether of the crew, steerage, or other passengers, who, on examination, might show reasonable probability of infecting the ship. Measures to this end were in fact taken by the owners, and there is no evidence of remissness in this particular.

On arrival at New York, the officers of the ship and the agents of the company seem to have been most energetic in their efforts, and liberal in their expenditures, for the health and comfort of the passengers, and the protection of the ship, and her company, against infection. Nearly \$37,000 extra expenses were incurred by the company in this work.

2. The principal ground of the libel, however, is the charge of falsely representing that there were no steerage passengers on board the *Normannia*, whereby the libellant was induced to take passage on that ship, to his alleged injury and damage, as above stated. The libellant had, no doubt, a right to decline to take passage on the *Normannia*, and to forfeit his passage money, if he

chose to do so, for any reason, whether good or bad; and in a matter likely to affect his health or comfort, he had certainly a moral claim on the company and its agents for any reasonable information that might aid him in forming a judgment whether to forfeit his contract and refuse to go on the *Normannia* or not. It may be that the libelant had no legal right to claim information, and that the company was under no legal obligation to afford him information, for the purpose of enabling him to avoid his contract. If the company, or its agents, had, on inquiry, refused any such information, I do not know of any mode in which they could have been legally forced to give it, or to pay damages for withholding it; but if they chose to answer such inquiries, knowing that the libelant intended to act upon their information, they were bound, by the obligations of good faith, to answer honestly, and without deceit; just as a person inquired of as to the personal responsibility of another, is bound to answer in good faith, and without deceit, if he answers at all. The gist of an action for false representations is deceit; to sustain it, a fraudulent intent, or its legal equivalent, must appear. *Marsh v. Falker*, 40 N. Y. 562; *Wakeman v. Dalley*, 51 N. Y. 27, 35; *Daly v. Wise*, 132 N. Y. 306, 312, 30 N. E. 837; *Stewart v. Rancho Co.*, 128 U. S. 383, 9 Sup. Ct. 101; *Iron Co. v. Bamford*, 150 U. S. 665, 673, 14 Sup. Ct. 219. And the same rule is applicable to this branch of the libel.

3. It is urged that the alleged false representations, being no part of the contract of carriage, but subsequent to it, and made on land, are not the subject of an action in admiralty, because not maritime. I cannot sustain this objection; for the reason, that the alleged representations were not independent of the maritime contract of carriage, but were made with evident reference to it, and made for the purpose of inducing the libelant to carry out that contract; and for the reason also that the damages which are alleged to have arisen from the false representations, arose upon the sea, in the course of maritime transportation. Though the origin of the tort, i. e., the false representations, began upon land, its consummation, effect, and damage, arose upon the water; and this locus of the damage is sufficient to give the admiralty jurisdiction. *The Plymouth*, 3 Wall. 20; *Leonard v. Decker*, 22 Fed. 741, and cases there cited.

It may be doubtful, considering the decision of Mr. Justice Nelson in the case of *The Eli Whitney*, 1 Blatchf. 360, Fed. Cas. No. 4,345 (see, also, *The Baracoa*, 44 Fed. 102; *The Electron*, 48 Fed. 689), whether such false representations would sustain an action in rem; but this is now immaterial, since the owner being sued in personam has appeared in the action, and on the attachment of the vessel, has procured her release on stipulation; so that the cause is now before the court as a suit in personam, for an alleged maritime tort; and as such it is maintainable if the averments of the libel as to the wrong, and as to the damage, are sustained by the evidence.

The steamship arrived in this port on the 3d of September. Up to that time but five deaths had occurred on the ship from cholera, viz., one, a second cabin passenger, 57 years of age, and four children

in the steerage, of whom three belonged to one family. Four other persons on board were also sick with cholera on arrival, September 3d, viz., two firemen, and two children in the steerage; of these one fireman and one child died on the following day, September 4th. Heinrich Lammers, a nurse in the steerage, 47 years of age, and Otto Engel, a stoker, were also attacked with cholera on September 4th, both of whom died that day, or the next. The entire number of cases of cholera on board during the voyage, and after arrival, were, therefore, eleven; three of them firemen, one a second-cabin passenger, and six in the steerage; of the latter all were children save one.

On account of these various cases of cholera, and because the vessel came from an infected port, she was detained at quarantine, by the order of Dr. Jenkins, the health officer. On Sunday, September 4th, the day after arrival, all the steerage passengers were removed to Swinbourn Island. Their quarters on the ship were at once disinfected. Provision was made for removing the crew in two squads as fast as possible, and for disinfecting the forecabin. No case of cholera having appeared among the first-cabin passengers, and only one among the second-cabin passengers; and no quarantine accommodations on shore being ready for so large a number of first and second cabin passengers (about 500), these passengers remained on board the *Normannia* until September 10th, when they were transferred to the steamer *Stonington*, in the expectation of greater security from contagion; but the conveniences on the *Stonington* being inadequate, the passengers were the next day again transferred to the *Cepheus*, for the purpose of being taken to Fire Island, a temporary quarantine station hastily procured, some 30 miles distant from Sandy Hook. The *Cepheus* upon her first trip thither was unable to effect a landing there, owing to the darkness and heavy weather, and the passengers were returned the same night to the *Stonington*. The next day another attempt was made by the *Cepheus* to land the passengers at Fire Island; but so great was the prevailing excitement, that they were met by an angry and threatening mob, who prevented their landing until the following day, the 13th September, after which the passengers were comfortably provided for until the 16th, when they were again brought to this port and discharged from quarantine, after an entire detention of 13 days.

The condition of the passengers while upon the *Cepheus* was wretched in the extreme. The libellant claims that through the mental and physical suffering arising from the detention in quarantine, and from the apprehension and excitement caused by the exposure of the passengers to cholera while upon the *Normannia*, and his sufferings on the *Stonington* and the *Cepheus*, he was rendered ill, and was incapacitated from his usual employment for a month. He claims damages for this actual loss of time, and such additional damages for the deceit, and the mental suffering, as may be properly awarded.

The evidence shows that the libellant was traveling in company with Mr. Reid and Mr. Hawley, and that they had purchased tickets for their passage upon the *Normannia* some time previous. On

Wednesday, the 24th of August, being in London, and hearing of the outbreak of cholera at Hamburg, they determined not to return by the *Normannia*, in case she took steerage passengers, as was her custom. They accordingly went to the branch office of Smith, Sundius & Co., who were the London agents of the steamship company, in Cockspur street, made known their determination, and asked to be informed whether the *Normannia* would take steerage passengers; and if so, whether their passage money would be returned. The agent replied that he did not know, as to either point, but promised to ascertain by telegraph, and directed the inquirants to call the following day. Several times on the following day (Thursday) the same inquiries were renewed at the Cockspur street office, and the same answer returned. On Friday morning the inquiries were again renewed, and assurances were then given by the agent that an answer would be obtained and sent to their hotel during the afternoon. At about 4 or 5 o'clock that afternoon an answer in writing was received at the hotel, addressed to the three passengers. This letter has not been preserved; but its substance is testified to most specifically by Mr. Reid, who says that the dispatch was on two sheets of paper of continuous reading matter, covering three points: First, that it was the *Normannia* that would sail from Hamburg; second, "no steeragers carried by our line;" and third, "no refund of passage money," with something about "fast steamers plying to Southampton." Mr. Berting, the agent in charge of the Cockspur street office, who had had the conversation with these passengers, testifies that this despatch was part of a telegram received from the Hamburg office by Smith, Sundius & Co. at 1:57 p. m. of Friday, the 26th, at their main office in Leadenhall street, London, and thence transmitted to him by telephone. This telegram was as follows, the words in brackets translating the cipher:

(A) "Smith, Sundius & Co.: Nigger stagnant [*Normannia* 27 August, the following are the numbers vacant]: Gents berths 1, 21, 3 in 4 persons room 62 marks 400 one 85 second class full; instruct Beebe calling and other inquirants that refund of passage does not take place measures to secure sanitary safety of cabin passengers rigorously taken no steeragers allowed by our line fast steamers only plying Southampton and New York Nigger [*Normannia* takes] no passengers [to] Southampton."

The libellant and his friends relying upon the letter sent to them by Mr. Berting as an assurance that there were no steerage passengers on the *Normannia*, took the steamboat train at 9 o'clock the following morning from London to Southampton, went thence by steam tender some seven or eight miles to the *Normannia*, and arrived on board at about 1 o'clock p. m.; they did not learn that any steerage passengers were on board until some 15 to 20 minutes after the tender had returned.

For the libellant it is contended that the company's telegram above quoted, and the agent's letter based upon it, were not merely untrue, but that they were intentionally misleading and fraudulent, so as to subject the defendant company to punitive damages. As bearing upon that issue, other testimony has been received of an-

swers made to similar inquiries by other passengers at about the same time, both in London and in Southampton; that of Mr. Fisher, Mr. Taylor, and Senator McPherson, being the most important. Mr. Fisher's inquiries were made at the agents' main office in Leadenhall street; Mr. Taylor's and Senator McPherson's at the agents' branch office at Southampton, which was in daily communication by telegraph with the London office. Upon commissions to take the depositions of witnesses in London and Hamburg, all the letters, correspondence and telegrams between the parties concerning the matter have been called for; and, according to the testimony, all have been produced, except the inquiry made by Beebe, which could not be found. From this testimony it appears that Beebe was the only passenger who telegraphed from London directly to the office of the company at Hamburg; and his inquiry was whether the Normannia would carry steerage passengers, and if so, he desired the return of his passage money.

4. From a careful collation of all the testimony, I am satisfied that in sending the above telegram to the London office, there was no intention on the part of the company at Hamburg, or any of its officers or servants in the Hamburg office, to deceive, or to mislead, either their London agents, or any passengers who might make inquiries of them in regard to steerage passengers on the Normannia, or desire a refund of passage money. The telegram, it must be borne in mind, was not sent in answer to any previous inquiry made by the London agents; for when it was sent no such inquiry from them had been received. It was sent at about half past 11 a. m. on the 26th; and the Normannia had already left Cuxhaven the day before, with 500 steerage passengers on board. A few hours afterwards, viz., at 3 p. m. of the 26th, in answer to the following inquiry from the Southampton office of Smith, Sundius & Co.:

(B) "Will the Normannia have steeragers aboard?" the company's reply was immediately sent as follows:

(C) "Normannia has steeragers aboard, but has bill of health."

This was received at the Southampton office on Friday afternoon at about half past 5 o'clock.

The only telegram sent by the London agents at all on this subject, was one sent from the Leadenhall street office at about half past 11 on the 26th, by the superintendent, Sisley, which was received at the Hamburg office at 2 minutes past 2, and was as follows:

(D) "Nigger [Normannia] Mr. Fisher cabin 8, attorney World's Fair, having important business in New York fearing detention quarantine, asks if you will exceptionally refund passage, or how much enable him to proceed Umbria to-morrow; if you wire that no steerage on board and no fear from crew, still hope to induce him to proceed Normannia. Sundius."

—To which the company at once sent the following answer, received at London at 5:25 p. m.:

(E) "You may refund Fisher passage amount in case you can sell cabin 8; otherwise forfeited."

This telegram (E), considering the language of the inquiry (D), and the known habit of the Normannia to carry steerage passengers,

was plainly equivalent to a statement that the Normannia had steerage passengers on board; and it could not possibly be otherwise interpreted; for if she had no steerage aboard, the answer could not have omitted to say so, instead of saying that the passage money must be forfeited. The three telegrams (A, C, E) were all sent by the same man in the Hamburg office; and if he had intended by the first telegram (A) to mislead the London agents, or any inquiring passengers in London or Southampton, for the purpose of inducing them to take passage on the Normannia, under the false impression that no steerage passengers were on board, it is not conceivable that he should have immediately sent from Hamburg either of these answering telegrams (C and E) as soon as the inquiries were received; had there been any such fraudulent purpose, he would have delayed answering, or answered evasively, or not at all. The explanation of the first telegram (A) sufficiently appears, and is briefly as follows:

On the 25th, when the threatening character of the cholera epidemic first became known in Hamburg, the directors of the steamship line held a meeting there, and resolved to take no more steerage passengers for the present, but to run their fast steamers between New York and Southampton only. This had reference, however, to the vessels sailing after the Normannia, beginning with the Columbia; for at that very time the Normannia's 500 steerage passengers were already embarking, to be taken 30 miles below to Cuxhaven, where the Normannia then lay; and on the same day the Normannia dropped 30 miles still further down the river with her steerage passengers on board. After the meeting of the directors on the 25th, this resolution was telegraphed on the same day to the Associated Press in London for publication, stating that this service would commence with the Columbia; and a letter fully explaining this was on the same day written and forwarded to Smith, Sundius & Co., both at Southampton and at London. This letter would not be received in London, however, until the 27th. The Normannia sailed on the following day, the 26th, at about noon, from her last port, 60 miles below Hamburg; the last railroad train to reach the steamer left Hamburg at about 7 a. m.

At about 11 o'clock of the 26th, Mr. Fincke, who kept the account of the passengers' rooms, was preparing a telegram to the London office to state what rooms or berths remained undisposed of. This was in the usual course of business. While doing so, he was directed by Mr. Steinz, the office manager, to answer Beebe's inquiry, and also to state the substance of the directors' resolution, and of the letter sent the day before with reference to the future business of the company. Mr. Fincke thereupon incorporated in the telegram (A) the part following the statement of rooms unsold, and closed with a second reference to the Normannia (Nigger), stating that she would take no passengers from Hamburg to Southampton. The beginning and the end of the telegram referred to the Normannia; the middle portion was intended to relate only to the future business of the company, and to inform their agents of the results of the directors' meeting in reference to it. The telegram was not ad-

dressed to passengers, nor intended to be shown to them. It was a private telegram to their own agents only, to be read and interpreted by them in the light of their knowledge of the company's business and modes of correspondence. The repetition of the word "nigger" near the close, by which the subject of the Normannia was resumed, and the immediate association of the phrase "no steeragers forwarded by our line" with the words following, viz., "fast steamers only plying Southampton and New York," which could not possibly apply to the Normannia, were both strong indications that the reference to steerage passengers did not include the Normannia; while the previous statement that "no passage money would be refunded," having reference to the Normannia, was an implication that she had steerage passengers, since that was the only ground on which a refund had been asked. These circumstances, together with the fact that within a few hours afterwards two other telegrams were dispatched by the same man in answer to inquiries, the one (C) to Southampton, and the other (E) to London—the former explicitly stating, and the latter necessarily implying, that the Normannia had steerage passengers on board, are sufficient in my judgment, wholly to relieve the Hamburg office from the charge of bad faith, or of any intent to mislead anyone on that subject.

5. The case of the London agents in that regard seems to me to be quite different. The evidence leaves no doubt that in answer to the repeated and urgent inquiries of the libellant, and of various other persons, the London agents undertook to procure the information desired. Mr. Berting on three successive days, at the Cockspur street office, promised to cable to the Hamburg office for information; but notwithstanding these repeated promises, no inquiry was ever made by him, or by his principal, Mr. Sisley, of the Leadenhall street office, whether the Normannia would carry steerage passengers or not; nor was any inquiry whatsoever made in the libellant's behalf. The only telegram sent by them was the special telegram (D, supra) sent by Mr. Sisley so late as 11:25 a. m. of Friday, the 26th, on Mr. Fisher's account; an inquiry which Mr. Fisher succeeded in getting forwarded only after persistent efforts, which could not be frustrated by the employés with whom he first came in contact. From the language of this telegram (D), as well as from Mr. Berting's own testimony, it is clear that up to about 2 p. m. of Friday the London agents assumed and expected that the Normannia would carry steerage passengers as usual. They had no reason to expect otherwise. They knew from the usual course of business that a large number of steerage passengers must have been booked for the Normannia, and already arrived in Hamburg before the outbreak of cholera, and would embark by the 25th; and in the absence of information, there was no reason to suppose that any change in the company's arrangements could be made to exclude them from the Normannia. That the agents expected no such change, is further shown by the telegrams exchanged between themselves. About noon of Friday, the 26th, the Southampton office telegraphed to the London office as follows:

(F) "Have you received instructions from the company if any one wants refund, Normannia."

—To which, at 12:15 Mr. Sisley replied:

(G) "Have no instructions about refund, but have contented ourselves by saying if company considers safe send steamer, must be safe for passengers; however, expect reply from company shortly to special application we made for refund."

Not long after, at about 2 p. m., telegram (A) was received by Mr. Sisley, who sent it by telephone to Mr. Berting, as above stated. So far as relates to passengers or refund, this telegram was an accidental one; for it was not sent in answer to any inquiry by the agents. They were bound, therefore, to observe carefully all its language. On its face, if it did not show conclusively that the passage about steeragers could not refer to the Normannia, yet it did show at least such doubt and ambiguity that the agents were not justified in making use of the telegram as a positive assurance that the Normannia had no steerage passengers.

Mr. Sisley and Mr. Berting, however, both testify that they understood this telegram to mean that the Normannia had no steerage passengers. But their conduct before and after does not suffer me to accept this explanation. During the three days previous, during which these numerous inquiries were made, they did not expect, and had no reason to expect, that the Normannia would omit steerage passengers; yet they did not state their reasonable knowledge and expectation in that regard. They made many promises daily to inquire by telegraphing to Hamburg whether the Normannia would take steerage passengers, yet never made any such inquiry; and when, in sending the Fisher telegram, a special opportunity for such an inquiry arose, it is plain that Mr. Sisley purposely avoided making this inquiry. When the accidental telegram (A) was received, though its terms were plainly so dubious as to put him on his guard, Mr. Sisley at once made use of it to assure Mr. Fisher, who happened to call at about the time it was received, that there were positively no steerage passengers on the Normannia. He knew, and he told Mr. Fisher, that it was not an answer to his telegram; and he promised Mr. Fisher to send him the answer which was expected to be received later in the day. At half past 5 the answer was received at Mr. Sisley's office, which, by necessary implication, showed that steerage passengers were on board; yet this answer was never sent to Mr. Fisher, nor to the Cockspur street office. Mr. Berting, instead of sending to the libelant, at his hotel, an answer in his own words, sent a copy of a part of the telegram (A) without the means of explanation he himself possessed, and without any suggestion of the doubts his own testimony satisfies me he had.

On the following morning, as Mr. Taylor and Senator McPherson testify, they were assured, on inquiry at the Southampton office, that no steerage passengers were on board, though express information to the contrary had been received at that office the afternoon before; and during the passage upon the tender from Southampton to the steamer, one of the London agents, or their representative, was on board, who must by that time have been perfectly informed

of the fact that steerage passengers were on the Normannia, through the company's telegrams to the London and the Southampton offices the afternoon before; yet no information was given to the numerous persons on the tender, who were known to be proceeding on the faith of the assurances previously given them.

I am constrained to find, therefore, that the London agents did not deal frankly or honestly in regard to the inquiries made of them; that trusting if the company thought it safe to send out the steamer, it would be safe for them to send off the London passengers, they suppressed their own reasonable knowledge and expectation, and put off and deluded the libelant and other inquirers with false promises, which they did not fulfill, and did not intend to fulfill; that the accidental telegram (A) received by the agents from the company did not warrant the assurances which they based upon it, as the agents had sufficient reason to know; and that afterwards when the facts became sufficiently known to the agents both at London and Southampton, the facts were not communicated as they had promised, and had opportunity to do, and as good faith required, but were intentionally suppressed. These findings would be sufficient to sustain an action for false representations against the agents personally; it is sufficient as against the company also, if the company is liable for the misconduct of its agents in such a matter.

6. It is urged, however, that the defendant company is not liable for any such misconduct of their English agents, because it arose, as it is said, while the agents were acting wholly outside of the scope of their employment; and that whatever the agents did, or undertook to do, for the libelant, was either a mere matter of courtesy, or else was done as agents of the libelant, and not of the respondents.

I cannot sustain this view. The agents of the company in London were the ordinary channel of communication in reference to a great variety of matters pertaining to the transportation of passengers, which were evidently reasonably necessary in the successful prosecution of the company's business. The evidence shows that changes in passages, after tickets had been obtained and paid for, were frequently made through correspondence between the agents and the company. Such correspondence was apparently a part of the agents' ordinary duties. Applications of this kind were frequent. The company dealt with the public in that way; and the public relied on the agents as the representatives of the company, as the latter well knew; and their telegram (A) to the London agents on its face furnishes evidence that the company recognized this usage, and the duty of their agents to give information to passengers; since the telegram directed them to "instruct Beebe, and other inquirants," on these subjects.

I find, therefore, that the agents in undertaking to procure the desired information and to report to the libelant and others making inquiries, were acting within the scope of their employment by the defendant company; and that their misconduct charges the principals with the actual damages caused thereby (Story, Ag. [9th Ed.]

452; *Griswold v. Haven*, 25 N. Y. 595; *Fifth Ave. Bank v. Forty-Second St. & G. St. Ferry R. Co.*, 137 N. Y. 231, 33 N. E. 378), though not with any punitive damages, as neither the company, nor its officers in Hamburg, are personally chargeable with any deceit.

7. It is contended, however, that the libelant suffered no damage from the misrepresentations, inasmuch as the detention of the steamer would have been precisely the same had no steerage passengers been on board. The evidence, I think, sustains the latter fact. The testimony of Dr. Jenkins, and the record of the arrival of other vessels, show that all vessels coming from infected ports, even though no cholera was on board, were detained in quarantine, usually about a week, and sufficiently to satisfy the health officer that there was no danger of contagion; and that in cases where cholera had broken out during the voyage, the vessel was held for a longer time until the period for any probable further development of cholera was passed.

Upon the *Normannia*, besides the cases of cholera among children in the steerage, there were, as above stated, two cases among the crew, and one in the second cabin during the voyage; and on the day after arrival two additional cases appeared among the crew. Upon the evidence, I must find, therefore, that the detention of the *Normannia's* passengers would have been the same, had no steerage passengers been on board. The presence of the steerage passengers, it is therefore urged, made no difference to the libelant. He was willing, it may be said, to take the chances of detention through the sailing of the vessel from an infected port, and of any additional detention that might come from the outbreak of cholera among the crew, or the second cabin passengers; and these chances having turned against him, he suffered no more detention than the risks that he was willing to assume actually produced; and that, therefore, no damage arose from the misrepresentations about the steerage.

The libelant, on the contrary, urges that he had a right to determine what risks he would take, and what not; and that but for the deception, and the suppression of the truth he would not have been on board; and that his embarkment was induced solely by the misrepresentations which led him into the detention he had meant to escape.

I do not think the mere circumstance that he would "not have been on board" but for the false representations, would be sufficient to make the defendant liable for whatsoever might happen to the libelant's injury while on the ship on which the representations had induced him to embark, if the injury was not proximately related to, and did not naturally grow out of, the subject-matter of the misrepresentations. Had the libelant, in this instance, suffered no detention through cholera, or quarantine, but had been injured through a collision with another ship, or by some accident on the *Normannia* itself, in no way connected with the presence of steerage passengers, it surely would not have been claimed that the defendant, if not otherwise in fault, would have been responsible to the libelant for such damages, merely because steerage passengers were

on board, and because the libellant would not have embarked on the *Normannia* had he known of their presence; since neither the cause of the injury nor the damage would, in the case supposed, have had any connection with the presence or the absence of steerage passengers.

To recover damages for a tort, they must be proximately, and naturally, connected with, and flow from it; they must be such as might be within the contemplation of the parties as a natural consequence of the wrongful act, as distinguished from a merely accidental result. *Smith v. Bolles*, 132 U. S. 125, 130, 10 Sup. Ct. 39; *Railroad Co. v. Reeves*, 10 Wall. 176. The subject-matter of the inquiry, and of the deceit, in this case, was the presence or absence of steerage passengers on the *Normannia* as related to cholera contagion and consequent detention of the vessel in quarantine. If no cases of cholera had appeared among the steerage passengers, and the detention of the vessel had arisen solely from the other conditions and circumstances proved, I think this libel must have been dismissed; for the reason that though the deceit was established, no damage would be shown to have resulted from it.

But in this case, cholera did appear among the steerage passengers; it appeared among them first, and chiefly. If the ship might have been detained for the same period had no steerage passengers been aboard, it is equally true that the detention would have been just the same had there been no cholera except in the steerage. Cholera in the steerage was at least as much a cause of the detention, as cholera in the second cabin and among the crew. The detention was, in fact, due to both alike. The damage in this case, therefore, did happen in part directly from the subject-matter of the deceit, and not wholly from an independent cause, such as a cyclone, or a collision; and as the presence of steerage passengers, and of cholera among them, was certainly a contributing cause of the damage, that is sufficient to make the defendant liable.

Although the detention of the vessel, moreover, might have been the same had no steerage passengers been on board, still there is no doubt, I think, that the alarm and excitement produced both on the ship, and on shore, when the facts became known, were mainly due to the cholera among the steerage passengers. The facts concerning cholera on the ship were carefully suppressed during the voyage. It was not until arrival, and upon the receipt of the New York newspapers, that the passengers discovered, as one of the witnesses (Senator McPherson) states, that "they had a perfect Vesuvius of cholera on board." Beyond the single case in the second cabin, had there been no cholera except the few cases among the crew, the alarm among the passengers, as well as the general excitement and apprehension would have been much less. I cannot, therefore, acquit the respondents on the ground that the presence of steerage passengers made no difference to the libellant, and was not one of the proximate causes of the damage.

8. The same rule that limits damages to the natural and proximate results of the wrong, requires the exclusion of a considerable part of the libellant's claim. Aside from some indisposition during the two

or three days after arrival at New York, which was soon relieved by prescriptions, and apart from the deprivations and discomfort while on board the Stonington and the Cepheus, the libelant does not appear to have suffered any definite illness. He did not contract cholera, nor any other ailment; but in consequence of the excitement and anxiety while on board the Normannia, Stonington and Cepheus, he was unable, as he states, during the three weeks after his arrival home to do more than a week's work. This loss, with the loss of two weeks in quarantine, make up the loss of a month's time, which, at the rate of his usual average yearly earnings would amount to at least \$800.

As the vessel was from an infected port, however, she would have been detained a week in any event, though she had had no cholera, and though no steerage passengers had been on board. The first week's detention must, therefore, be deducted as independent of the misrepresentations. The distressing incidents, moreover, so graphically described by the witnesses, which arose after the removal of the passengers from the Normannia on September 10th in the expectation of improving their condition, cannot be charged against the Normannia; (1) because the removal of the passengers was not the Normannia's act, and (2) because the incidents which followed were not produced by the steerage passengers, nor were they the natural results of the removal, nor such as might have been expected to flow from it; but they arose from wholly independent and fortuitous causes, not to be anticipated. I must, therefore, exclude those painful incidents, and the mental suffering that attended them, as direct subjects of compensation, and also their effects in contributing to the libelant's subsequent disability for work. How much of the subsequent two weeks' disability should be ascribed to causes occurring before the removal from the Normannia, and how much from what occurred afterwards, is mostly a matter of surmise; the testimony of the libelant seems to lay chief stress upon the latter cause.

Excluding, therefore, such elements of damage as are not properly attributable to the presence of steerage passengers, I think \$500 will be a proper compensation for the libelant's loss of time, and for his suffering, so far as legally recognizable. From this sum is to be further deducted the price of a return ticket, say \$100, which would have been lost if the libelant had not returned upon the Normannia; since he evidently would have had no legal claim upon the company for its return. There remains \$400, for which a decree may be entered in favor of the libelant, with costs.

THE MEMNON.

AFRICAN STEAMSHIP CO. v. CUNEY.

(Circuit Court of Appeals, Fifth Circuit. June 12, 1894.)

No. 233.

1. SHIPPING—STEVEDORE'S COMPENSATION FOR BREAKING OUT CARGO ON FIRE.
A stevedore loaded and stowed a cargo of cotton, under a contract, for 50 cents a bale. On the cargo taking fire, he rendered services in break-

ing out a large part of the cargo, the hold being filled with smoke, and the cotton either on fire or saturated with water. *Held* that, in the absence of an agreement as to the amount of the compensation therefor, he was entitled to more than the ordinary wages, and an award of 75 cents a bale, justified by evidence as to the custom of the port, should be sustained.

2. PAYMENT—APPLICATION BY DEBTOR.

An agent of two vessels, making payments at intervals to a stevedore for work on both progressing at the same time, kept their accounts separate, stating in the receipts taken and in the checks given the vessel on whose account payment was made. *Held*, that one of the vessels was not liable to the stevedore in a suit in rem for more than the amount due from her on such appropriation of payments by the agent.

Appeal from a Decree in Admiralty of the District Court of the United States for the Eastern District of Texas.

This was a libel by N. W. Cuney against the steamship *Memnon* (the African Steamship Company, claimant), for stevedore's services in loading and stowing, and in breaking out and restowing cargo. The district court rendered a decree for libellant. Claimant appealed.

W. B. Denson, for appellant.

R. S. Wheeler, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

LOCKE, District Judge. N. W. Cuney, the libellant, a stevedore of Galveston, had loaded and stowed the cargo of the steamship *Memnon*, consisting of bales of cotton, under a contract of 50 cents a bale for the cotton stowed in the harbor of Galveston, and 5 cents a bale extra for that stowed outside. Upon her attempting to put to sea, it was found that her draught of water was so great that it was feared that it would be necessary to break out and unload a portion of the cargo, so as to float her over the bar. No arrangement, contract, or agreement had been made for this, but, after waiting four days, the libellant was requested by the ship's agent to have his men ready the next morning to break out what cargo was necessary. The ship was then lying outside at the bar, and, early on the morning of October 10th, was discovered to have fire in the cargo, and was brought to the dock. The city fire department was soon on hand, and commenced playing water into the holds and onto the burning cotton, and the gang of hands of the libellant were at once put to work breaking it out. The libellant himself was not there at that time, but Scott, his foreman, was in charge of the gang. They worked about four days breaking out 1,456 bales, when it was reloaded, and the vessel prepared for sea. Upon the libellant's presenting his bills for loading, breaking out, and restowing the cargo, objection was made to the item of 75 cents a bale charged for the breaking out, as well as the form of the bill, it being all against the vessel, instead of a portion of it, that caused by the fire, being against the vessel in general average, as the agent desired it, and he declined to pay it, when the libellant

filed his libel, and had the vessel attached. Upon a hearing, judgment was given upon the libel for the full amount, and an appeal was taken to this court.

The claimant alleged in the answer that a contract was made with Scott by Spencer in behalf of the ship for 40 cents an hour for the men at the time they commenced discharging cargo. Whether or not such a contract was made is one of the important questions in the case, as the libelant claims in his libel upon a contract of 75 cents a bale, as well as upon a quantum meruit and custom of the port, but presents no evidence whatever to support the allegations of a contract made. In regard to the contract for 40 cents per hour, we are not satisfied from the evidence that there was such agreement or contract to perform the service for that sum. The agent's accounts show that he did not so consider it, as, in addition to the 40 cents per hour allowed for the men, he credited the foreman with \$10 a day, and the stevedore with a profit of 10 cents a bale upon the cotton broken out. It is not claimed that there was any contract for such allowance, and, whether reasonable and just or not, it was based upon no agreement, and shows conclusively to our minds that it was not considered by the agent that there was one covering the entire service. The men were not employed themselves; they were already in the employ of the libelant; and it does not appear that the foreman, Scott, had authority to make any contract or agreement for them or for the libelant. Scott says that there was no contract made. The libelant says that Mr. Spencer asked him that afternoon what he was going to charge. Unquestionably, there was some conversation regarding the rate to be charged, and Mr. Spencer probably considered that a contract had been made at longshoremen's wages, when Scott only was intending to tell him what such wages were,—what the stevedore was paying. We cannot find, therefore, that the ideas and intentions of the contracting parties at any time agreed upon any amount, and the questions of the usual custom and quantum meruit demand examination. The work was not ordinary longshoremen's work. The cargo of the ship was on fire, the hold filled with smoke, and the cotton either on fire or saturated with water. The circumstances rendered the service entitled to a higher rate of compensation than the common every-day wages, and we are satisfied that the evidence as to the custom of the port and the usual amounts paid on such occasions justifies the amount claimed by the libelant, as being a reasonable compensation, and, upon this branch of the case, consider that the decree below should be sustained.

But there is another question. At the time the libelant was loading this steamship, the Memnon, he was also loading another steamship, the Sirona, under a contract and agreement with the same agent. The work was progressing upon the two vessels at the same time, and payments on account of the two vessels made at intervals. The agent, in making these payments, kept the accounts of the two vessels separate, stating in the receipts taken the vessel on whose account the payment was made, and on the margin of the checks given in payment, in some instances at

least, the different amounts to be credited to each vessel. Such receipts show that, according to the accounts of the agent, there had been paid upon account of the Memnon, at the time of the suit, \$1,700. The libellant, on the other hand, had paid no attention to the appropriation of the payments by the ship's agent to the different vessels, but had credited the entire amount received, except \$200, to the Sirona, the first vessel leaving, overpaying her account \$93.50, making, with the \$200 excepted from the Sirona's account, \$293.50 only which he credited to the account of the Memnon. The result of this difference in keeping accounts has been to cause the libellant to bring suit against the Memnon for the entire amount he claimed to be due him from both vessels.

There is no question of the right of the debtor to appropriate his payments to the several accounts of his debts as he sees fit, and more especially should this be recognized in case of an agent acting for several parties, and who is handling different funds. Had no appropriation been made by the party whose duty it was to pay, the one receiving would have had full power to make such application as would be to his interest; but that such appropriation was made in this case is plain from the forms of the receipts taken and the checks which had passed through the hands of the libellant, and bear his indorsement. This is an action in rem, and, no matter what the equities may be between the libellant and the agent of the steamships, this vessel cannot be held for anything not shown to be due by her. The amounts paid by her agent on her account must be presumed to have been paid from the funds of her owners, and ample notice was given the libellant at the time of his receiving them. Accepting as correct the respondent's statement of the number of bales handled and the manner and place of their loading, which very nearly corresponds with libellant's accounts, but allowing 75 cents a bale for breaking out at the time of the fire, as claimed in the libel, and deducting the \$1,700 shown to have been paid on account of the vessel, we find due the libellant, at the commencement of this suit, \$4,590.10. Of this amount, claimant admitted that \$4,122.10 was due, and offered to pay this amount, upon condition that the suit be dismissed. While he may have been justified in refusing to pay the full amount claimed in the libel, and submitting such question to judicial determination, he is entitled to no greater advantages regarding interest or costs by making such a tender on account of exacting such condition than if it had not been made; and, although the amount admitted to be due was deposited in the registry of the court, it was of no advantage to the libellant, and should not affect his rights. The question of costs, and very largely of interest, is within the discretion of the court in admiralty practice. In this case, costs having been decreed for the libellant in the court below, such costs will be taxed in his behalf; but, the claimant being fully justified in his appeal to this court, on account of judgment pronounced against the Memnon, a portion of which amount properly belonged to the Sirona, the costs of this court will be taxed against the libellant.

We are therefore of the opinion that this cause should be re-

manded to the court below, with instructions to set aside the decree thereinbefore granted, and enter a decree in favor of the libelant for \$4,590.10, with interest from the 27th day of November, 1893, the date of judicial demand, at the rate of 6 per cent. per annum, and the costs in that court incurred; and that the \$4,122.10, now on deposit in the registry of the court in this cause, less the costs of such deposit, be applied in part payment thereof; and that libelant have judgment for any balance then remaining unpaid against the African Steamship Company, composed of Elder, Dempster & Co., and Thomas H. Sweeney and George Sealy, sureties upon its stipulation, and such judgment be without prejudice to the rights of N. W. Cuney, libelant herein, against the steamship Sirona, W. W. Wilson, agent, or any one else on account of any amount that may be due him from said steamship; and that the costs herein be taxed against the appellee herein; and it is so ordered.

THE PORT ADELAIDE.

JAMISON v. PERRY.

(Circuit Court of Appeals, Second Circuit. June 7, 1894.)

No. 148.

SHIPPING—CHARTER PARTY—RIGHT TO EXTRA FREIGHT EARNED.

By the terms of a charter party, the charterer was entitled to the whole cargo capacity of the vessel, and the services of her officers and crew, for the specified voyage. The master, without the charterer's permission, used the vessel on part of the voyage for carrying cargo for third persons. *Held*, that the charterer might recover the freight thereby earned, less the expenses incurred in earning it, by libel against the vessel. 59 Fed. 174, modified.

Appeal from the District Court of the United States for the Eastern District of New York.

This was a libel by Edward Perry against the steamship Port Adelaide (David E. Jamison, claimant) for freight received by said steamship while under charter to libelant, and for damages for breach of the charter party. The district court rendered a decree for libelant. 59 Fed. 174. Claimant appealed.

J. Parker Kirlin, for appellant.

David Thomson, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. By the terms of the charter party, the whole cargo capacity of the steamship, and the services of her officers and crew, belonged to the libelant for the specified voyage. If it had been intended to reserve to the shipowner any part of the vessel for the purpose of carrying cargo, that intention would doubtless have been expressed in the contract, but instead the charter party was for "the whole of the vessel." Under such a contract the master had no right, without the permission of the libelant, express or implied, to use the vessel upon any part of the voyage for carrying cargo for third persons. Having done so, however, and earned freight thereby, the libelant, if he saw fit to adopt the

master's act, became entitled, upon the plainest principles of law, to the freight earned. We fully agree with the views expressed in the opinion of the learned district judge as to the right of the libellant to recover the amount of freight. But the amount earned was \$500, and not \$950, and there is no evidence in the record which justifies a finding that the expenses incurred in earning the freight were not as stated in the testimony of the master.

The decree should be modified accordingly, and the cause remitted, with instruction to the court below to decree for the reduced amount, with interest and costs of the district court; the appellant to have costs of this appeal. Ordered accordingly.

THE PHOENIX.

PARSONS et al. v. ROCKWELL.

(Circuit Court of Appeals, Fourth Circuit. May 22, 1894.)

No. 68.

SALVAGE—COMPENSATION—REVIEW ON APPEAL.

A steamship, worth, with her cargo, about \$160,000, was disabled by the breaking of her shaft, far out at sea, and after drifting under sail several days, changing position but little, was taken in tow by another steamer, valued at \$125,000, whose cargo was worth \$400,000, and whose freight and passage money amounted to \$13,000. No unusual trouble occurred, and no unusual risk was involved in the towage, and the only storm encountered arose on the fourth day, when the vessels were anchored in a place of comparative safety; and, on the next day the towage was completed. *Held*, that an award of \$35,000 was excessive, and should be reduced to \$20,000.

Appeal from the District Court of the United States for the Eastern District of Virginia.

This was a libel by Cyrus O. Rockwell, master of the steamship *Saginaw*, against the steamship *Phoenix*, John J. Parsons and Thomas Linton, claimants, for salvage. The district court rendered a decree for libellant. Claimants appealed.

The decision of the district court, rendered by HUGHES, District Judge, was as follows:

Statement of the Case by the Court.

The British steamship *Phoenix* (Philliskirk, master) left Macio, Brazil, on the 19th of January, 1893, laden with 2,100 tons of sugar, bound for New York, where the cargo was worth \$98,953. The vessel herself was worth not less than \$60,000. Her freight money on this cargo was \$5,000. She was of two short masts, schooner rig, carrying foresail, square foresail, double topsail, fore and aft foresail, fore staysail, main staysail, and jib. Her tonnage was 1,728 gross; her length, 256 feet; beam, 36 feet; and depth, 18 feet 6 inches. On the 8th day of February her shaft broke square off in the thrust bearing. The steamer was then in longitude 70° 20', latitude 30° 31'. All sails were set, and the ship headed to the northwest. She proceeded under sails until the afternoon of the 12th, making a total distance in the time of 117 miles. The engineers began an attempt at repairing the broken shaft on the 9th by cutting out the thrust collars, and placing in these two steel plates, on opposite sides of the shaft, fastened with bolts, as is shown by that portion of the shaft itself, which is exhibited in court. They worked at this job continuously from the 9th to the afternoon of the 12th, and now they say they could have completed the two patches and have fastened them in place in four or five hours longer. The job was never completed, and its efficacy was

never shown during the period of a week and more before the arrival of the Phoenix at New York; especially not in the ten or twelve hours of the twelve which elapsed after they had unnecessarily suspended their labors, and before the Phoenix was actually taken in tow by a salvor, at 2 a. m. on the 13th. Previously to the 12th, the Phoenix had put out signals of distress; but only two ships had been seen (both sailing vessels) in the period of four days. She was out of the track of vessels, in unfrequented waters; being 150 miles west of the usual track of vessels trading to South American ports, and 150 miles east of the track of those bound to and from the Gulf, San Domingo, and Cuba. Between sundown and midnight of the 12th, the rockets she sent up as signals of distress attracted the attention of the American Clyde steamer Saginaw (Rockwell, master), which was bound from New York to Turk's Island and other West Indian ports. The Saginaw proceeded immediately to the relief of the ship in distress, which proved to be the Phoenix, hailed her, and received her master, Philliskirk, on board, who came alone.

The Saginaw is a freight and passenger steamer, plying between New York and ports of the West Indies on fixed schedule time, in conjunction with one or more other Clyde steamers, which also sail on schedule time, arranged at intervals of ten days or two weeks, as one or two sister steamers of the Saginaw may be put on the line. The Saginaw is a modern iron steamer, with a gross tonnage of 1,800, and length 260 feet. She is valued at \$125,000, and had an assorted cargo, composed in part of perishable goods, and embracing \$193,000 of specie, all worth in total value about \$400,000, her freight money being \$13,000. She had a crew of thirty-nine men, and she had eight passengers.

As to what occurred on the night of the 12th of February, 1893, when the Saginaw responded to the call of the Phoenix upon her for help, the two masters say as follows (I quote from their depositions):

Philliskirk, loquitur: "Q. When he [Rockwell] came up alongside, what happened? A. He asked me if I wanted assistance. I told him, 'Yes.' And the captain said, Well, hadn't I better come on board. I said, 'Very well.' I put the boat out and went on board. Q. After you got aboard, whom did you see? A. I saw the captain [Rockwell]. Of course, he asked what was the matter. I told him the thrust shaft was broken. He asked if I wanted assistance. I said I did. 'Well,' he says, 'captain, I have got a perishable cargo aboard and passengers, and am bound to Turk's Island. I will tow you there.' I said that would not do me at all. Turk's Island is no use to me. I couldn't do anything or get anything there. So, after a little conversation, I said, 'You may tow us up the Chesapeake,—the nearest place.' And he consented to the Chesapeake. Q. You refused to go to Turk's Island? A. Yes. Q. Did you inform him you were making repairs to your shaft? A. No. Q. Was anything said about that? A. Nothing said. Q. Did you inform him of the value of your cargo or freight or vessel? A. No; I don't think I said anything about the value of the cargo. He asked me what I had in her, and I told him sugar; * * * near about 2,100 tons."

Rockwell, loquitur at Norfolk: "About 9 o'clock p. m. of the 12th, we saw signals from the E. S. E. of rockets. We proceeded in that direction about an hour, and found the Phoenix broken down. I hallooed and asked him if he wanted assistance, and he said, 'Yes.' I asked him to come aboard, which he did, and he desired to be towed to the Chesapeake, which I did. Q. When he asked to be towed to the Chesapeake, what proposition did you make to him? A. I objected to towing him to the Chesapeake for several reasons, and offered to tow him to Turk's Island, and then to Bermuda, and he objected strongly to that for several reasons, and wanted to come here very much; and, after thinking the matter all over, I agreed to take hold of him and tow him here if possible; if not, to such safe point as I could. Q. Did he express himself as to any trouble? A. I asked him his trouble, and he said his shaft was broken. I asked him if it could be repaired at all, and he said he could fix it; and I said there was no use of my fooling with him if he could fix it. But he objected strongly to my leaving him, but I told him, if he could repair his ship, I wouldn't want to trouble with him at all. Q. In other words, you were reluctant to undertake the service? A. Unless he was helpless. Q. And you only undertook it on account of his

saying that he was helpless? A. Yes, sir; he insisted upon my helping him into port, and insisted upon coming here to this port." In cross-examination Rockwell says: "Q. I understood you to say, when the captain [Philliskirk] came on board, he made some mention of these repairs? A. I don't remember. He said he had made some repairs, but he said it could be fixed, or words to that effect; and there was some mention made about repairs or fixing. Q. You said that you did not want to take him in tow if that was the case? A. In case he could repair his ship, I didn't want to take hold of him at all, and he objected strongly to my leaving him."

Gerrie, engineer of the Phoenix, loquitur: "It was against my wish for them to take my ship, but, of course, I didn't care about refusing the assistance. Q. You mean by that— A. Of course, I told the captain to take the tow, you know. Q. You did not care about refusing? A. It was against my wish, certainly, for my own part, but still I wouldn't have refused it, you know. The captain asked me, and I told him, 'Certainly, take the ship,' because I did not know what it would have done. I just went on his own judgment."

It may be added here that, previously to the Saginaw's taking hold of the Phoenix, her master saw and spoke to no other member of the Phoenix's crew, and there is nothing in the evidence to show, and it is not at all probable, that either Capt. Rockwell or any of his men were on the Phoenix during the whole of this salvage service. Counsel for respondent admit that Capt. Rockwell took hold of the Phoenix for the purpose of securing the salvage award. The Saginaw took hold of the Phoenix and began to make for the Chesapeake about 2 o'clock on the morning of the 13th of February. The chart exhibited in the record shows that the place where the Phoenix was found was in latitude 32° 30', longitude 71° approximately, about 475 miles due east from Charleston, and 360 miles from Chesapeake bay. The towage was done with a steel hawser belonging to the Phoenix, which was put aboard the Saginaw by the men of the Phoenix. It was at no time lost, and did not part. It was hitched to 35 fathoms of chain on the Phoenix, and was connected to the Saginaw by a bridle of manilla hawsers, in order that the line between the vessels should be springy and elastic, to enable the towing to be done without the jerk that would result from having so much dead weight to tow. The manilla hawsers belonged to the Saginaw, and were rendered useless in the progress of the towing by the chafing to which they were subjected by the heavy tow. The whole length of the towing cables and the hawsers forming the bridle was upwards of 250 fathoms, and, if the lengths of the two ships be added, then the length of the whole tow was 336 fathoms, or more than one-third of a mile. The course of the towing lay directly across the Gulf Stream, where heavy fogs are prevalent in February. The fog and the length of the make-up rendered the danger very considerable of colliding with vessels passing north and south along the Gulf Stream across the course of the procession in necessary ignorance of the fact of one vessel being in tow of the other. Except two or three periods of gale, and except the fog, the weather during the towing after the 12th and before the 17th was favorable; but the towing was at all times difficult, and required the utmost care in the navigators of the Saginaw to prevent fouling of the cable with her propeller or rudder during the several intervals when it was necessary to stop or slow down to readjust the bridle on the Saginaw. The sea, as usual in February, was rough, requiring a man to stand constantly aft on the Saginaw to watch the hawsers, which chafed continually, and requiring a man to stand much of the time at the engine-room door to pass orders by word of mouth to the engineer, in order to conform better the speed of the towing vessel to the exigencies of the work in hand and the movements of the ship in tow. Necessarily, there was a great deal of yawing by so large a body as the Phoenix, whose engines were disabled, especially in the early days of the towing. There were fresh gales of wind on the 13th, 14th, and 15th, not of long duration, but putting great strain on the cables; and, during the last days of the service, fog was encountered, rendering it often difficult for the Phoenix to be seen from the Saginaw for hours at the time, and creating much risk of collision with coastwise vessels crossing them in the Gulf Stream. On the 16th the two vessels arrived in the Chesapeake bay, about three miles W. N. W. of Cape

Henry light in Lynnhaven bay, where they had to come to anchor in consequence of the dense fog. The Saginaw lay by the Phoenix, waiting for better weather, until the morning of the 17th, when the Phoenix was again taken in tow with difficulty, while a strong northwesterly gale was prevailing; and at about 4 o'clock p. m. she was finally brought to anchor in Hampton Roads. In approaching the Virginia Capes on the 16th, a dense fog prevailed, which rendered it difficult to get within the Capes without a pilot, and would have made it necessary for almost any other navigator to come to anchor outside, until a pilot could have been procured; but Capt. Rockwell, from his familiarity with those waters, resolved to make his way in. This he did successfully, by diligent sounding, and by cautiously regulating his course by the moan of the Siren buoy off Cape Henry light. His good fortune in this venture, by which he brought the two ships into safe anchorage in Lynnhaven bay on the 16th, secured them from the hazard which would have overtaken them outside from the northeasterly storm which soon after set in and continued for many hours.

The salvage service lasted through all of the 13th, 14th, 15th, 16th, and 17th days of February. Although the weather was, in general, unusually favorable for the season of the year, yet much of it was rugged, and nearly all of the latter part of it was characterized by thick fog, which, as said before, brought much risk to a tow more than one-third of a mile long of being run into by coastwise vessels crossing its course at right angles, unaware of the fact that the two steamers were fettered in their powers to maneuver by a connecting cable. There was constant risk, whenever it became necessary to stop or slow down, of the cable becoming fouled with the propeller of the Saginaw, or else with her rudder. Unusual precautions were taken against this risk by Capt. Rockwell, in having an ample force of men and mechanism ready at hand to keep the slack of the cable promptly hauled in, whenever stop or slow down was made. In this matter, and in his entire work during this arduous service, Capt. Rockwell proved himself a seaman of the highest order of skill and efficiency and provident intelligence.

The towing service rendered it necessary for the Saginaw to replenish its store of fuel and provisions at Norfolk. The time lost in the service was rather more than seven days. The towing of so heavy an object as the Phoenix and her 2,100 tons of cargo across the Gulf Stream into Hampton Roads, for so long a distance as 375 miles, and for the protracted period of five days, subjected the Saginaw to much strain, which, though not requiring immediate repairs, entails a necessity for them in the future. Much dissatisfaction was caused to the shippers of freight on the Saginaw by the week's delay in delivering it. Much of the freight destined for her on her return trip in the West Indies which was awaiting her on the wharves had to be stored during the lost week, and other freights sought other conveyances to market. Great loss and inconvenience also resulted to the owners of the Saginaw by the next trips of herself and her companion ship being thrown together; which practically caused the loss of one trip out from the West Indies to one or other of the two ships. The pecuniary losses resulting from these several necessary incidents of the Saginaw's service to the Phoenix are set forth by an estimate filed in the evidence.

In ascertaining the amount proper to be recovered in this action by the libellant, the actual expenses incurred by the Saginaw in the performance of the service must be allowed. The accounts shown by Exhibit G of \$570.89 for actual expenses are allowed. I think the evidence shows that the use of the Saginaw and her crew for seven days is worth on the basis of quantum meruit fully \$400 a day, or \$2,800. Exhibit H, in the libellant's evidence, is an estimate of the incidental and resulting cost to the Saginaw of the deviation and delay which the salvage service caused. I regard it more as an argument for a liberal award than as recoverable *eo nomine*.

Comments and Conclusions by the Court.

The interview between the two masters on the Saginaw in the night of the 12th of February was a distinct employment of the Saginaw by the Phoenix, which was helpless, in a salvage service. When something was mentioned about fixing the broken shaft (which was of so little importance that

Capt. Philliskirk entirely forgot it in giving his testimony), Capt. Rockwell at once said: "If you can fix your shaft, I will not fool with you;" whereupon Capt. Philliskirk incontinently dropped the subject, not to be resumed, and insisted upon being assisted to port. The chief engineer of the Phoenix himself, who was the inventor of two flange plates which figure so largely in respondent's evidence, had advised his master to crave assistance and accept it. For four days, while the work in the two small flange plates was in progress, the ship was flying and firing off signals of distress, calling for help. When, at last, rescue came, not one word was said of the 7 by 10 flange plates, not a word to render material the voluminous testimony which has been taken concerning those two pieces of steel and their screws. Although it is now insisted that those patches could have been completed in four or five hours of the 12th, yet work upon them immediately and finally ceased as soon as rescue came. The interview between the two masters was the time and place for these since tediously discussed plates to have been brought into the case; yet Capt. Rockwell heard not a word of them, and it was not until the testimony of the respondent was taken and its answer was filed that they loomed up as the prominent features of the defense. As these plates were not brought to the attention of Capt. Rockwell in the interview of the two masters, and were not mentioned then and there, and as all mention of them was then avoided, the question of the ability of the Phoenix, by completing the patching of the shaft for which these plates were intended, to steam her way into the port of New York, is of very slight materiality in this cause. If Capt. Philliskirk and his several engineers, who all tell the same stereotyped story of ability to complete the repairs in four or five hours, and of confidence in the sufficiency of the two little plates to bring them into port, really believed in that sufficiency, then a deliberate deception was practiced on Capt. Rockwell in concealing from him the grounds of that confidence; and, as to him, the case is the same as if the repairs had never been attempted. That the repairs were in fact puerile is almost apparent from the evidence of the engineers themselves. That a thrust shaft 10 inches in diameter, of solid wrought iron, which had broken square across in a smooth fracture under the strain or pressure or twist which it had to sustain, could be made efficient again in any degree by two steel plates 7 by 10 inches long and wide, and $\frac{3}{4}$ of an inch thick; bent over the cylindrical shaft, and screwed to it by a few $\frac{3}{4}$ screws, sunk an inch into the huge shaft, is to me incredible. If the sanguine engineer who devised this method of repairing a solid shaft really believed in its efficiency, his infatuation calls to mind that of the schoolboy who had broken the big blade of his pocketknife in a square fracture, and thought he had made it all right again with two little drops of Spalding's glue. It is not a case for mixed mathematics, but for plain common sense and practical judgment. When a vessel flies signals of distress in midocean in winter weather, and demands and accepts salvage service of a passing ship, and conceals from the salvor the fact of her ability to get to port without help, and then uses the fact of her not being helpless to reduce the salvage service to the grade of mere towage, public policy and every consideration of fair dealing forbid an admiralty court from entertaining such a pretension. The relations between the salvors and the salvaged in the crisis of peril are too serious for concealments of such a character as I am dealing with. The utmost frankness is demanded of the vessel in peril. A full and complete revelation of all the circumstances of the ship in distress which are not visible to the naked eye is essential. Concealment of any material fact is absolutely intolerable. I will do Capt. Philliskirk and his engineers the justice to say that I do not believe they thought their vessel was otherwise than helpless, or that it really entered into Capt. Philliskirk's thought to deceive Capt. Rockwell in this matter. This pretense of ability to repair the shaft and to get to port with the ship's own engines and sails is an afterthought, resorted to as a means of diminishing as much as possible the reward due for the salvage service, which, by the skill, thoughtfulness, diligence, and good fortune of Capt. Rockwell, was, unexpectedly, so successfully and easily accomplished. The pretension does not commend itself to the favorable consideration of the court, and is rejected. It is rejected—First, because, if the Phoenix was really able to get to port

without help, it was a fraud upon the *Sax* law to ask for and to obtain salvage service by concealing this ability; and, second, because, if the ability did not exist, which was doubtless the fact, the pretense of it now is an afterthought, which the court cannot entertain to the prejudice of a meritorious salvor, after an admirably conducted and exceptionally successful salvage service.

Another question, less elaborately discussed in the briefs, is whether a salvor who takes upon himself all risks in entering upon a dangerous service is entitled to reward if the casualties incident to the service do not actually happen. Is the salvor alone entitled to the benefit of the nonhappening of expected casualties? If all goes well, and the seas, the winds, and the working of machinery are propitious, is the salvor to sink into a mere tow master, and the salvor to be sole beneficiary of the good providence which attended the service? These questions cannot be answered in the affirmative. They are self-refuting. The question assumes a more concrete form, however, when applied to a prominent incident of the service under consideration. The two steamers neared the Capes of Virginia on the 16th February, in a thick fog. Capt. Rockwell did not come to anchor and wait for a pilot, as would have been proper in other vessels, but, trusting to his individual knowledge of those waters, resolved to come on and get inside the Capes at once. This knowledge and the skill he exerted in effecting his purpose gave success to his venture, and the two ships were thus in safe anchorage inside the Capes when the northeasterly storm came on, which soon after set in with great force and violence. The salvage service was still in progress when this storm prevailed. It would possibly have been disastrous to the *Phoenix*, unable to use her engines, if she had remained outside, waiting for a pilot. She was saved from this danger by the skill and resolution of Capt. Rockwell. A question discussed in the briefs, pro and con, is whether the court may increase its award to Capt. Rockwell for saving the *Phoenix* from the possible and threatened disaster which was avoided and escaped by having been brought into the Capes before the storm set in. While there are frequently cases in which admiralty courts may refuse to take into consideration storms that have been fortuitously avoided and escaped, yet I think that this case presents circumstances which call urgently upon this court to make up its award with reference in part to Capt. Rockwell's skillful and fortunate conduct in this particular matter.

Summing up the case, I deem this to have been a highly meritorious salvage service. It was rendered in dangerous waters, by a ship embodying values exceeding half a million of dollars, to another ship embodying property worth \$160,000. The *Phoenix* was picked up in the waters off Hatteras, Lookout, and Fear, proverbially a nest and habitat of storms, and was towed for four days through those waters, in a winter month, for a distance of 375 miles, into Hampton Roads. The *Phoenix* was found in unfrequented waters, moving under sail at the rate of 117 miles in four days, or rather more than a mile an hour, at which rate she was more than 15 days from anchorage, with disabled engines, which constituted an incumbrance rather than a help in those rough seas, presenting a tempting and certain prey to winter storms whenever an evil fortune should bring them upon her. At the distance at which she was found in the waters off Hatteras, she was in a piteously helpless condition with reference to the storms there prevalent and always probable, and in which the two small steel plates so largely discussed in evidence would have been less prominent in the minds of seamen on the ocean than they have been in the minds of witnesses on dry land. The unusual length in miles of this service distinguishes it conspicuously from nearly all the cases cited in the arguments of counsel. The long duration of the risk and the strain of the heavy draft on the salving ship is another distinguishing feature. The length of the salvage expedition, more than one-third of a mile, stretching across the path of ships, made the risk of collision and entanglement unusually great in the long nights and heavy fogs of that season and of those waters. The steam navigator's terror of fouling his propeller was always present. The complete success, without a single accident, and only one day's delay from adverse weather, was a crowning and distinguishing merit of this enterprise. This success is due in chief part to the rare resolution and conscious skill of Capt. Rockwell, but for which

the Phoenix would not have been taken in charge at all in the dangerous region of shipwrecks and storms in which she was found. Salvage services rendered in this region cannot be justly assimilated with such services rendered in other regions of navigation. They will not be undertaken here at all unless under the stimulus of maximum rewards for maximum successes. It was a happy fortune of the Phoenix that fogs and adverse winds had driven the stalwart ship Saginaw, commanded by such a master of the sea as Capt. Rockwell, in her vicinity. Few other men would have taken hold of her at all at the risk of half a million of values; and few other ships would have been stout enough to draw her over so long a distance for so protracted a time, into safe anchorage. The embarrassments which were brought upon his owners and the shippers of the cargo, and on the schedule trips of the steamers of the line to which the Saginaw belonged, by the bold action of Capt. Rockwell, cannot with any justice or propriety be overlooked by the court in fixing the salvage award in this case. I will give a decree for \$35,000, and for amount of the account for outlay of \$570.89, which has been mentioned.

J. P. Kirlin, for appellants.

Robert M. Hughes, for appellee.

Before GOFF and SIMONTON, Circuit Judges, and JACKSON, District Judge.

JACKSON, District Judge. The master of the steamship Saginaw, on behalf of the owner, filed a libel for salvage, in the circuit court of the United States for the eastern district of Virginia, against the steamship Phoenix. The Saginaw was a passenger and freight steamer plying between the city of New York and divers West India ports. She left New York on her regular trip February 9, 1893, with an assorted cargo worth about \$400,000, with a crew of 39 men, and 8 passengers. The value of her trip, including both freight money and the fares of passengers, was about \$13,000.

On the night of February 12th, in latitude 32° 35' N., longitude 71° W., the Saginaw was attracted by signals of distress, and, proceeding in the direction of the signals, about 10 miles distant found the British steamer Phoenix disabled with a broken shaft, and requiring assistance. The captains of the two steamers entered into negotiations for the towing of the Phoenix, which resulted in the libellant agreeing to undertake to tow the Phoenix into Chesapeake bay. When the shaft broke, the Phoenix was about 300 miles from the bay, in the open sea; the accident occurred February 8th, and the Saginaw took the Phoenix in tow about 2 o'clock on the morning of the 13th. Between those dates she was under sail and drifted about, changing her position but little. The libellant says, in his testimony, "the weather was generally fair, except at times strong gales and heavy seas." The voyage commenced about 2 o'clock on the morning of the 13th, and during that day the evidence shows that there was a moderate breeze and cloudy weather. On the 14th, the weather was squally, blowing hard at times; the 15th "set in with moderate weather and light breeze blowing" until evening, when it became foggy, which condition prevailed until the vessels came to anchor on the morning of the 16th, and in consequence of the fog, and the violent storms which set in during that night, remained at anchor until about 11 o'clock on the morning of the 17th, when the storm abated and the voyage was resumed, and the

Phoenix towed, without difficulty, into Hampton Roads. A careful examination of the evidence shows that there is but little, if, in fact, any, conflict between the parties to this case as to the character of the weather during the time actually occupied in the towing, and we therefore accept the statement of the master of the Saginaw "that the weather was generally fair, except at times strong gales and heavy seas," which the evidence discloses were of short duration; but his evidence does not, nor does that of any taken upon the part of the libellant, show that there was any unusual or dangerous storm while the vessel was actually in tow. It is not to be denied that there was more or less trouble, as is always the case under such circumstances, in handling the vessel, but it must be admitted that no unusual trouble occurred, nor was there any evidence of any unusual risk taken by the Saginaw. In the language of one of the witnesses, the Phoenix "towed pretty evenly, without jerking." The weather, for the season of the year, was very good, and under its condition there was but little danger or difficulty to be apprehended. But little, if any, hazardous service was encountered; certainly there was no heroic effort required of the salvors in bringing the vessel into the port of safety. Such we find to be the substantial facts of this case, upon which the district court founded its judgment, and awarded the libellant \$35,000 salvage.

It is to be observed that the services rendered were not extraordinary nor unusual. No unusual seas were encountered, the vessels had no hurricanes to contend with, nor was the Phoenix, the disabled vessel, close to a dangerous coast, and, as the sequel proved, there never was a well-grounded apprehension of extreme danger. The only storm encountered arose after the vessels were anchored inside of Lynnhaven bay, a place of comparative safety, which continued a day before they were enabled to go into Hampton Roads, where the towage ceased. Although the storm was violent while the steamers remained at anchor, still there is no evidence of any particular peril encountered, or of unusual risk to the vessels. We are asked, under these circumstances, to affirm the judgment of the district court, and many cases have been cited, not only to aid the court in reaching that conclusion, but also to show that courts, in the exercise of sound discretion, in cases of this character, are as a general rule disposed to be liberal in their allowances for compensation, and that a more liberal allowance should be made in cases arising on the south Atlantic coast, for the reason that navigation along it is more dangerous and perilous than on the northern coast. Another reason assigned for the support of this proposition is that there are not near so many vessels passing along that coast, and for this reason the risk to disabled vessels is greater in this part of the ocean.

This brings us to the consideration of the main, if not, in fact, the only, question presented in the record in this case, and that is whether the amount of salvage allowed by the court is excessive. Counsel on behalf of the claimants have referred the court to a number of adjudicated cases as persuasive authorities to show, not only the flexibility of the judicial mind in regard to salvage re-

wards, but to convince it that the allowance in this case is excessive, while the opposing counsel has cited many to sustain it. It is to be remarked that the elements that enter into an estimate are not always found to exist alike, and for this reason the award in each case must depend upon the circumstances surrounding it, and hence "the elasticity of the law of salvage."

From the many cases referred to, we have selected *The Alaska*, 23 Fed. 597, one of the largest passenger vessels afloat at that day, not only for the reason that the conditions prevailing at the time of her accident, and during her towage, were in many respects similar to those of the *Phoenix*, but for the additional reason that the allowance made in her case was the largest, under somewhat similar conditions, among the cases cited. She, with her cargo and freight, was valued at \$1,041,542, and the *Lake Winnipeg*, which went to her assistance, was valued, including her cargo, at about \$350,000. When found, she was 600 miles from New York, with a broken rudder, having encountered "heavy weather," and had drifted for two days without aid when the *Lake Winnipeg* observed her signals of distress and took her in tow, arriving in New York on the fourth day of their voyage. During the voyage the weather became "boisterous, with thick snow," the cables which fastened the two steamers together parted, and many other difficulties were encountered. In her case, the character of the weather was much the same as existed in the case of the *Phoenix*. No supreme danger was encountered by either vessel during their towage, which called for heroic endeavor. The allowance in that case was \$9,000 less, though there was nearly, if not, three times as much in value involved.

But it is claimed by counsel for the libellant that this and other cases relied upon by counsel for claimants as persuasive guides for the court in fixing the amount of the allowance are mostly, if not altogether, cases decided by courts on the north Atlantic coast, who are not inclined to be as liberal as courts on the south Atlantic coast, mainly for the reason that they are not called upon to consider cases which arise on that coast, and which to the mariner is one of special danger. Whether or not there exists upon that coast special danger is not a question of fact involved in this case, and cannot, therefore, be considered as an element in fixing the allowance, as the *Phoenix* was far out at sea, and for this reason we dismiss its further consideration. In our examination of the cases relied upon by counsel for the libellant, where the accidents to vessels have occurred on the south Atlantic coast, we reach the conclusion that the courts on that coast have not been more liberal than the courts on the northern coast, but that in a few instances they have had cases of extreme peril to life and property, which required heroic efforts upon the part of those who went to the assistance and rescue of vessels, that justified liberal allowances. The *Akaba*, which is relied upon to support the allowance in this case, and which is the strongest one cited, we think rests upon facts that do not exist in this case. The case of the *Phoenix* is one of meritorious towage, where no such supreme necessity for aid and prompt action existed as in the case of the *Akaba*. This court, in reviewing that case,

used the following language, which we adopt, showing the extreme peril of the vessel and all on board: "She was found on a dangerous coast, perhaps the most dangerous of American coasts, drifting to leeward, in a heavy northeast gale, almost helpless," with a broken shaft, 10 miles off the coast at Hatteras. "The vessel that went to her rescue had many passengers and a valuable cargo aboard, much of which was perishable, rendered her successful assistance, rescued her from imminent peril, and after great toil and danger towed her to a place of safety." That was a case of supreme necessity, requiring prompt action and great effort upon the part of the crew of the vessel which went to the assistance of the Akaba. In that case, the district court allowed \$30,000, which, upon appeal, was approved by this court. 8 U. S. App. 316, 4 C. C. A. 281, and 54 Fed. 197. But that allowance was \$5,000 less than in this case, and, as we have seen, under far different circumstances. That is the only reported case we can find on the south Atlantic coast that approximates the allowance in this case. Numerous cases cited in appellants' brief tend to show that this allowance is in excess of the usual amounts for services of this character under similar conditions. Necessarily, no general rule can be laid down to regulate allowances in cases of salvage. The rewards to salvors largely depend upon the merits of their claims in each case. We would not be inclined to interfere with the decree complained of in this case, even if we were of opinion that the allowance was greater than we would have originally made, unless, under all the facts, we reached the conclusion that the allowance was excessive.

In the light of the precedents before us, as well as the fact of the absence of those essential elements in this case that would justify so large an allowance as the district court made, we are of opinion that there should be an abatement of \$15,000, reducing it to \$20,000, which, we think, under the facts of the case, will be a liberal reward.

The decree of the district court is modified to this extent, and the case is remanded for that purpose, in accordance with this opinion.

Petition for Rehearing by Appellee.

(June 2, 1894.)

PER CURIAM. We have carefully considered the petition for a rehearing, and the points therefor pressed by the appellee. We see no reason to change the conclusion reached by the court after a full and exhaustive argument upon the merits of the appeal. Whatever ambiguities, if any there be, in the opinion filed, have been removed in the mandate sent down by this court to the district court. In that court, a reapportionment can be made upon the change in the amount of the salvage award, where complete justice can be done to all parties. The prayer of the petition is refused.

PATTEN v. CILLEY.

(Circuit Court, D. New Hampshire. July 6, 1894.)

No. 400.

APPEALABLE ORDERS—DISMISSAL OF PETITION FOR REMOVAL.

The dismissal of a petition for removal on the ground of local prejudice stands on the same ground as an order of remand, and is not a final judgment from which a writ of error will lie. In *re Pennsylvania Co.*, 11 Sup. Ct. 141, 137 U. S. 451; and in *re Coe*, 5 U. S. App. 6, 1 C. C. A. 326, and 49 Fed. 481, followed.

This was an application for a writ of error to the supreme court to review an order dismissing, for want of jurisdiction over the subject-matter, a petition for removal of the cause from the state court, on the ground of local prejudice. 58 Fed. 977.

Harvey D. Hadlock and W. L. Foster, for petitioner.

Bingham & Mitchell and Streeter, Walker & Chase, for respondent.

Before COLT, Circuit Judge, and ALDRICH, District Judge.

ALDRICH, District Judge. At the August term, 1892, this court remanded the probate proceeding in which Horatio G. Cilley was appellant in the state probate court, and which he removed to this court within the time in which a party may remove a proper cause as a matter of right. Such order was upon the ground that the court had no jurisdiction over the subject-matter of the controversy. Subsequently, the same party petitioned for the removal of the same controversy, on the ground of local prejudice; and such petition was dismissed December 11, 1893, for the same reasons, and the case is reported in *Re Cilley*, 58 Fed. 977. This is an application or petition for writ of error from such order of dismissal, to the supreme court of the United States. In *re Pennsylvania Co.*, 137 U. S. 451-454, 11 Sup. Ct. 141; *Patten v. Cilley* (1892) 1 C. C. A. 522, 50 Fed. 337; and in *re Coe*, 5 U. S. App. 6, 1 C. C. A. 326, and 49 Fed. 481,—would seem to settle this question against the petitioner. The case first cited was a petition for removal on the ground of local prejudice; and Mr. Justice Bradley, in denying the petition for mandamus, seems to have made no distinction between the dismissal of a petition for removal and a remanding order. In *re Coe* does not suggest any distinction, and, indeed, the opinion in that case is based upon the idea that the order is not a final decision of the cause, but rather a refusal to hear and decide, from which there is no appeal. The dismissal of a petition for removal is as much a refusal to hear and decide as a remanding order, and we do not see our way clear to make the distinction which the petitioner claims. See, also, *McLish v. Roff*, 141 U. S. 661, 12 Sup. Ct. 118; *Railroad Co. v. Roberts*, 141 U. S. 690, 12 Sup. Ct. 123; *Joy v. Adelbert College*, 146 U. S. 355, 13 Sup. Ct. 186; *Wauton v. De Wolf*, 142 U. S. 138, 12 Sup. Ct. 173; *American*

Const. Co. v. Jacksonville, T. & K. W. Ry. Co., 148 U. S. 372, 382, 13 Sup. Ct. 758.

The writ is denied, and the petition dismissed.

COLT, Circuit Judge, concurs.

CILLEY v. PATTEN et al.

(Circuit Court, D. New Hampshire. July 6, 1894.)

No. 255.

1. **FEDERAL COURTS—JURISDICTION—PROCEEDINGS TO CONTEST WILLS.**

A federal court has no jurisdiction to disestablish a will admitted to probate in the state court and establish one not admitted, where the state courts of equity have no such powers.

2. **SAME—DIVERSE CITIZENSHIP—ACTUAL INTERESTS OF PARTIES.**

In determining questions of jurisdiction on the ground of diverse citizenship, the parties are to be placed on the side of the controversy to which they belong according to their actual interests.

This was a suit by Horatio G. Cilley against William A. Patten, in which John J. Cilley and J. Henry Dearborn were also joined as defendants, to disestablish a will admitted to probate in the state court and establish an earlier will. For reports of previous decisions in the same litigation, see 46 Fed. 892; 1 C. C. A. 522, 50 Fed. 337; 58 Fed. 977; also, 62 Fed. 497.

Harvey D. Hadlock, for complainant.

Streeter, Walker & Chase and Bingham & Mitchell, for respondent Patten.

Before COLT, Circuit Judge, and ALDRICH, District Judge.

ALDRICH, District Judge. This is a bill in equity, and involves the validity of the will of Matilda P. Jenness, dated March 26, 1884, in which William A. Patten is sole legatee, or, to speak more specifically, seeks the disestablishment of the will of 1884, admitted to probate in the state court, and the establishment of a will dated in 1878, not probated in the state court, and in which Horatio G. Cilley, John J. Cilley, and J. Henry Dearborn are sole legatees. It also prays for relief in the circuit court of the United States annulling the decrees of the probate courts in New Hampshire, an accounting by the sole legatee under the probated will of 1884 to the sole legatees of the unprobated will of 1878, and, as incident thereto, the setting aside of certain assignments from the testatrix to Patten, between the dates of the earlier will and the later one. The controversy is the same, as that involved in the probate proceeding before this court in *Re Cilley* (determined December 11, 1893) 58 Fed. 977. The decision of the question then considered proceeded upon the idea that the federal courts had no jurisdiction over the probate of wills in a state where there was no statute conferring jurisdiction upon its own equity or common-law courts. We think the reasoning there covers the present cause. If the will of 1884

stands, all rights which the estate might otherwise have to set the assignments aside are merged in the will and Patten, who is executor and sole legatee thereunder. The right to contest the assignments, therefore, is incident to the will itself, which can only be overthrown in the probate court. In other words, if the will stands, no one has any right or interest to contest the assignments which relate to the property operated upon by the will; and the question of the existence of the paper as a valid will can only be determined by a probate court proceeding to that end. So it follows that no issue exists as to the assignments except as incident to the jurisdiction to disestablish the will of 1884, and establish the will of 1878; and it results from such situation that we cannot reach an issue as to the property assignments without disestablishing a will admitted to probate in the state probate court, and establishing one not admitted, and this would involve the exercise of jurisdiction which, we have already said (58 Fed. 977), does not attach to a federal court in a cause coming from the state of New Hampshire, where courts of equity do not exercise such powers.

Moreover, if the subject-matter were cognizable here in a proper cause, the diverse citizenship contemplated by statute is lacking. The court directed evidence to be taken upon the question of controversy; and upon the evidence we find, as a matter of fact, that there is no controversy between John J. Cilley and J. Henry Dearborn, of New Hampshire, who are made defendants, and Horatio G. Cilley, of Nebraska, who is the sole complainant of record, and that the parties were so arranged for the purpose of creating a cause cognizable in the federal courts. In reaching this conclusion, we have considered the nature of the contest as disclosed by the pleadings, as well as the evidence submitted by the parties, and have not been unmindful of the fact that John J. Cilley has been before this court on many occasions during the contest as to jurisdiction, advising with the learned counsel who contends that the last will should be broken and the earlier will established.

The statute of August, 1888 (Supp. Rev. St. p. 614, § 5), provides, in substance, that if, at any time after suit is brought in the circuit courts, or removed thereto, it shall appear that such suit does not really and substantially involve a dispute or controversy within the jurisdiction of such court, or that the parties to such suit have been improperly or collusively joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under such act, the court shall proceed no further, but shall dismiss the suit, or remand it to the court from which it was removed, as justice may require. The court not only may, but most assuredly should, for the purpose of determining its jurisdiction over the controversy, look to the real interests of the parties, in order that it may know whether the parties, adversely arranged on the record, have a real and substantial controversy, such as the statute contemplates, or whether the controversy is fictitious, and therefore without substance as a basis for assumption of jurisdiction. Jurisdiction depending upon diverse citizenship is founded upon contro-

versial relations, and this means a real controversy as to the facts involved in the suit. Federal jurisdiction is not founded in fiction, nor does it depend upon the arbitrary or capricious arrangement of the parties by the pleader. While it is doubtless proper, in the first instance, and for the purposes of a decree binding all, to join as defendants all parties interested who do not desire to institute suit as plaintiffs, when the parties are before the court the court will, for the purpose of ascertaining its jurisdiction, arrange them according to their actual interests, and place them on the side of the controversy to which they belong, and, if it then appears that the controversy is not between citizens of different states, the condition contemplated by statute is wanting, and the court is without jurisdiction. The duty of the court to inquire would seem to be as fully recognized as its power to act as justice may require when the facts are made to appear by the parties upon motion and evidence. Stat. Aug. 13, 1888, § 5; *Bland v. Fleeman*, 29 Fed. 669; *Marvin v. Ellis*, 9 Fed. 367; *Covert v. Waldron*, 33 Fed. 311; *Rich v. Bray*, 37 Fed. 273; *Williams v. Nottawa*, 104 U. S. 209; *Detroit City v. Dean*, 106 U. S. 537, 1 Sup. Ct. 560; *Railway Co. v. Swan*, 111 U. S. 379, 4 Sup. Ct. 510; *Cashman v. Canal Co.*, 118 U. S. 58, 6 Sup. Ct. 926.

The interests of the Nebraska Cilley and the New Hampshire Cilley and Dearborn lie in the same direction. As sole legatees under the will of 1878, they claim, in substance, that all acts subsequent to 1878 should be annulled, and the will of 1878 established, while Patten alone claims that the will of 1884 is valid, and, unless defeated by proper proceedings in the probate court, supersedes all prior wills; and this is the controversy. Place the New Hampshire Cilley and Dearborn on the side of the controversy to which they belong, and there is no jurisdiction on the ground of diverse citizenship. The ingenious or capricious act of counsel in setting them up on the wrong side does not confer jurisdiction. For the above reasons, the bill is dismissed, with costs to the defendant Patten.

COLT, Circuit Judge, concurs.

MAYOR, ETC., OF BALTIMORE v. POSTAL TEL. CABLE CO.

(Circuit Court, D. Maryland. February 23, 1894.)

1. REMOVAL—JURISDICTION—AMOUNT IN CONTROVERSY.

An action was brought by a city in a state court to recover a tax of \$2 for each of 509 telegraph poles maintained in the streets, but the declaration concluded: "And plaintiff claims \$10,000." *Held*, that the actual amount in dispute was but the amount of the tax, \$1,018, and a circuit court could not take jurisdiction by removal.

2. SAME.

Defendant could not maintain that the real matter in dispute was its right to keep its poles in the streets without paying the tax and without being liable to the fine of \$10 per pole for nonpayment, imposed by the city ordinance, and the penalty of having its poles removed; for in an

action at law to recover money, the amount in controversy is determined by the particular demand sued for, and not by any contingent loss through the indirect or probative effect of the judgment, however certain such loss may be.

This was an action by the mayor, etc., of Baltimore, against the Postal Telegraph Cable Company to recover a tax of two dollars on each pole maintained by defendant in the city streets. The action was brought in a court of the state of Maryland, and removed therefrom by defendant. Plaintiff moved to remand.

William S. Bryan, Jr., for plaintiff.

N. R. Preston and Geo. H. Bates, for defendant.

MORRIS, District Judge. This case was originally brought in the court of common pleas of Baltimore city, and was removed upon the petition of the nonresident defendant. The plaintiff now moves to remand the case upon the ground that the matter in dispute does not exceed, exclusive of interest and costs, the sum or value of \$2,000, which, by the act of congress of August 13, 1888, is the sum required to give jurisdiction to this court, and to give the right of removal. The declaration contains but one count, and that is for the recovery of the tax of \$2 for each of 509 telegraph poles alleged to be maintained by the defendant in the streets of the city of Baltimore. The declaration concludes as follows: "And the plaintiff claims ten thousand dollars." The amount alleged to be due and unpaid by the single count of the declaration is the tax of \$2 on each of 509 telegraph poles, and there was filed with the declaration an account in which the only item is as follows:

Baltimore, Nov. 10, 1893.

The Postal Telegraph Cable Co., to the Mayor and City Council of Baltimore, Dr.

To license fee on 509 poles, at \$2 per pole.....\$1,018
Interest from June 15th, 1893.

To this account the mayor makes oath "that there is justly due and owing by the Postal Telegraph Cable Company, the defendant in said case, to the plaintiff, on the annexed account (the cause of action in said cause), the sum of \$1,018, over and above all discounts." If the defendant had suffered judgment to go against it by default, the whole amount for which judgment could have been entered would have been \$1,018, with interest and costs. It is true that, in actions of tort, it is the damages claimed which determine the amount in dispute, but, in an action to recover a specific sum of money, the court examines the body of the declaration, and the cause of action set out, to determine what is the real sum in dispute. *Hilton v. Dickinson*, 108 U. S. 174, 2 Sup. Ct. 424; *Lee v. Watson*, 1 Wall. 337. In this case the declaration and the sworn account disclose that the real matter in dispute is \$1,018, and not the sum demanded in the formal claim of damages.

It is urged, however, that the real matter in dispute, so far as it affects the defendant, is its right to maintain its poles, as now erected in the streets of the city, without paying the annual tax of \$2 for each, and without being liable to a fine of \$10 for each pole,

imposed by the ordinance for nonpayment, and without being subject to the penalty of having its poles removed, in default of payment, and because the right to recover in this suit depends upon the validity of the ordinance, and, if its validity is sustained in this suit, the consequence to the defendant will be that it will have to pay a large annual tax, or submit to have its poles and its business destroyed.

It is true that where a bill in equity is filed to abate a nuisance, or to set aside a deed, or for a decree giving other mandatory or preventive relief, it is the value of the property of which the defendant may be deprived by the decree sought which is the test of jurisdiction, and not the claim of the complainant. *Railroad Co. v. Ward*, 2 Black, 485; *Market Co. v. Hoffman*, 101 U. S. 112; *Estes v. Gunter*, 121 U. S. 183, 7 Sup. Ct. 854. But it has been uniformly held in actions at law, where the plaintiff's claim is for money, that the amount in controversy is determined by that particular demand which the plaintiff sues for, and not by any contingent loss which either party may sustain through the indirect or probative effect of the judgment, however certain it may be that such loss will occur. *Security Co. v. Gay*, 145 U. S. 123, 12 Sup. Ct. 815; *Elgin v. Marshall*, 106 U. S. 578, 1 Sup. Ct. 484; *Gibson v. Shufeldt*, 122 U. S. 27, 7 Sup. Ct. 1066; *Clay Center v. Farmers' Loan & Trust Co.*, 145 U. S. 225, 12 Sup. Ct. 817; *Washington & G. R. Co. v. District of Columbia*, 146 U. S. 227, 13 Sup. Ct. 64. It seems to me clear, upon authority, that this suit must be remanded.

STARCKE et al. v. KLEIN et al.

(Circuit Court of Appeals, Fifth Circuit. November 28, 1893.)

MANDAMUS—COMPELLING TRANSMISSION OF TRANSCRIPT OF RECORD ON APPEAL.

On an appeal to the circuit court of appeals that court will not grant appellants' petition for a mandamus to the clerk of the lower court to certify and transmit a transcript of the record, merely to determine in advance whether a certain deposition is part of the record, where the ordinary procedure is adequate for the purpose.

Appeal from the Circuit Court of the United States for the Southern District of Mississippi.

On application for mandamus.

Wade R. Young, for appellant.

M. Dabney, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

McCORMICK, Circuit Judge. We do not deem it necessary to add to what we have said in cases hereinbefore decided in reference to the duty of the clerk of the circuit court in making the return to a writ of error or order granting an appeal. For the purposes of this case, our views on the subject are sufficiently expressed in the cases of *Blanks v. Klein*, 1 C. C. A. 254, 49 Fed. 1; *Pennsylvania Co.*,

etc., *v. Jacksonville, T. & K. W. Ry. Co.*, 5 C. C. A. 53, 55 Fed. 131; and *Warner v. Railway Co.*, 4 C. C. A. 670, 54 Fed. 920.

The order granting the appeal was filed in the circuit court July 27, 1893. The time for filing the transcript was enlarged to the third Monday in November,—the first day of this term. The transcript has not been filed. On the first day of this term, counsel for appellant moved this court for leave to present a petition for an alternative mandamus, to be directed to the clerk of the circuit court, commanding him to appear and show cause why a peremptory mandamus should not be awarded, “commanding him to certify and transmit to this court a true and complete transcript of the record and proceedings had in said court in said cause, as the same remain of record and on file in his office, following the note of evidence made under the rule of court, and neither diminishing the record by leaving out any evidence presented below, nor increasing it with matter not presented.” It appears from the face of this petition that the clerk contends that a certain deposition is a part of the record, and must be included in it, to enable him to make the full certificate required by our rule 14, 1 C. C. A. xv., 47 Fed. vii.; while the appellant contends that no file mark appears on said deposition, to show that it was ever made part of the record, and that the note of evidence does not show that said deposition was given in evidence on the hearing, and that hence the clerk can and must certify to the record as thus shown by the file mark and the note of evidence. It is not intimated that the deposition was not in fact presented and considered on the hearing. It is not intimated that the clerk refuses to furnish a transcript otherwise correct, or that any demand for a transcript, accompanied by written instructions from the appellant as to what it should embrace, was made by appellant. No showing is made of any oppressive accumulation of costs that might be put on appellant by including said deposition in the record, or that the payment of such additional costs in advance was insisted on by said clerk. The petition assumes the right to call on this court, by these extraordinary proceedings, to settle in advance whether a certain paper is or is not a part of the record. Our ordinary procedure is adequate. The prayer for mandamus must be refused.

GORDON v. SMITH et al.¹

(Circuit Court of Appeals, Fifth Circuit. May 15, 1894.)

No. 114.

1. MORTGAGE—REDEMPTION BY EQUITABLE ASSIGNEE OF MORTGAGOR—SUBROGATION.

After foreclosure of a mortgage held by an agent for a bank and purchase of the property for the bank at the foreclosure sale, the mortgagor, having a statutory right of redemption, subject to liens of judgments as well as to the rights under the mortgage, obtained a loan from complainant, on security of a new mortgage of the property, by representations that he had a perfect title thereto, and thereupon previous negotiations between the mortgagor and the bank for redemption of the property by him

¹ Rehearing pending.

were partially carried into effect by the appropriation of part of the loan to the purchase by the bank of certain judgments, liens against the property, the bank receiving the money from him for that purpose, leaving the balance of the redemption money to be paid thereafter; but the mortgagor became insolvent. *Held*, that the mortgagor had a right to redeem, founded on contract as well as on the statute, which, in view of his representations, his insolvency, and his neglect to act, might be asserted by complainant, as his equitable assignee, and subrogated to his rights, and enforced against the bank, it not being impossible for its rights and claims to be divested on equitable terms.

2. SAME—BONA FIDE PURCHASER.

In complainant's suit to establish his claim and to redeem, it appeared that before the loan he was advised of circumstances which should have put him on inquiry as to the bank's claim. *Held*, that as he did not seek priority, but the simple right to redeem, and as the bank retained the benefit of part of the loan by him to the mortgagor, it was not important that complainant was not within the strict definition of an innocent purchaser for value.

3. SAME—TENDER OF REDEMPTION MONEY.

Before the expiration of the mortgagor's right of redemption, complainant, for the purpose of redeeming from the foreclosure sale, offered to the purchaser and the bank the amount of the price paid, with interest and all lawful costs and charges, which was rejected on the grounds that complainant had no right to redeem, and that redemption on part of the mortgagor must be in amount sufficient to cover, in addition to the mortgage, the full amount of the judgments, without credit for the money advanced on account thereof. Complainant's original bill, previously filed, had offered to redeem from all defendants' liens when ascertained according to law, and his amended bill offered to pay into court the amount tendered, or any sum which the court might determine to be proper, and to do whatever might appear equitable. *Held* that, under the circumstances, failure to make actual tender before filing the original bill did not necessarily defeat complainant's equity, and that the offer to do equity was sufficient.

4. SAME—STATUTE OF FRAUDS.

The payment and application of the money advanced by the mortgagor to the bank for purchase of the judgments being, as between them, a partial performance, the statute of frauds, even if otherwise applicable, could not be applied as against complainant exercising the right of the mortgagor.

Appeal from the Circuit Court of the United States for the Southern Division of the Northern District of Alabama.

This was a suit by Basil B. Gordon against William J. Smith, C. A. Johnston, the First National Bank of Columbus, Miss., R. T. Williams, and E. A. Quintard, to establish a lien on certain lands and to redeem the same.

On April 19, 1884, one E. W. Rucker conveyed to W. J. Smith, by general warranty deed, certain 840 acres of land, situated in Walker county, Ala., together with all the mines and mining rights,—the whole constituting the mining lands and property involved in this suit; and, upon the same day, Rucker took back from Smith a mortgage upon the same property to secure the sum of \$2,725.55, to become due April 19, 1885, and represented by a promissory note payable at the Alabama National Bank, at Birmingham, Ala.; the same being one-half of the purchase money agreed to be paid by said Smith for said property. Said mortgage provided, among other things, that if the grantor should fail to pay the secured note at maturity the grantee, or his representative or assigns, might at once enter upon and take possession of the property, and proceed to sell the same at public outcry to the highest bidder for cash, after giving 20 days' notice of the time, place, and terms of such sale, with a brief description of said property, which notice

should be given by advertising the same in some newspaper published in Jefferson county, Ala., at least three times before the day of sale, and that at such sale the grantee, his representative or assigns, might buy said property, and have full power to make conveyance thereof to purchasers of the same. Before the maturity of the note and the law day of the mortgage, said E. W. Rucker assigned and transferred said note and mortgage to C. A. Johnston. On July 20, 1885, the said note being past due and unpaid, C. A. Johnston, as assignee, sold the said property on the premises, after a notice and advertisement of the same published in the Weekly Iron Age of July 2d and July 9th, and in the Daily Age from June 23d to July 5th (in all, 11 insertions), to R. T. Williams, and on July 23, 1885, executed and delivered to said Williams a deed reciting, in substance, the foregoing facts, which deed was duly recorded in Walker county on July 25, 1885. Johnston was the president and Williams was the cashier of the First National Bank of Columbus; and in taking and foreclosing said note and mortgage, and buying the property, they acted for and in the interest of said bank. Following the said sale, the bank put an agent in possession and general charge of the property, but contracted with Smith to operate the mines, as far as he could, for a stipulated rental. On March 25, 1885, one D. J. Gibson recovered a judgment against W. J. Smith in the circuit court of Walker county, Ala., for \$3,708.46, and at the same term J. Pollock & Co., and other creditors of Gibson, recovered judgments against him for an aggregate amount about equal to his (Gibson's) judgment against Smith; and thereupon Gibson assigned and transferred his said judgment against Smith to his said creditors, in equal parts, to secure the said several judgments against him. Execution was issued upon the Gibson judgment, so that it operated as a lien on Smith's property in favor of Gibson's creditors, subject to the prior lien of the Rucker mortgage. On November 19, 1885, the First National Bank of Columbus recovered a judgment against W. J. Smith in the circuit court of Walker county, Ala., for the sum of \$1,183.35, and \$30.85 costs of suit, which judgment also became a lien upon Smith's property, but junior and subordinate to Gibson's. On the 25th day of September, 1885, William J. Smith, with several friends, representing a few shares, inaugurated proceedings in the state of West Virginia to charter a corporation by the name of Wolf Creek Coal Company, for the purpose of mining and shipping coal, and transacting a general merchandise business, which corporation was to keep its principal offices or places of business in New York, New Orleans, and Wolf Creek, in the county of Walker, state of Alabama. For the purpose of forming the said corporation, \$500 were subscribed to the capital thereof, with the privilege of increasing the capital, by the sale of additional shares from time to time, to the sum of \$100,000. The secretary of state for West Virginia certified and declared that the corporators named, and their successors and assigns, should be a corporation until the 1st day of September, 1935. On the 26th day of September, 1885, the Wolf Creek Coal Company, represented by William J. Smith, president, and William P. Smith, secretary, executed a first mortgage upon the 840 acres of land herein referred to as Smith's property, and also all the machinery, miners' houses, buildings, railroad cars, and other plant in use for working the mine on said premises, to E. A. Quintard, trustee, to secure an issue of 50 bonds, of \$1,000 each, to be issued by said Wolf Creek Coal Company, to be due in 10 years, with interest at the rate of 8 per centum per annum, payable semi-annually. Said mortgage was filed for record in the proper office of Walker county, state of Alabama, on the 21st day of November, 1885, and was duly recorded January 6, 1886. Armed with his West Virginia charter for the Wolf Creek Coal Company, and an issue of \$50,000 of bonds of said company, secured by mortgage as aforesaid, Smith undertook to raise money to redeem his land, and organize and operate the mining properties, at the north. Meeting Mr. Basil B. Gordon, a citizen of Virginia, he made such representations, in personal interviews and by letters, to him, that he obtained from Gordon a loan of \$5,000, secured by a pledge, as collateral, of the \$50,000 bond issue of the Wolf Creek Coal Company. The representations made to Gordon as to the security given are fully shown by letters, of which the following are copies:

"Baltimore, July 10th, 1886.

"Basil B. Gordon, Esq., Front Royal, Va.—Dear Sir: For the purpose of fully securing you for the loan of \$5,000.00 on my property, I am willing to give you the fifty bonds of the Wolf Creek Coal Co., of \$1,000 each,—\$50,000 in all. Said bonds are secured by a first mortgage on my 840 acres of coal land, and on all the plant. E. A. Quintard, president of the Citizens' Savings Bank, corner Bowery and Canal street, New York City, is trustee under the mortgage. Said mortgage is duly recorded at Jasper, Walker county, Ala., as well as the deed for the 840 acres purchased from Gen. L. E. W. Rucker, of the Alabama State Bank, at Birmingham. I have a copy of the mortgage and deed now in my possession. The deed to my coal land is perfect and clear title, as well as the first mortgage under the bonds, the whole issue being for \$50,000. My object in making you this proposition was that the bonds have cost me, as well as the mortgage has cost me, considerable money, and after you have loaned me the \$5,000 and you should decide not to take a one-third interest with me, I would then negotiate these bonds, and secure the money on them, and pay you your \$5,000, with 8 per cent. per annum interest. I will leave it to you, after you lend me the money, to decide, one way or the other, when you will take the interest I offered on the terms I submitted to you in writing. I think that this is the best plan for both of us, and you can draw up an agreement in regard to taking an interest in my property on the terms I submitted. Gen. L. E. W. Rucker will guaranty the deed to my property by accepting this proposition. All that remains due on it will be what I owe the First National Bank of Columbus, Miss. What little I owe outside of the bank I will settle with out of the \$5,000 you loan me, which will leave enough for me to start and operate my mine. Not knowing when you would return to the city, I concluded to write you on the subject. I would be pleased to receive an early reply. Hoping that you are well, and enjoying yourself on your farm, I am,

"Truly yours,

W. J. Smith.

"P. S. Address 134 Boundary avenue, near John street, Baltimore, Md.
"[Indorsed] Eight hundred and forty acres on main line Georgia Pacific, Walker county, Ala., purchased April 19th, 1884, from Gen. E. W. Rucker."

"Baltimore, August 2nd, 1886.

"Basil B. Gordon, Esq., Sandy, Va.—Dear Sir: Your favor, 30th, at hand this morning. I visited Messrs. Brown & Lowndes' office, and examined the abstract of title of my property furnished you by Messrs. Garrett and Underwood, which is very clear and explicit in all of its details, as far as they went. The court at Jasper was destroyed by fire in 1884, and May, 1886, by which all of the records of Walker county, Alabama, was destroyed by fire. Then Gen. E. W. Rucker went to the chancery court, and had the said court give him a title for all the lands that Thos. Petus purchased from the owners with Gen. E. W. Rucker's money, embracing the 840 acres that I purchased from E. W. Rucker, which makes my title perfect. And besides this, Gen'l Rucker will guaranty my title himself, and give it to me in writing whenever I call on him for it. As he is responsible, and is worth \$100,000, in addition to this I will be responsible myself, so far as the title is concerned; and my improvements are worth to-day, at the mines, \$10,000, outside of the land. I would consider it a personal favor if you would please loan me the \$3,000 on my bonds on the terms I proposed, and you will find that I will carry out all my promises; and, if you do not care to take an interest in my property, I will return you the \$5,000 in January, 1887, with interest, as I learned from a friend that I can raise the money on my property in Memphis, Tenn. I can do this when I have my mines fully under way, and shipping 100 tons of coal daily. On receipt of this, will you please wire me, care of Brown & Lowndes, if you will let me have the \$5,000 on my bonds, either as temporary loan, or on the terms I proposed, as I am very anxious to start my mines at once, to take advantage of the fall trade, which will be very active. If you will grant me this favor, I will stop at Birmingham, and get Gen'l E. W. Rucker to guaranty the title to the property, and will assign it to you, in addition to the bonds. Those little defects in the chain of title are obliterated by being destroyed by fire, and are wiped out

by the title given to Rucker by the chancery court, and will never bother me in the future. This man, Thos. Petus, died very suddenly, and was insolvent at the time of his death. Rucker furnished him the money to purchase some 30,000 acres of coal land in Walker and Jefferson county, Alabama; and to secure Rucker he made a will, and appointed E. W. Rucker his executor, to settle up his estate, as well as to secure him for the money he advanced to purchase these mineral lands, and Rucker is now acting in that capacity now, and is selling off those coal lands at an advanced price, by which will make over \$200,000 when he sells all of the 30,000 acres. Said lands he is selling from \$15 to \$25 per acre, which are from two to five miles from the railroad. Hoping that you will comply with my request, I am,

"Yours, truly,

W. J. Smith.

"P. S. My bonds are still in the possession of Brown & Lowndes."

"Baltimore, August 2nd, 1886.

"Basil B. Gordon, Esq., Sandy, Va.—Dear Sir: Since writing you this morning, I send you a copy of the deed of the 840 acres from E. W. Rucker to W. J. Smith, in which he defends me in the title, making the title perfect against all claimants. You can judge from the perusal of the same that it is correct and binding, and leaves no room for any doubt. I would suggest to you to write to E. W. Rucker, Birmingham. He will verify all I have stated. Please return this copy of deed.

"Truly yours,

W. J. Smith."

The \$5,000 advanced by Gordon on the representations of Smith were paid in sums as follows: \$2,500 on the 4th day of August, 1886; \$2,000 on the 8th day of September, 1886; \$250 on the 16th day of November, 1886; \$250 on the 20th day of November, 1886. The money was paid in drafts, a large portion of which was collected by the First National Bank of Columbus, which bank, through its agents, was informed of the source and purpose for which Smith obtained the money. The most of the money passing through the bank was applied to the operation of the mining property, but \$1,000 of it, by agreement between Smith and the bank, was applied to the purchase of the judgments against Gibson, which were to be used in offsetting the judgment in favor of Gibson against Smith, to facilitate the redemption of the land by Smith from the sale under the Rucker mortgage in case Smith should be able to redeem within the two years allowed by the statute, which it was hoped and expected he would be able to do.

On the 31st day of December, 1886, C. A. Johnston, president of the First National Bank of Columbus, sent the following letter:

"First National Bank, Columbus, Miss., Dec. 31st, 1886.

"Mr. Basil B. Gordon, 14 E. Franklin Street, Balto., Md.—Dear Sir: Mr. W. J. Smith, formerly of Baltimore, has a coal mine on the Georgia Pacific Railroad, some 70 miles from this place. In July, 1885, it was sold under a mortgage, and one Mr. Williams bought it. I bought a judgment against Mr. Smith, which was obtained about the time of the mortgage sale. Under the laws of Alabama, he has two years in which to redeem this property from the above liens. That time will expire in July, 1887, and the title will be vested absolutely as above stated. He is working the mines under our permission, though we are in possession, but his means are limited; that is, he is actually living from hand to mouth, and cannot make any money. I understand you have advanced him some. Now, I suggest that for your security, and the proper working of the mines, it would be to your interest to pay us off, and take possession of the property. Mr. Smith is doing the best he can, under the circumstances, but he can do almost nothing with such meager means.

"Yours, very truly,

C. A. Johnston."

—And on the 14th of January, 1887, also forwarded the following letter:

"Birmingham, Ala., January 14th, 1887.

"Mr. Basil B. Gordon, 14 E. Franklin Street, Balto., Md.—Dear Sir: Your favor, 4th inst., was forwarded here from Columbus, Miss. I may be in

Baltimore in course of the next ten days, and, if so, will try to call on you, to talk over Mr. Smith's affairs. We bought the property at mortgage sale in July, 1885, and own a judgment against him for some \$3,500.00, and another for some \$1,200.00. Under the laws of this state, he has until July of this year in which to redeem property. After that time, our title is good. We do not want the property without his full and free consent, but do want our money, and can hardly wait any longer after his right ceases. Your Wolf Creek Company mortgage is subsequent to all above.

"Yours, very truly,

C. A. Johnston."

These two letters not sufficiently explaining the situation to Mr. Gordon, Mr. Johnston, on the 27th of January, 1887, wrote the following letter:

"Columbus, Miss., January 27, 1887.

"Mr. Basil B. Gordon, 14 E. Franklin St., Baltimore, Md.—Dear Sir: I was not able to stop in Baltimore on my recent trip to New York, as I hoped. I now find your favor of the 12th inst., and in reply will give you the general facts, without going into details. When Mr. Smith bought this land of Gen. Rucker, he paid part cash, and gave a mortgage for the unpaid balance. I bought this, and foreclosed it in July, 1885; Mr. R. T. Williams buying the property for about the amount due me. A short time previously, a Mr. Gibson got judgments against Mr. Smith for something over \$3,000.00, and levied on this property, and sold and took possession of, and away, some of the machinery. Mr. Smith owed this bank some \$1,200.00, with interest, upon which we sued, and got judgments, but junior to the Gibson judgments. Within the past year, I bought the Gibson judgment against Smith. So that now our Mr. Williams owns the whole property under a foreclosure deed subject to the rights of redemption by me, as owner of the Gibson judgment, and all subject to the right of redemption by this bank as the junior judgment's creditors. I am advised that under the laws of Alabama the fee-simple title will rest on Mr. Williams, under his mortgage deed, if he is not redeemed out at the expiration of two years from its date, to wit, in July, 1887. I understand that the mortgage under which the bonds that you hold, was made subsequent to the deed to Mr. Williams and the judgments referred to above. If this is the case,—and it undoubtedly is, as to the deed,—you will have no security after July, 1887. Knowing your situation, I deemed it advisable to open this correspondence with you, and suggest that you will have to pay off existing liens before you have any security.

"Yours, very truly,

C. A. Johnston."

July 8, 1887, Gordon brought his bill in the circuit court against William J. Smith, C. A. Johnston, the First National Bank of Columbus, Miss., R. T. Williams, and E. A. Quintard, of New York City, in which, after alleging many of the foregoing facts, he averred, charged, and prayed as follows:

"And your orator further avers that, after obtaining the various sums of money from him as aforementioned, said Smith did in fact pay said money, or a large amount thereof, to the said bank in Columbus, on account of and in redemption of the said Rucker mortgage debt, then held nominally by the said R. T. Williams, and particularly that one payment of two thousand dollars made by your orator (that of the 8th day of September, 1886) was paid by your orator to said Williams, the cashier of said bank, on account of said Smith, which in itself went far towards the redemption of said mortgage claim held by said Williams for said bank, as the law, under the circumstances before mentioned, would certainly apply it; and, out of the balance of the \$5,000 advanced by your orator to said Smith, enough more money was paid to said bank by said Smith to completely redeem and extinguish the claim upon the said property due under the Rucker mortgage, and enough money further to purchase and secure from the parties holding the same the judgment obtained against said Smith by said D. J. Gibson, for your orator further alleges that said D. J. Gibson had previously assigned the judgment held by him against said Smith, in certain proportions, to certain creditors of his (said Gibson, namely); that said Gibson assigned to Rankin & Co., who had a judgment against said Gibson, of date March 25, 1885, for \$1,616.35,—an equal amount of the judgment held by him, said

Gibson, against Smith; and that said Gibson assigned to J. Pollock & Co., who held a judgment against said Gibson, of date March 25, 1885, for eleven hundred and sixty dollars and twenty-five cents, an equal amount of the judgment obtained by him, said Gibson, against said Smith, and said Gibson assigned to Buckner & Co., who held a judgment against said Gibson, dated March 25, 1885, an equal amount of said judgment held by him, said Gibson, against said Smith; and that said Smith, through C. A. Johnston, with part of the money obtained from your orator as aforesaid, purchased, with the consent of said Gibson, the judgment claims of Rankin & Co. and J. Pollock & Co. against said Gibson, thereby extinguishing the judgment obtained by said Gibson against said Smith to the extent and amount of said last two judgments, though the assignment from said Rankin & Co. and said J. Pollock & Co. of their rights against said Gibson and said Smith was secured in the name of said C. A. Johnston, but in reality are owned by said Smith, and, in view of the facts and circumstances before stated, ought to be treated as the property of your orator, and entered to your orator's use, or canceled as against your orator. And your orator further alleges that, out of the money obtained as aforesaid from your orator, said Smith purchased fifteen new pit wagons, and other machinery and equipments of said mine, which are now upon the said property, and that said Smith, also out of said money furnished by your orator, paid his operatives and operated said mine from August, 1886, to January, 1887, since which time he has been operating said mine, but the machinery and property are lying neglected and idle, and depreciating in value, and without proper precautions for preservation and protection for the benefit of your orator, or of any other parties interested in the said property. And your orator further charges that while said mine is now actually, and always (at least, since August, 1886) has been, in the possession of said Smith, yet said C. A. Johnston claims that the possession of said Smith is constructively said Johnston's possession, though said Johnston has in reality no right to the possession whatever; and, as before recited, said Johnston threatened to occupy and appropriate all of said property mentioned in said mortgage (Exhibit No. 1), to the total and final exclusion of your orator, and the deprivation of your orator of all the security in the property, both real and personal, to which your orator is entitled, as above set out. And particularly said Johnston claims, and has notified your orator, that after the 20th day of July in the year 1887 said Johnston shall consider and so use and treat said property as if your orator's rights in the premises were forever lost and forfeited, and will not allow your orator the opportunity of redeeming such prior liens as may be determined to be lawfully existent upon said property, and which your orator is willing to redeem, and hereafter, more particularly and formally, offers to redeem. And, further, your orator charges that said Smith is absolutely and altogether insolvent, as is also the said Wolf Creek Coal Company, and that unless said property, real and personal, is put into proper care and custody until the same can be sold, for the interest of the parties herein, to advantage, it will be insufficient to discharge the claim of your orator, even though your orator's claim constitutes a first lien on the property, prior to all others. And your orator further avers that if the whole claim of the said First National Bank of Columbus, or whatsoever other person held the claim against the mortgaged property represented by the Rucker mortgage, were not discharged by the money obtained of your orator by Smith as aforesaid, or if any lien prior to the date of the mortgage from the Wolf Creek Coal Company to said Quintard exists, unpaid and undischarged, against said property, and superior to your orator's rights to the same, your orator is able and willing, and hereby offers, to discharge and redeem the same when the same shall have been truly and justly ascertained and established according to law. And your orator is advised that said defendant Smith, and all claiming under or by him, are estopped from disputing, or taking advantage of the absence of the record of, the deed from said Smith to said Wolf Creek Coal Company for the property herein referred to (being the same mentioned in Exhibit No. 1), by reason of the representation of said Smith to your orator and others, and your orator's action upon said representation, and that said Smith will be required by this court to record, or to re-execute and record,

said missing deed (referred to in said Exhibit No. 1) from said Smith to said Wolf Creek Coal Company, nunc pro tunc, and that your orator, by reason of the facts hereinbefore mentioned, is entitled to a first lien, free of all incumbrances, upon the property mentioned in Exhibit 1, and all personal property upon or about said mine, acquired since the date of said exhibit, to wit, September 26, 1885; and your orator is entitled to have his said lien executed upon said property, and extended for the amount of your orator's advances to said Smith, by the proper process of this court,—the said coupon bond being three coupons in arrears and unpaid, and your orator's claim being overdue by its terms,—and that pending the final decision of this court upon the claim of your orator, and upon all disputed matters in this suit, and the final adjudication of all controversies herein suggested, that this court, according to its course and custom for the protection of the interests of your orator and all parties concerned in this controversy, will appoint its receiver to take possession of all the property—real, personal, and of any kind whatsoever—in these proceedings mentioned, and to hold and care for the same, under the direction of this court, until the further order of this court in the premises, an order to which effect is hereby particularly prayed. And your orator is also advised and specially prays that this court will issue its writ of injunction, directed to the said First National Bank of Columbus and the said C. A. Johnston and R. T. Williams and the said W. J. Smith, forever prohibiting them, or any of them, from treating as their own, converting to their own use, selling, transferring, or assigning, or otherwise disposing of, any of the property in these proceedings mentioned, or any interest or title claimed or held by them, or any of them, in the said property, until the final adjudication of all rights involved in these proceedings, or the further order and judgment of this court. And your orator further alleges that he hath heretofore, prior to the filing of this bill of complaint, requested the said E. A. Quintard, the trustee mentioned in said mortgage (Exhibit No. 1), to proceed to execute the trust imposed upon him by said mortgage in accordance with its terms, applicable to the facts and circumstances hereinbefore referred to, but said Quintard hath in effect refused and neglected so to do. To the end, therefore, that this court will pass an order appointing its receiver for the property herein referred to, as hereinbefore specially set out and prayed, and will further issue its writ of injunction, enjoining and prohibiting the said First National Bank of Columbus, the said C. A. Johnston, the said R. T. Williams, and the said W. J. Smith from converting to their use, removing, assigning, concealing, or otherwise disposing of, any part, interest, or claim in the property herein referred to, as above specially set out and prayed, and will further require the defendants hereinafter named to make full discovery of all the matters and facts herein charged against them, and to account fully to and with your orator for all moneys or other securities received by them, or any of them, directly or indirectly, of your orator, and to fully set out, discover, and prove all claims for money or property, of any kind whatsoever, held or claimed by them, or any of them, against your orator, or against the property and security herein claimed by your orator, so that your orator may have full opportunity for redeeming the same, and that this court will fully investigate, hear, and determine the accounts and disputes, claims and counterclaims, between your orator and said defendants, and will further pass a decree establishing and allowing your orator's claim, as herein set out, to be a first lien, for the full amount thereof, on the property herein mentioned, and ordering the same to be sold to satisfy your orator's claim, and the claim of all parties to this suit, in their proper order."

After vainly demurring to Gordon's bill, the First National Bank of Columbus, C. A. Johnston, and R. T. Williams answered the bill under oath, separately, but substantially to the same effect, reciting many of the facts as claimed by the complainant, confessing and avoiding other matters about which there was practically no dispute, and otherwise as follows:

"Answering paragraph fifth of said bill, respondents deny that said Smith paid said money, obtained by him from said Gordon as aforesaid, or any part thereof, to said bank, or to any one else for it, on account of and in redemption of said Rucker mortgage debt. Nor was said two thousand dollars, obtained as aforesaid by said Smith's order, on the 8th day of September, 1886,

or any part thereof, paid on account of said Smith for the extinguishment of said mortgage debt, or the redemption of said mortgage claim, as alleged in said bill. Respondents deny that said two thousand dollars ought, by law, to be applied to said Rucker mortgage, as insisted in said bill, for reasons which will hereafter more fully appear. Respondents further deny that enough or any part of said five thousand dollars was paid to said bank, directly or indirectly, in redemption and extinguishment of said Rucker mortgage debt, as alleged in said bill; and they further deny that any part of said five thousand dollars (except the sum of one thousand dollars, as hereinafter more fully explained) was used by said bank, or either of these respondents, to purchase the judgments held by said D. J. Gibson against said Smith. Respondents admit that said Gibson, in order to secure certain judgments held against him by Rankin & Co., J. Pollock & Co., and Buckner & Co., as alleged in said bill, did on the 25th day of March, 1885, transfer his said judgment of \$3,708.46, which he held against said Smith in certain proportions mentioned in bill, to his aforesaid judgment creditors, which more fully appears from a copy of said security herewith filed as Exhibit F of this answer, which respondents pray may be taken and considered as part thereof. Respondents admit that a part of said money obtained from said Gordon, to wit, the sum of one thousand dollars, was used by said Johnston to purchase the entire judgment of said Buckner & Co. and part of the judgment of said Rankin & Co. against said Daniel J. Gibson, as alleged in said bill, not with any knowledge or information or notice whatever, at the time said \$1,000 was obtained by said Johnston for said purpose, that said Gordon furnished the same to said Smith. Further answering said fifth paragraph, and in full explanation of the entire dealings and transactions between said bank and said Smith, respondents aver and state the truth to be as follows, to wit: Said Smith, having opened a coal mine in Walker county, Ala., upon the property involved in this controversy, in the year 1884, opened an account with said First National Bank of Columbus, Miss., and transacted his business through said bank. Soon afterwards he borrowed one thousand dollars from said bank, giving his notes therefor. He failed to pay said notes at maturity, whereupon said bank brought suit and obtained judgment against him in the circuit court of Walker county, Ala., on the 19th day of November, 1885, for eleven hundred and eighty-five and 35-100 dollars, besides thirty and 35-100 dollars costs,—in all, \$1,219.20. Previous to obtaining said judgment, however, the said Daniel J. Gibson had obtained his said judgment against said Smith in said circuit court of Walker county for the sum of \$3,708.46, so that the bank's said judgment was junior to said Gibson's. The said bank having learned in the meantime that said Smith was still indebted to E. W. Rucker in the sum of \$2,725.33, balance of purchase money on said lands, as aforesaid, the said bank, in order to better its condition with reference to its said judgment against Smith, under advice of counsel, purchased a Rucker mortgage and note as aforesaid, giving full value therefor, thereby securing to itself a first lien upon the property. In due time the Rucker mortgage was foreclosed as hereinbefore stated and fully explained, and said property was purchased and taken charge of for the benefit of said bank as aforesaid. Said Smith was thereby thrown out of employment, and left without means. His hope was to redeem the property in the two years allowed him by law. He placed an exaggerated value upon the premises, and never seemed to doubt his ability to raise the money necessary to pay all indebtedness, and become the owner of the property again. The bank was hopeful that he would be able to do so; having no desire to own the property, but only wishing to get back what money it had expended on said property as aforesaid. Having the property thus in possession, the bank deemed it advisable to keep the mines open; thinking that there might be some profit in carrying on the business, and at the same time have the property suitably cared for, and the mines protected from damage by flooding. Said Smith being out of employment, and competent to superintend the working of the mines, the bank put him in charge of said mines, employed miners, and worked the mines about one and a half months, when, finding there was no profit to it in said business, the hands were discharged, and the mines were put in charge of a watchman to look after the property and drain it. Several months after this, to wit,

about the 16th day of August, 1886, said Smith came to the bank, and stated to Mr. Williams, the cashier, that he had some money, and wanted to lease the mines. Said Williams tried to induce him to pay the money into the bank, as in part redemption of said property. Smith declined, and, after talking for some time over the propositions, he and said Williams agreed that he might go to the mines, and work them as the lessee of the bank, and pay rents in sums of \$500 and upwards, but that the bank's watchman should remain in charge and legal control and possession of the property, so that the bank might be able to dispossess the said Smith at any time, in case it should see fit to do so. Said Smith then opened an account with said bank under the style of 'W. J. Smith, President,' and deposited to his credit the sum of \$1,350 in cash on August 16, 1886. Subsequently, to wit, about the 10th September, 1886, said Smith came into the bank, and said that he had authority to draw on Brown & Lowndes, of Baltimore, Maryland, for the sum of \$2,000, which money he proposed to use in the same way. Said Williams took his draft for collection, and when he got the return for it, on the 15th of September, 1886, he gave W. J. Smith, president, order for the proceeds of said draft, to wit, \$1,998; said Smith again refusing to pay this money to the bank as in redemption, in part, of said property, but he put it into said bank to his credit as president, as capital in operating said mines. Subsequently, however, said C. A. Johnston induced said Smith to turn over to the bank one thousand dollars in cash, to be used partly in purchase of the judgments against said Daniel J. Gibson, held by J. Pollock & Co., Rankin & Co., and Buckner & Co., as aforesaid; the bank being advised that said judgments, secured as they were by a lien on said Gibson's judgment against Smith of \$3,708.46 as aforesaid, created an incumbrance on said property prior to the bank's said judgment of \$1,219.20 against said Smith, which would entitle said judgment creditors of Gibson to come in and redeem said property within two years from said foreclosure, to the exclusion of the bank, or which might put the bank to a disadvantage in redeeming said property, and which, therefore, the bank desired to remove. The bank was also advised that by purchasing said judgment there would be less complication and difficulty attending the redemption proceeding stated in paragraph 12 of this answer; and thereupon the said Johnston did purchase said judgments against said Gibson, using one thousand dollars of Smith's money, deposited as aforesaid, in the purchase thereof, as hereinbefore explained (all of which will appear from Exhibits G, H, I, and J, which are the assignments of said judgment, filed with this answer), and prayed to be considered as a part of the same, and they were to be held for the use of said bank, by said Johnston, with the understanding and agreement, however, with said Smith, that he was to have credit for said \$1,000 when he came to redeem the said property within the two years allowed him by law, which he fully expected he would be able to do. The bank was also advised and was anxious to fasten its said judgment of \$1,219.20 against Smith, as a lien upon said property, within the two years allowed by the laws of the state of Alabama for the redemption by judgment creditors of the property sold under mortgage. Hence, on the 1st day of July, 1887, the bank assigned its said judgment to C. A. Johnston, in order that he might redeem said property in the interest of said bank, which he afterwards did, as will be particularly explained in paragraph XII of this answer. Said assignment to Johnston by the bank is herewith filed, as Exhibit K hereof, and prayed to be taken as a part of the same, but said assignment to C. A. Johnston, without his paying anything to the bank, to be held by him for the use and benefit of the bank. * * * Respondents aver that they and said bank knew nothing of Smith's transactions with Gordon, and never heard of it until after he had exhausted his deposits in said bank in the manner above explained. Nor did they know of the existence of said Quintard's deed of trust, nor of said Smith's alleged deed to the Wolf Creek Coal Company, until long after said transactions with Smith were ended. And respondents aver and charge that said Smith was never entitled, by statute or otherwise, to redeem said property from them; that the right of redemption secured to him at one time by statute was entirely lost when he conveyed his right, title, and interest in said property to said Wolf Creek Coal Company, in so far as said Smith was concerned, and that

any dealings or transactions between these respondents and said Smith, by which they aided or attempted to aid his alleged redemption of said property, were absolutely *ex gratia* on the part of respondents,—not forced upon them by law, but merely a favor extended; and that although they might have allowed said Smith to have redeemed said property, had he have repaid to them the lawful charges, yet the said Smith did not at any time redeem said property, nor did he pay any part of the lawful charges thereon, nor is he nor the said complainant entitled at this time to a reconveyance of the same, except by such contract as one citizen may make with another. In fact, as soon as respondents learned that the said Gordon had advanced money to said Smith with a view of looking to said property for security, said Johnston hastened to inform said Gordon of his claims upon said property, and of said Smith's hopeless condition, financially, to make good his promises and obligations, so that Gordon might proceed in due time to take such steps as would secure to him a lien on said property that would protect him against loss. Hence, said letters from Johnston to Gordon, exhibited with complainant's bill, were to inform him of the liens and incumbrances he would have to pay off before he could hold said property as his security, for at that time Smith had almost, if not entirely, exhausted his resources."

The answer further admitted the insolvency of Smith and the alleged Wolf Creek Coal Company. In addition, the said answer showed that Daniel J. Gibson, on the 14th day of July, 1887, after the filing of the bill, but claiming without notice thereof, redeemed the lands in controversy to the said bank, through R. T. Williams, who held legal title thereof, and that on the 15th day of July said bank, through its agent, C. A. Johnston, who held the legal title in the interest of said bank, redeemed said property from said Gibson, as provided by the laws of the state of Alabama, from which deed of redemption it appears that, in consideration of said Johnston purchasing and canceling said several judgments in favor of Pollock & Co. and others against said Daniel J. Gibson, he transferred and duly assigned his said judgment against said Smith, of \$3,708.46, to said C. A. Johnston, \$1,000 of which was held to the credit of said Smith if he had come to redeem said property before the 20th day of July, 1887, by offering to pay said Rucker mortgage debt and said Gibson judgment, with interest and lawful charges.

Smith answered the bill, giving a history of the facts in the case as he believed them to be; admitting the purchase from and the mortgage to Rucker, and a foreclosure of said mortgage, the purchase of the property by the bank, which entered in possession through an agent; admitting also the Gibson judgment, the organization of the Wolf Creek Coal Company, the making a deed of the property to said Wolf Creek Coal Company, the issuance of 50 bonds, of \$1,000 each, by the Wolf Creek Coal Company, and the granting of a mortgage to secure the same, the negotiations with and the loan from Gordon, substantially as alleged in the bill,—and specifically averred as follows: "Respondent visited Columbus, Mississippi, on his way to Alabama, and called on C. A. Johnston, who held said mines for the bank as aforesaid, to make arrangements for opening up said mines again, but he was not willing to allow respondent to begin operations until the said Gibson judgment was removed. Respondent informed Mr. Johnston that he had contracted to sell Mr. Gordon one-third interest in said property for \$20,000, to be paid when the title was perfected, and that he had already advanced to him \$2,500 of the money, and that he wanted to begin mining operations with that, and put it in bank to his credit as president of the Wolf Creek Coal Company, and that, with the other money he was to receive from Gordon, he proposed to pay off and discharge all incumbrances. Respondent then wrote again from Columbus, Mississippi, asking him for \$2,500 more to pay off the D. J. Gibson, judgment. He wired respondent, at Columbus, in answer to said request, to draw on him, through Brown & Lowndes, for two thousand dollars, which he did; placing the check in the bank for collection, and ordering the proceeds to his credit as president. A few days after drawing said check, and placing the same in bank for collection, the bank informed respondent that it had been paid, and the proceeds, \$1,998.00, had been placed to his credit as directed; and respondent gave C. A. Johnston, the president of the bank, a check for one thousand dollars, with which to purchase at a discount, such as said Johnston

could negotiate, certain outstanding judgments against D. J. Gibson, with which to offset said Gibson's judgment against respondent, and said Johnston used said \$1,000 accordingly." And he averred other facts not necessary to recite.

Replications were filed to all the answers on the 22d of March, 1889. October 1, 1890, by leave of the court, the complainant amended his bill, alleging irregularities in the foreclosure of the Rucker mortgage, and that the sale thereunder was voidable because of inadequacy of consideration, and because the bank had purchased it at its own sale, and further alleging that on the 15th day of July, 1887, within the period of two years from the sale under the Rucker mortgage, the complainant, by his authorized agent, tendered to the First National Bank of Columbus, Miss., and then and there offered to pay to the said bank and R. T. Williams, in gold coin of the United States of America, \$4,000, and, in addition thereto, all lawful costs and charges, of any sort whatsoever, paid by said Williams and said bank on said lands, and that the said Williams thereupon refused to accept said tender for himself or for said bank, or any tender less than \$8,500 in amount, and "orator now offers to pay in court, for the benefit of the real owner of the Rucker mortgage, the amount bid at said foreclosure sale, with all proper interest, liens, and other charges that are right and proper for orator to pay, in order that said sale may be set aside and vacated as soon as the same may be ascertained;" and otherwise, and in all respects, orator offered to do and perform equity and right in the premises. The defendants filed their demurrers to the complainant's bill, as amended, which demurrers, having been argued and duly considered by the court, were overruled; and thereupon the defendants the First National Bank of Columbus, Miss., and C. A. Johnston and R. T. Williams, refiled their answers as amended, and the complainant refiled the general replication. The cause, as to Rucker, was dismissed by stipulation. On the hearing the court dismissed the complainant's bill, with costs, and complainant, Gordon, appealed.

A. H. Taylor, for appellant.

James E. Webb, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge, after stating the facts, delivered the opinion of the court.

The conceded facts of this case require that, as between Smith and Gordon, the latter's title to the land in controversy, as deeded by the Wolf Creek Coal Company, the validity of the mortgage made by the Wolf Creek Coal Company to secure the issue of \$50,000 of bonds, and Gordon's rights, as pledgee of such bonds, to a good title to the land in controversy, if Smith can give it, shall be recognized. Now, when we consider that in fact Smith had nothing to convey, nothing to pledge, but an interest in the property subject to mortgage rights and outstanding judgments, there is no question that, in equity, Smith is estopped from setting up any of these things as a reason why he should not make good his representations and promises; and it is clear that if he has or had any control over or interest in these outstanding incumbrances, or if he subsequently acquired any other or further interest in the property, he is compelled, as a matter of equity, to use his rights for the benefit of his covenantee, Gordon. The specific performance to which Gordon is entitled, as against Smith, is not necessarily barred by the intervention of the rights and claims of the First

National Bank of Columbus. Such a bar exists only if it is impossible for these rights and claims to be divested on equitable terms. See *Breitling's Adm'r v. Clarke*, 49 Ala. 450; *Moore v. Crawford*, 130 U. S. 132, 9 Sup. Ct. 447. If Gordon has the right to a specific performance against Smith, then, considering Smith's representations, his present insolvency, and his neglect and refusal to act, it seems clear that Gordon is so far subrogated to the rights of Smith, including the rights that Smith ought to acquire and secure for his benefit, that Gordon may himself, in a court of equity, assert and compel such rights, at least to the extent that such rights are transferable. Now, at the time Smith, on representations of perfect title to the property in controversy, obtained Gordon's money, he (Smith) had the statutory right to redeem the property sold under the power in the Rucker mortgage, and this right to redeem fully existed at the time the bill was filed in the cause. The case further shows that, prior to the loan obtained by Smith from Gordon, negotiations were pending between Smith and the agents of the bank, looking to the redemption of the property by Smith from the sale under the Rucker mortgage, as well as under the judgments in favor of the bank and in favor of Gibson, and that after the loan was obtained from Gordon such negotiations were partially carried into effect by the appropriation of \$1,000 of the money obtained by Smith from Gordon to the purchase by the agents of the bank of the Pollock & Co. and other judgments against Gibson, with the acknowledged intent and purpose of offsetting the same against the judgment obtained by Gibson against Smith, and thereby reducing the amount which Smith would have to pay in order to obtain a clear title. It is true that the bank and its agents, in their sworn answers, deny that they at that time knew that the moneys which Smith, through the bank, was collecting from Gordon, were moneys obtained from Gordon; but the circumstances of the case, in connection with the sworn answer of Smith, are very strong to charge the bank with such notice. Be this as it may, the bank acknowledged to have received the \$1,000 from Smith for the purpose of acquiring the judgments against Gibson in the interest of Smith's redemption of the property. On no other theory than that there was a contract between Smith and the bank that Smith should be allowed to redeem the property can the payment and appropriation of the \$1,000 be accounted for. It is true that the bank claims that the redemption contemplated on the part of Smith, which was to be facilitated by the purchase of the judgment against Gibson, was the strict redemption provided for by the statute, and that thereby Smith acquired no greater right than the right given him by the statute; but in our opinion, if there was a contract between Smith and the bank that Smith should be allowed to redeem, and the bank accepted part of the redemption money, leaving the balance to be thereafter paid, Smith's right to redeem thereafter was founded upon contract right, as well as upon the statutory right. There may be some question whether Gordon, as the equitable assignee of Smith, in the absence of other equities, could be

let in to exercise Smith's statutory right of redemption. In *Pauling v. Meade*, 23 Ala. 505, it was said:

"That the judgment debtor has the right to sell his equity of redemption cannot be questioned; and, when sold, the purchaser becomes substituted to all the rights and remedies which the statute confers on the debtor himself, and is subjected to the duties which by law devolve on his vendor."

So, in *Bailey v. Timberlake*, 74 Ala. 225, 226, the right of the assignee of the equity of redemption under the statute was recognized. In *Powers v. Andrews*, 84 Ala. 289, 4 South. 263 (a case decided since the institution of the present suit), *Bailey v. Timberlake*, *supra*, was overruled by a divided court: and it was decided that the statutory right of redemption is confined to the persons upon whom it is expressly conferred, and it is not conferred upon a junior mortgagee, or assignee of the equity of redemption. Following the decisions of *Powers v. Andrews*, February 27, 1889, the redemption statute was amended so as to read as follows:

"Where real estate or any interest therein is sold under execution, or by virtue of any decree in chancery, or under any deed of trust or power of sale in a mortgage, the same may be redeemed by the debtor, his vendee, junior mortgagee or assignee of the equity of redemption from the purchaser or his vendee within two years thereafter; in the manner following," etc.

The supreme court of the United States has said that the construction of a state statute given by the highest court of a state is a part thereof, and, when a contract has been made under protection of it, it will not allow a change of construction by a state court to impair the rights of the parties under it, any more than it would allow an act of the legislature to have such effect. *Douglass v. County of Pike*, 101 U. S. 677; *Clark v. Bever*, 139 U. S. 117, 11 Sup. Ct. 468. We do not, however, find it necessary, in this case, to determine exactly whether Gordon, as the equitable assignee of Smith, had a right to exercise Smith's right of redemption under the statute; for we are of the opinion that, as between the parties to this case, and growing out of their dealings and conduct, Smith's right to redeem was taken out from under the statute, and founded upon a contract, the specific performance of which can be enforced by Smith, and should be enforced in favor of Gordon, as the equitable assignee of Smith. See *Butts v. Broughton*, 72 Ala. 294; *Anthe v. Heide*, 85 Ala. 236, 4 South. 380; *Bates v. Kelly*, 80 Ala. 142; *Moore v. Crawford*, 130 U. S. 122, 9 Sup. Ct. 447.

The defenses urged in this case merit examination.

It is urged that Gordon does not occupy the position of a bona fide purchaser, because he was advised by the letters of Smith to him, and particularly by the letters of July 7 and 10, 1886, of the bank's claim upon the property. There is no doubt, under the evidence in this case, that Gordon showed little of the shrewdness and caution of the ordinary money lender, and that by the letters in question he was advised of circumstances which should have put him on inquiry. At the same time the evidence impresses us that Gordon, in advancing the money which he did to Smith, believed Smith's verbal repre-

sentations, and that he was getting a good title. In the original aspect of Gordon's bill, wherein he seeks, not only the right to redeem the property, but a recognition of priority of lien over the First National Bank of Columbus, the question of Gordon's absolute good faith is a very serious matter; but in the aspect given to his case by his amended bill, wherein he seeks no priority, but the simple right to redeem, and particularly in view of the admitted fact that the First National Bank of Columbus obtained, and still retains, the benefit of at least \$1,000 advanced by Gordon to Smith, Gordon's absolute good faith, within the strict definition of an innocent purchaser for value, is of very little importance.

It is also urged in defense that Gordon's right to redeem must be denied because he has not made a sufficient tender in fact, or in his bill. Before Smith's right to redeem, under any view of the case, expired, Gordon, as the holder of bonds of the Wolf Creek Coal Company, which bonds were secured by deed of trust or mortgage on the lands in controversy, offered to redeem the said lands from the sale under the Rucker mortgage, and for this purpose tendered to the purchaser (for the tender was both to the First National Bank of Columbus and to Williams, the nominal purchaser) the sum of \$3,000, the price paid by the purchaser at the sale of the property, with 10 per cent. interest thereon, and in addition thereto all lawful costs and charges on said land accruing after the purchase. This tender was rejected for the assigned reason that Gordon had no right to redeem, and that a redemption by Smith, or on his part, must be in amount sufficient to cover, in addition to the amount of the Rucker mortgage, the judgments in favor of Gibson and in favor of the bank; for it is on this theory only that the amount required would be near as much as the \$8,500, which was the amount given by Williams for himself and the bank as the minimum for which redemption would be permitted. In the original bill the complainant offers to redeem from all the liens claimed by the defendants, when the same shall have been justly and truly ascertained according to law; and in the amended bill, after reciting the tender as aforesaid, the complainant offers to pay into court the amount tendered, or any sum which the court may determine to be proper, and to do and perform whatever may appear equitable and right in the premises. Under the circumstances of this case, considering the involved character of the title, by reason of the judgments against Smith, the inability of Gordon to know, until after an account should be taken, exactly what sum would be necessary to redeem, and considering the equity resulting in favor of Gordon from the denial of the First National Bank of Columbus and its representatives that any sum had been furnished by Smith towards acquiring the Gibson judgment, and further considering that when the tender was actually made on behalf of Gordon the First National Bank of Columbus, by its representatives, denied his right to redeem, and, as to a redemption on the part of Smith, insisted upon an amount based upon the par value of the Gibson judgment, without any credit whatever for the \$1,000 advanced by Smith, we are inclined to the opinion that complainant's offer to do equity is all that equity requires.

"The complainant below, has brought his bill within the time allowed by the statute. He offers to pay (and proposes to bring the money into court for that purpose) any sum which the chancellor may decree to be paid by him as the consideration on which he should redeem, and the amount to be paid is yet to be ascertained by the master. Until it is ascertained, it is not incumbent on the party to bring the money into court. He does not know how much to bring. That the offer made by the bill is sufficient, see *Smith, Ch. Pr. 8*; *Daniell, Ch. Pr.*; *Colombian Government v. Rothschild*, 1 Sim. 94; *Nelson v. Dunn*, 15 Ala. 515." *Freeman v. Jordan*, 17 Ala. 500.

"If the purchaser only objects to the amount tendered, and declares that he is not satisfied that the complainant is a bona fide creditor, he cannot afterwards raise an objection to the authority of the person through whom the tender was made, nor to the fact that the money was tendered in bank notes." *Couthway v. Berghaus*, 25 Ala. 393.

"The right to redeem is not perfect, and cannot be enforced in equity, until there has been either a full performance by the plaintiff of all the statutory requisitions, or a valid and sufficient excuse for his nonperformance, without any fault or neglect on his own part; and when the bill alleges an excuse for such nonperformance the excuse must be accompanied with an offer in the bill to perform all the statute requires. If the bill does not show that the tender was made before it was filed, a tender made in it is not sufficient to authorize a decree of redemption, unless, in connection with such offer, the bill also shows a valid and sufficient excuse for the omission to make the tender before it was filed." *Spoor v. Phillips*, 27 Ala. 193.

"An offer in the bill to do equity is sufficient, a good and proper excuse being shown for not having made a tender of the amount admitted to be due prior to the filing of the bill. It is made clearly to appear that Tulane had conveyed the property to Louis Bates, and that each of them repudiated the claim set up to it by the complainant. The offer would have been fruitless, and the law never requires the performance of a nugatory act. *Robbins v. Battle House Co.*, 74 Ala. 499; *Elliott v. Boaz*, 9 Ala. 772." *Bates v. Kelly*, 80 Ala. 142.

See, also, *Pryor v. Hollinger*, 88 Ala. 405, 6 South. 760.

It is also urged that the tender and the demand for redemption made on behalf of Gordon cover, as does the prayer of Gordon's bill, 120 acres as a part of the 840 acres which is included in the mortgage of Smith to Rucker, but which is not included in the deed of trust of the Wolf Creek Coal Company to Quintard, trustee, and that, therefore, Gordon is seeking to redeem a large quantity of land, in which he can claim no equity whatever. To this it is to be answered that Smith, in his letters, assured Gordon that he would give him a first lien on the 840 acres purchased from Gen. Rucker, and the Quintard mortgage describes the property as 840 acres conveyed, to wit, by W. J. Smith, and expressly covenanted for all further requisite deeds and assurances for conveying the premises, and that it would warrant and forever defend the same. When, therefore, Gordon made the formal tender by his attorney in fact, and renewed it in his bill, to redeem the 840 acres described, his tender and the other allegations in the bill concur, and are correct.

The appellees invoke the statute of frauds, but, if such statute would be otherwise applicable in the case, it cannot be applied against Gordon exercising the right of Smith, because, as between Smith and the appellees, there has been partial performance by the payment and application of the \$1,000. See *Anthe v. Heide*, 85 Ala. 236, 4 South. 380.

Other defenses, mainly consisting of irregularities, are urged against the appellant, such as not making actual tender before

filing original bill, and the failure to take a second decree pro confesso against Smith after filing the so-called amended bill, and before final submission of the cause. We do not think that the failure to make a tender before the filing of the original bill necessarily defeats complainant's equity, under the circumstances developed. On a remanding of the cause, which is necessary in our view of the case, and particularly if the case was heard in the circuit court before issue joined, it will not be too late, before entering another decree, to take a pro confesso against Smith.

Our conclusion on the whole case is that the decree appealed from should be reversed, and the cause remanded to the circuit court, with instructions to enter a decree in favor of the complainant, to the effect that an account be taken of the amounts of the several liens due on the 15th of July, 1887, on the property described in complainant's bill and held in the names of the defendants Johnston, Williams, and the First National Bank of Columbus, or either of them, crediting upon the same the sum or sums paid on account thereof by the complainant, Gordon, and the defendant Smith, or either of them, together with such deductions for rents and profits as equity may require, and, after such accounting, that complainant, Gordon, be allowed to pay off the said liens, as so ascertained, and redeem the lands described in the bill, within a reasonable day, to be named by the court, and, further, that the amount of said liens, when paid by the complainant, Gordon, shall be added to his own lien for \$5,000, with interest, and that the property described in the complainant's bill be sold to satisfy said complainant's lien, as so ascertained and determined; and it is so ordered.

BROWN v. DAVIS et al.

(Circuit Court of Appeals, Fifth Circuit. June 5, 1894.)

No. 235.

EQUITY—GOOD FAITH OF COMPLAINANT—ESTOPPEL BY SILENCE.

D., owning land on which M. held a vendor's lien and also a duly-recorded deed of trust, applied to B. for a loan on a deed of trust of the land, representing that there was no lien thereon except the vendor's lien; and B. consented to make the loan, without obtaining the usual abstract of title, relying on a partial abstract previously received in relation to a loan to another. M., being informed by both parties of an intent to pay off the vendor's lien, claimed payment also of an unsecured debt, and obtained from D. an order on B. for the amount of both, which B. paid; and thereupon M. executed to D. a release of his vendor's lien, but made no mention to B. of the deed of trust in his favor. *Held*, that a bill filed by B. for relief against M.'s deed of trust, making reckless charges of fraud and conspiracy against M. and others against whom he had no equity, impugning their personal and professional integrity, followed by reckless evidence in support thereof, which the slightest investigation would have shown him to be wholly unfounded, was properly dismissed, without regard even to the question whether M. was estopped by his silence, as B., making such a presentation of the facts, was not entitled to a favorable consideration of such partial equity, even if it were otherwise well founded.

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

This was a suit by J. Gordon Brown against Cornelius Davis and others to restrain enforcement of a deed of trust and for cancellation thereof. The circuit court dismissed the bill. Complainant appealed.

This suit was commenced in the circuit court of the United States in and for the eastern district of Texas, April 6, 1891, by the filing of a bill by the appellant, J. Gordon Brown, which bill alleged that J. Gordon Brown is a citizen of the kingdom of Great Britain, and that Cornelius Davis, Adelaide Davis, Harris Masterson, and Archie R. Masterson, are citizens of the county of Brazoria, in the state of Texas. That Cornelius Davis applied to J. Gordon Brown, in 1890, for a loan of money, offering to secure the payment thereof by a deed of trust upon a parcel of land in Brazoria county, Tex., particularly described by metes and bounds, and representing to the complainant, under oath, in writing, that said land was clear of all incumbrances except a vendor's lien in favor of Harris Masterson for \$700. That in making said application for said loan, Harris Masterson aided and assisted the said Cornelius Davis, and negotiated with the complainant therefor; he, as well as the said Cornelius Davis, representing to the complainant that the said land was clear of incumbrances except the said sum of \$700, due him as aforesaid; he and the said Cornelius Davis agreeing with the complainant that, should such loan be granted, he, the said Harris Masterson, should be paid the said sum of \$700 as a cancellation of the said lien, and that thereupon the said Harris Masterson would release and relinquish the said lien which he and the said Cornelius Davis represented and led the complainant to believe was the only incumbrance upon the said property. That the defendant Archie R. Masterson, an attorney at law, at the instance of said Cornelius Davis and Harris Masterson, was employed by the complainant to prepare for him a full and complete abstract of all transfers in said Brazoria county appertaining to said land, and in compliance with said employment the said Archie R. Masterson, on the 27th day of January, 1890, did prepare and deliver to the complainant what he represented as being a full and complete abstract of said property, showing, on the 27th day of January, 1890, by his certificate, that there were no liens affecting the said lands, except the one stated in said abstract. That the defendant well knew that the complainant relied upon the aforesaid representations of Cornelius Davis, Harris Masterson, and Archie R. Masterson with reference to the liens upon the said property, and that, relying thereon, the complainant made said loan to said Cornelius Davis, and paid the said sum of money, on or about April 7, 1890, whereupon the said Cornelius Davis and his wife, Adelaide Davis, made and executed their certain promissory notes for said sum of money due, with 10 per cent. attorney's fees, aggregating the sum of \$2,200, and bearing interest at the rate of — per centum per annum from date, which deed of trust was filed for record on the 19th day of April, 1890, and duly recorded in Book 3, pages 29, 30, 31, and 32 of the Mortgage Records of Brazoria County, Tex.; and that the complainant is still the owner and holder of said notes. That all of the aforesaid representations of defendants were faithfully and implicitly relied upon by the complainant as being true, and, believing this, he loaned said sum of money as aforesaid; otherwise he would not have done so, and this defendants knew. That all of said representations made by the defendants were wholly false and untrue, and that at the time of making said representations defendants knew that they were false; but, nevertheless, knowing that complainant relied upon them as true, said defendants made said false representations with the deliberate intention of cheating, swindling, and defrauding the complainant. That the complainant now finds that at the time said application for the loan of money by said Cornelius Davis and wife the said Harris Masterson had in his possession, duly signed, executed, and delivered, a deed of trust by and from the said Cornelius Davis upon the identical land which was offered to and accepted by the complainant as his security for the said loan of money by the said Cornelius Davis and wife, which deed of trust was made, executed, and delivered on the 10th day of September, 1889, to secure the sum of \$3,321.75,

with 12 per cent. interest. That, so conspiring and combining with the other defendants to cheat, swindle, and defraud the complainant, the said Harris Masterson retained said instrument in his possession in total ignorance of complainant, failing to file the same for record until the 21st day of January, 1891, a period of six days before the said Archie R. Masterson certified that there were no liens upon said property, except as hereinbefore stated. That at the time of soliciting and negotiating for said sum of money from the complainant the defendants well knew that the said deed of trust for \$3,321.75 in the possession of said Harris Masterson was an incumbrance upon said property, besides the lien of \$700 before stated, but nevertheless concealed such fact from the complainant, and designedly failed to place said lien on record until just in time to acquire precedence over the lien of complainant. That said Harris Masterson was and is the beneficiary in said deed of trust of \$3,321.75, and the said Archie R. Masterson, who prepared and delivered to the complainant the aforesaid false and fraudulent certificate, is a brother of said Harris Masterson, and is the trustee in said deed of trust securing said sum of \$3,321.75. That while so employed by complainant as his attorney, and at the time he made said false and fraudulent abstract and certificate, the said Archie R. Masterson well knew that said deed of trust in which he was trustee, securing his brother in the sum of \$3,321.75, was in the possession of Harris Masterson, and knew that the same was to be and was placed upon the record anterior to the complainant's deed of trust, and was so of record, and constituted a lien upon the said property, at the time he made said false and fraudulent abstract and certificate; and that in making the same he colluded, conspired, and combined with the other defendants herein for the purpose of aiding them in their schemes to cheat, swindle, and defraud the complainant. That said deed of trust of Cornelius Davis to Harris Masterson, given to secure the sum of \$3,321.75 aforesaid, as a matter of fact is a pretext and pretense on the part of the defendants to affix and establish a prior lien upon said property, and to have said property sold thereunder, and thereby to cheat and defraud the complainant out of his said sum of money loaned to said Cornelius Davis and wife, and intending to force the sale of said land under the said deed of trust, and buy the same in themselves, and thereby deprive the complainant of his money loaned upon said land, or force the complainant to buy the same at an exorbitant sum, sufficient to cover both debts, while the fact is that said Cornelius Davis, at the time of executing the said deed of trust, was not indebted to said Harris Masterson, except in the sum of \$700, which was to be paid by the complainant, and for which said Harris Masterson executed a release. And that the said Archie R. Masterson, defendant, as trustee in the said deed of trust securing the sum of \$3,321.75, due on the 13th of March, 1891, posted his certain notices upon the courthouse door of Brazoria county, and on other places in the county, as provided by law, whereby he announces and gives notice that he will proceed to sell said property under said deed of trust on the first Tuesday in April, 1891, at the courthouse door of Brazoria county, and that, unless restrained by the court, he will so proceed to sell said property. The bill prayed for an injunction; that the defendants should answer; and that the complainant, on hearing, should have judgment perpetuating the injunction and canceling the deed of trust executed by Cornelius Davis to Archie R. Masterson, as trustee, to secure the said Harris Masterson the sum of \$3,321.75; and for general and special relief. This bill was unqualifiedly sworn to by the complainant, J. Gordon Brown, as being true. Upon the presentation of the bill in chambers, the district judge granted an injunction restraining Archie R. Masterson, trustee, from making the sale of the property.

Archie R. Masterson filed a sworn answer to the bill, wherein he generally and categorically denied all the allegations charging his connection with the transactions as set forth in the bill. Harris Masterson filed a sworn answer, admitting his relationship with Archie R. Masterson; the existence of the deed of trust in his favor as charged by the complainant; that the complainant made the loan of \$2,000 to Cornelius Davis, and that he received \$1,285 of the money borrowed from complainant in satisfaction of a vendor's lien, which was released by him; but he generally and specially denied all the alle-

gations in the bill charging him or his brother with fraudulent doings. Thereafter, on May 7th, the complainant, J. Gordon Brown, by leave of the court, filed an amendment to his bill of complaint, and therein, in addition to the allegations in his original bill, he further alleged that, besides the representations made by Cornelius Davis in his application for a loan, he made to one E. L. Dennis, the agent of the complainant, the same representations, upon which representations complainant also relied; and that for several months prior to the application of Cornelius Davis for said loan of money the defendant Harris Masterson had been acting as correspondent of the complainant and of his firm of Brown Bros. in carrying through for his clients loans secured by real estate in Brazoria and adjoining counties; and complainant relied upon said Harris Masterson's good faith, and frequently consulted and advised with him upon said applications for loans. That the said Harris Masterson, in his correspondence, assured the complainant and his firm that they might rely upon his good faith. That the said defendant Harris Masterson, at and during the time he was so acting, well knew, and was so informed, that the complainant would not loan money on prior incumbered property, but in all cases he required a first mortgage lien or deed of trust to secure him in the loan of money; and that, in case the application was made for a loan of money on incumbered property, complainant required that said incumbrance be paid off, liquidated, and discharged, otherwise he would not make the loan thereon, it being the established rule of the complainant and his said firm, and which the said Harris Masterson well knew, that he must have in every case a prior lien upon property accepted as security, and that the complainant would not loan money secured by property upon which there existed any prior lien or preferred lien. That the said Harris Masterson knew the value of the property offered and given by Cornelius Davis to complainant, and well knew that the complainant would not loan exceeding 40 per cent. of the value of property received as security, and that in the estimated value of the property as security it must in all cases be clear of prior mortgages. That during the pendency of the said application of Cornelius Davis to the complainant for a loan of \$2,000, E. L. Dennis, of Houston, Tex., was appointed representative of complainant and his firm to negotiate loans for his clients in the country contiguous to the city of Houston, including Brazoria county. That during the pendency of said application for a loan by Cornelius Davis the said Harris Masterson received from the complainant a letter requesting him in future to send his applications for loans to said E. L. Dennis, and that negotiations and correspondence relating thereto should be made through the said E. L. Dennis, and that for a long period thereafter, including all the time in which the said Cornelius Davis' application for a loan was pending, the said Harris Masterson continued to assist the said E. L. Dennis in negotiating loans for the complainant, acting in conjunction with E. L. Dennis. That, pending the negotiation of the loan of \$2,000 to Cornelius Davis, which was negotiated principally through E. L. Dennis, said Harris Masterson well knew the terms and conditions upon which said loan was being made, and well knew the value of the property offered for security, and well knew the amount of money that the said complainant was loaning to the said Cornelius Davis on said security. That in November, 1889, said Harris Masterson negotiated with and for the complainant a loan of \$5,000 to said Cornelius Davis, secured by land in Matagorda county, the greater part or all of which money was received by said Masterson himself in consideration of a release of a lien which he held on said land. And otherwise repeating the charges made in the original bill with regard to the want of knowledge on the part of the complainant, the abundance of knowledge on the part of Harris Masterson, and further alleging that the said Harris Masterson stood idle by, and induced and permitted the complainant to expend and loan the sum of \$2,000 to Cornelius Davis under false and fraudulent representations, and received and kept most of the proceeds of said loan, the complainant, J. Gordon Brown, again swore to the truth of the facts as set forth in the amended bill.

Harris Masterson answered this amended bill, and denied therein that he ever corresponded with or wrote to the complainant, J. Gordon Brown, upon any subject whatever, but admitted that he had written to Brown Bros., loan agents, relative to making loans for different parties; and he denied that there was ever

at any time confidential relations between himself and Brown Bros. further than that which existed generally between business men who are strangers to each other, writing to each other on business matters. He denied that he knew any rule of the complainant, in his individual business in loaning money, relative to taking property as security upon which existed a prior lien. He denied that he was aware, except by the allegations made by the complainant, when the negotiations between Cornelius Davis and J. Gordon Brown commenced; that he ever represented J. Gordon Brown personally in anything at any time, and ever represented Brown Bros. in anything at any time further than to make inquiries if they desired loans and to give names of parties wishing to borrow money; and he further denied that he had ever consulted with J. Gordon Brown or Brown Bros., or corresponded with them, relative to or concerning any applications made direct to Brown Bros. or through other parties than himself. He admitted that he knew the value of the property in question when the complainant made his loan upon it, but alleged that he was in absolute ignorance of any and all negotiations between the complainant and Cornelius Davis until the loan was closed. He again denied that the complainant, J. Gordon Brown, or the firm of Brown Bros., ever consulted or conferred with him about the \$2,000 loaned to Cornelius Davis on the property in question, or its value, or the title of said property on which said loan was made, further than to ask a release of the vendor's lien of \$700 and interest, which was given. He admitted that in the early part of 1890 he wrote to Brown Bros. relative to business matters, and was referred by them to E. L. Dennis as the sole agent for that part of the country; but he denied that he assisted E. L. Dennis in making any loan to any one, except that he had assisted one Terry in obtaining a loan from Brown Bros., which loan, he said, had no connection whatever with the Davis loan. He reiterated his previous denials with regard to knowledge of the terms and conditions upon which the Davis loan was being made, and with regard to the knowledge of the rules and intentions of the complainant in the matter of loaning money. He admitted that he made a loan for Cornelius Davis with Brown Bros., in 1889, for \$5,000, on Matagorda county property, and that a part of the money was received by him in payment of a lien held by him on that property; but he said that he represented Davis in making the loan, and that in relation thereto, in his opinion, said Brown Bros. are entirely safe and secure. He denied that he executed any release of the 535 acres of land in question for any other purpose than that expressed in said release itself, or with any other view than that declared in said release, and he alleged that he made no representations whatever to E. L. Dennis, or any one else, that he would do more than release the vendor's lien on payment of \$700 and interest. He denied that he ever had more than one interview with E. L. Dennis touching this matter, and said all that transpired then was that he presented to said Dennis the draft of Cornelius Davis on Brown Bros., and the release of the vendor's lien attached thereto, and that at said interview nothing was said by either party about the title of this land, its value, incumbrance thereon, or anything else concerning it further than aforesaid. He further alleged that he had nothing whatever to do with the loan of Davis, made suggestions or inquiries, deeming it none of his business. He denied that he ever made any loan in Davis name to raise money for himself and to secure it by the land of Davis, and alleged that all of the loans that he ever had any connection with for said Davis were made to procure money for Davis to pay his honest and just debts, to whomsoever he owed them. He denied that E. L. Dennis, as agent of Brown Bros., relied upon him in faith and confidence, or had any reason so to do, relative to the loan of Davis. He closes his answer with a reaffirmation that the deed of trust in favor of Archie R. Masterson from Cornelius Davis, Harris Masterson, cestui que trust, was given to secure an honest, just, and valid debt, made in good faith, long prior to any lien or claim of complainant, and the debt for which it was given is still due and unpaid.

This answer was filed on the 12th of May, 1891, and thereafter, on November 2, 1891, the defendant Harris Masterson filed a general and special demurrer to the complainant's original and amended bill of complaint. This demurrer, complainant moved to take from the files, as coming after answer filed, and too late. On December 7, 1891, the complainant moved

the court for leave to file a supplemental bill to set forth sundry facts that had happened since the institution of the suit; and afterwards, on the same day, moved the court to direct a repleader in the cause by all parties. This last motion was granted on the consent of counsel for certain of the parties. On December 15, 1891, the complainant filed an amended bill of complaint. This bill of complaint reiterated the matters set forth in the original and amended bill of complaint, but with more particularity. On the same day complainant filed a supplemental bill of complaint, alleging, in substance, that one T. L. Smith had filed a suit in the district court of Brazoria county, state of Texas, claiming to have purchased from Harris Masterson the claim against Davis secured by the deed of trust, and asking a decree for the foreclosure thereof; that the complainant had been made a party defendant to said suit; and that the prayer for relief was that the said deed of trust in favor of Masterson be decreed prior and superior in rank to the deed of trust made by Cornelius Davis to the complainant. The supplemental bill further alleged that the transfer from Harris Masterson to Smith was made pending the suit, and that Smith had actual notice; that Harris Masterson was the attorney for Smith; and that the proceedings in the district court of Brazoria county were for the purpose of directly evading the injunction issued in the cause. After other and formal allegations, the supplemental bill prayed for an injunction against the further prosecution of the suit in the district court of Brazoria county. On the same day, the court being in session, an order was entered granting the injunction, and citing Harris Masterson to show cause why he should not be held in contempt of court. On March 7, 1892, Harris Masterson and Archie R. Masterson filed their separate answers to the amended bill of complaint, alleging, in substance, the same facts as contained in their former answers, and again denying generally and specifically all allegations tending to charge them or either of them with fraudulent conduct. In August, 1893, the complainant filed an additional, supplemental bill of complaint, in substance, that during the pendency of the cause and the existence of the injunctions therein, the said T. L. Smith, acting by and through Harris Masterson, had procured a judgment in the district court of Brazoria county; that an order of sale had been issued under and by virtue of said judgment, and that the sheriff of Brazoria county was proceeding under said order of sale to sell said lands. The complainant prayed for an injunction against all parties, including the sheriff of Brazoria county and the clerk of said court, from proceeding to execute said judgment. On this supplemental bill an injunction was granted by the district judge in chambers, as prayed for. Exculpatory answers were filed by the defendants to the supplemental bills, and general and special replications were filed to all the several answers; but no decree pro confesso appears to have been taken against Cornelius Davis or Adelaide Davis. In this condition of the pleadings the cause was submitted on the 24th of October, 1893. Thereafter, on the 18th of November, 1893, the court filed its opinion, and on the same day entered a decree in favor of the defendants Harris Masterson, Archie R. Masterson, and T. L. Smith, dissolving and vacating all injunctions and restraining orders issued in the case, and dismissing the complainant's bill and amended bill with costs. From this decree complainant, J. Gordon Brown, prosecutes this appeal, assigning errors as follows: "(1) The court erred in rendering judgment for the respondents and in dissolving the injunctions previously granted in this cause, because the records of the case show conclusively that previous to the time of granting and paying the loan to Cornelius Davis by the complainant, Harris Masterson was occupying a fiduciary relation towards the complainant, and was occupying said relation at the time of granting and paying of said loan, and continued to occupy it for some time thereafter, and that, as such, it was his duty to impart to the complainant any and all facts within his knowledge concerning incumbrances upon said land offered for security; the testimony showing that in Davis' application for said loan he made an affidavit, and filed with complainant, stating that said land was unincumbered; the testimony also showing that Masterson knew that the complainant was loaning said money upon the belief that said land was unincumbered, and also

knowing that the complainant relied implicitly upon him, the said Master-son, to impart all such information as he had, which would be of interest to the complainant. That the said Harris Masterson was estopped to assert a lien in his own favor as against the complainant's lien, and the injunction against his enforcement of said lien should have been made perpetual. (2) The court erred in its conclusion that the respondent Harris Masterson was not estopped by reason of the fact that it was not shown that he was actually employed as attorney in this particular transaction, because, in the absence of employment, and in the absence even of a fiduciary relation towards the complainant under the facts of this case, he was in equity completely estopped from asserting his lien."

J. M. Coleman, for appellant.

B. T. Masterson and H. Masterson, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge (after stating the facts). The complainant's original bill, and the answer thereto of Harris Masterson, ought to have been referred to a master, to be purged of scandal and impertinence, at the cost of the respective parties. In the record we find no note of evidence by either party, but we do find, in no particular order, ex parte affidavits, documents, depositions, and evidence taken orally before the examiner; and we also find the following certificate:

"In the United States Circuit Court for the Eastern District of Texas, at Galveston, Texas.

"Ch. No. 242. J. Gordon Brown v. Cornelius Davis et al.

"This is to certify that, as trial judge sitting in the above numbered and styled cause at Galveston, Texas, in November, 1893, there was much oral testimony heard and considered by the court on the trial of said above numbered and styled cause that was not taken down by any one in writing, neither the attorneys for complainant nor respondents requesting that it be done; and that said oral evidence is not in the record of this cause, upon which, in part, the decision of the court was based.

"Aleck Boarman,

"Judge Sitting on the Trial of the Above Numbered and Styled Cause."

It was the duty of each party to prepare and file in the record a note of the evidence upon which he relied, and it was his further duty to see that that evidence was filed with the clerk in such shape that it could be embodied in the transcript of appeal. The evidence found in the record wholly fails to sustain the sweeping charges of conspiracy and fraud contained in the original and amended bills. As to Archie R. Masterson, it not only fails to establish the charges of conspiracy and fraud made against him, but it is so strong in his favor as to affirmatively relieve him of all suspicion of any conduct in any wise affecting his personal or professional integrity. There is not a particle of trustworthy evidence in the record showing or tending to show that Archie R. Masterson was employed by the complainant, J. Gordon Brown, at the instance of any person whatever, to prepare for him a full and complete abstract of all transfers in Brazoria county appertaining to the lands described in the bill, or that he was

employed by any person whatever to make any such abstract, or that, in compliance with such employment, or without such employment, he did prepare and deliver to complainant what he represented as being a full and complete abstract of said property, or ever prepared or delivered to the complainant any abstract whatever. Nor is there any evidence in the record showing or tending to show that Archie R. Masterson knew anything about, or had anything to do with, any loan that the complainant made to Cornelius Davis, prior to the making thereof. The evidence affirmatively shows that Archie R. Masterson was not called upon by complainant to make any abstract at all in relation to any lands; that he made no abstract of the Davis lands; that he knew nothing of the loan by the complainant to Cornelius Davis; and that he was not even aware, at the time said loan was made, that he himself was named as trustee in the trust deed given by Cornelius Davis in favor of Harris Masterson in September, 1889. The complainant's charges so recklessly made against Archie R. Masterson have for a foundation only the fact that, prior to Cornelius Davis' application for a loan, Archie R. Masterson made an abstract, at the request of one Faickney, of the title to other lands, and on an application of Faickney to another mortgage company for a loan. Upon this fact of an abstract made at the request of another company of the title of other lands for another borrower of money is built the whole case of the complainant against Archie R. Masterson, by which he seeks to throw the consequences of his own carelessness and inattention to business details upon an innocent party. As to Harris Masterson, the complainant's case is but little better founded. The evidence wholly fails to support the charges of fraud and conspiracy made against him. It is not true that Harris Masterson aided and assisted Cornelius Davis in his negotiations with the complainant, J. Gordon Brown, for the loan of money upon lands described in the bill, or that he represented to complainant that said land was clear of incumbrances except the sum of \$700, or that he made any agreement with the complainant as to the payment of \$700 in case said loan should be granted, or that he represented to and led the complainant to believe that the said \$700 was the only incumbrance upon said property. It is not a fact that Harris Masterson induced the complainant to employ Archie R. Masterson for any purpose whatever. It is not a fact that the complainant relied upon any representations of Harris Masterson. Nor is it a fact, under the evidence in the case, that Harris Masterson knew anything about the application of Cornelius Davis for a loan, or had anything whatever to do with forwarding the same. The evidence does not show that Harris Masterson combined and conspired with any person whatever to cheat, swindle, or defraud complainant in relation to the Cornelius Davis loan, or any other loan; and the evidence sustains as genuine the deed of trust made and executed by Cornelius Davis to Archie R. Masterson, trustee, on the 10th day of September, 1889, to secure, in favor of Harris Masterson, the sum of \$3,321.75, with 12 per cent. interest; and

it shows that said deed of trust was placed of record nearly one month prior to the application of Cornelius Davis to Brown Bros. for a loan upon the lands in question. The evidence in the case fails to show that, in regard to Brown Bros., or the complainant, the said Harris Masterson, at the time Cornelius Davis applied for a loan, occupied any relation of trust or confidence to the said Brown Bros. or to the complainant. We say "at the time Cornelius Davis applied for a loan," because that is sufficient for this case, as on that very day any confidential relations that may have previously existed in relation to loans from Brown Bros. applied for through Harris Masterson were severed. The impression, however, left on our minds by the evidence is that at no time did fiduciary relations exist between Brown Bros. and Harris Masterson, no matter how much confidence Brown Bros. or J. Gordon Brown may have had that Harris Masterson was a reliable man to deal with. The evidence rather tends to show that Brown Bros., in their transactions with Harris Masterson, treated and trusted him as the agent of the borrower, and not as their own, and in all respects dealt with him at arm's length. We have observed in other cases that this has been the practice with kindred concerns engaged in loaning money, where the rule invariably is to put all the expenses upon the borrower; and we find nothing in this record to show that Brown Bros., or the complainant, J. Gordon Brown, followed any other practice. Brown Bros., and their rules and dealings, necessarily come to the front in this case. It was with Brown Bros. that Harris Masterson had dealings from 1888 to 1890 on behalf of various borrowers whom he represented. It was to Brown Bros. that the letters of Harris Masterson, which appear in the record, were written. It was to Brown Bros. that Cornelius Davis made his application for a loan. It was Brown Bros. who made the loan to Cornelius Davis, and who paid off the vendor's lien which Harris Masterson held. And the evidence in this case leaves a very strong impression with us that Brown Bros. are the real complainants in this suit, and any other impression seems incompatible with the assumption that J. Gordon Brown and R. L. Brown testified fully and truly in giving evidence in the case.

These conclusions necessarily dispose of all the alleged equities asserted by the complainant, except such as may arise from the following facts, developed by the evidence: Cornelius Davis owned a tract of land in Brazoria county, on which Harris Masterson held a vendor's lien for the sum of \$700, of several years' standing, and also a deed of trust to secure the payment of a debt amounting to \$3,321.75, which deed of trust was duly recorded in the records of Brazoria county on the 21st of January, 1890. On the 19th day of February, 1890, Cornelius Davis made application to Brown Bros., money lenders, for a loan of \$2,000, to be secured by deed of trust on said lands; and in such application represented that there was no lien upon the said land except the vendor's lien in favor of Harris Masterson for \$700. Brown Bros. decided to make the loan requested by Cornelius Davis, but in so doing did not provide them-

selves with an abstract of the title of Cornelius Davis, as is usual in such cases, but relied upon a partial abstract received by them prior to the application of Cornelius Davis in relation to another loan to another party. Harris Masterson was informed by the agent of Brown Bros. of an intent to pay off the vendor's lien of \$700, and also received the same information from Cornelius Davis. Harris Masterson claimed from Davis the payment of an unsecured debt of \$585 for amounts advanced for the payment of taxes, as well as the payment of his vendor's lien, and obtained from Cornelius Davis an order upon Brown Bros. for the sum of \$1,285, the amount of the vendor's lien and the unsecured debt, which Brown Bros. paid; and thereupon Harris Masterson executed to Davis a release of his vendor's lien upon the land, but made no mention to Brown Bros., or to their agent, of the deed of trust in his favor on record in Brazoria county. The contention of the complainant is that when Harris Masterson, knowing the purpose of the complainant to secure a prior lien upon the property, received the amount of his vendor's lien, it was his duty to make known that he also held a trust deed of record bearing upon the said land which would be prior in rank to the complainant's mortgage; and that by his silence with regard to the existence of the trust deed under the circumstances mentioned he is estopped in equity from asserting that trust deed as against the trust deed in favor of the complainant. This view of the case is strongly supported by the authorities, although there are some qualifications. On the other hand, it is contended that Harris Masterson had good reason to believe that Brown Bros., who he supposed were making the loan, were fully advised of the existence of the trust deed, as shown by the records, because he had every reason to suppose that, as prudent business men, and according to the general practices of careful money lenders in dealing with land, they had provided themselves, in the matter of the loan to Davis, with the abstract and certificate usual in such cases, which abstract and certificate would have fully shown the true state of facts; and that Masterson, not being in any way connected with the loan, and only applied to with reference to the payment of his vendor's lien, was not called upon to furnish information which he had the right to suppose was already in their possession. There are some adjudged cases supporting this view of the case. As the whole case was presented in the court below, and even in this court, we do not feel called upon to enter into the merits of this contention. If this were a case in which the complainant had come into court with a fair presentation of the facts, evincing a disposition to assert his equities without injury to others, and had presented the matter of estoppel upon the real facts of the case as above stated, we are inclined to the opinion that he would not have been turned out of court without consideration of his right to assert the estoppel in question. Such a case, however, is not the one in hand, but rather a case where the complainant, by his reckless charges of fraud, and conspiracy to cheat, swindle, and defraud, against Harris Masterson and other parties against whom he had no equity whatever, impugning their

personal and professional integrity, and following the same up with reckless evidence in support thereof, which the slightest investigation would have shown him to be wholly unfounded, presents himself as one more inclined to ask equity than to do equity, and one not in court with such clean hands as entitle him to demand of the court to consider favorably to him the partial equity suggested, even if it were otherwise well founded. Certainly, as the case was there presented, the decree of the circuit court dismissing the complainant out of court was properly given; and, even as the case is presented here, we see no sufficient reason to disturb the same. Affirmed.

BROWN et al. v. KING et al. (two cases).

(Circuit Court of Appeals, Fifth Circuit. May 29, 1894.)

Nos. 224, 225.

EQUITY PRACTICE—MASTER'S FEES.

The permanent master appointed in two suits to foreclose mortgages on a railway was a young man, not a lawyer, and without experience in railway accounts. The suits were not contested, and no matter of importance was litigated before him. His office expenses had been paid, and he had received \$6,000 on account of his compensation. The principal part of his work was done by the receiver's auditor, to whom was allowed therefor more than \$3,000. The master and the clerk of the court were appointed commissioners to sell the property, which was purchased at the upset price, \$500,000, and each received \$6,500 as commissions. His services extended very little over two years, during which he was absent five months or more; and he was also master in another railway foreclosure suit. *Held*, that his application for further compensation should be denied.

Appeal from the Circuit Court of the United States for the Northern District of Florida.

This was a petition by John King, permanent master in two suits for foreclosure of mortgages against the Florida Southern Railway Company, for allowance of further compensation to him as such master. The circuit court made a decree allowing such further compensation. Brown and others, members of the committee who had purchased the property, appealed.

T. M. Day, Jr., for appellants.

E. P. Axtell, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

McCORMICK, Circuit Judge. On March 18, 1890, the New England Trust Company and the American Loan & Trust Company exhibited their respective separate bills against the Florida Southern Railway Company in the circuit court for the northern district of Florida, seeking to foreclose mortgages held by them on the property of the railway company. A receiver was appointed to hold and operate the property, and the usual proceedings were had in the progress of the suits. On May 7, 1890, John King, the ap-

appellee, was appointed permanent master in each of the suits, "to do and perform all those things proper to be done by a master, to take evidence, and report on such questions and matters as should be referred to him." The suits were not contested. Decrees pro confesso were taken. The permanent master seems to have in some way passed on the reports and vouchers of the receiver as the same were prepared by the receiver's auditor, J. E. Starke, and presented to the court; and this auditor, besides his pay as auditor of the receiver, was allowed \$125 a month for 26 months as an expert accountant to assist the permanent master in passing on the receiver's accounts and vouchers. The permanent master's office expenses, including the services of a stenographer, seemed to have been paid by the receiver, on the proper decree of the court. No matters of great pith and moment appear to have been litigated before the permanent master. He was not a practicing or licensed lawyer. He was 28 years old when appointed. Before his appointment his business was that of a civil engineer. He had never served as master, or been in any way connected with courts, nor had any experience with railway accounts before his appointment. The final decrees of foreclosure were entered December 9, 1891. The appellee John King, and Phillip Walter, the clerk of the court, were appointed master commissioners to sell the mortgaged property. It was sold on March 7, 1892, to the appellants, as a purchasing committee, for the upset price, amounting to \$500,000. April 9, 1892, the sales were confirmed, and on the 30th April the proper deeds were delivered, and the property taken possession of by the purchasers. Final reports of the receiver were filed September 1, 1892. Pending the proceedings, the appellee John King received on account of compensation as master the sum of \$6,000, and received as his share of commissions for making sale of the mortgaged property \$6,500, making, as his compensation for service rendered in the suits, \$12,500. On April 23, 1893, he made application to the court praying for an order fixing his further compensation, which resulted in the passing of the decree appealed from, allowing him in each suit the sum of \$1,250 in addition to the amounts previously paid him. In suits in equity the allowance of compensation to masters is so largely a matter of discretion in the judge of the court of original jurisdiction that courts of error are reluctant to disturb such decrees as those appealed from in these cases. The discretion, however, is a legal discretion, and it may be so improvidently exercised as to devolve on the court of appeals the duty of reviewing it. Unpleasant as it must always be to reverse the decrees of the circuit courts in such matters, we have been constrained to do so in a recent case,¹ and feel compelled to the same course in this case. If the decrees appealed from are affirmed, this young, inexperienced man will receive from this trust fund \$15,000 for a period of service extending very little over two years. During 26 months of that time the principal part of his work appears to have been done by an assistant, who was an experienced man in such work, and for whose services there was paid out of this trust more than \$3,000. In the most responsible work the master did he was

¹ Cutting v. Tavares, O. & A. R. Co., 9 C. C. A. 401, 61 Fed. 150.

assisted by the clerk of the court as a co-worker, who was paid out of the trust \$6,500 for his assistance. It is shown that during this period of something over two years the appellee was absent from the state of Florida for five months or more, and that he was also master in another railway foreclosure suit. It is stated in the brief of counsel for appellants, and not controverted by the counsel for the appellee, that "after the date of the deeding of the properties to the purchasers, but during a considerable portion of the time in which Mr. King claimed to be rendering services in the cause, he was also acting as master in the case of *The American Construction Company v. The Jacksonville, Tampa & Key West Railway Company*, and on May 1, 1893, he was appointed master in the case of *The Pennsylvania Company for Insurance on Lives and Granting Annuities v. The Jacksonville, Tampa & Key West Railway Company*." We refrain from further comment. We conclude that the decrees appealed from must be reversed, and the appellee John King's application for additional compensation as such permanent master denied, and the application dismissed, at his cost in the circuit court and in this court; and it is so ordered.

UNITED STATES v. SOUTHERN PAC. R. CO. et al.

(Circuit Court, S. D. California. June 25, 1894.)

No. 184.

PUBLIC LANDS—PACIFIC RAILROAD GRANTS—FORFEITURE.

Act July 27, 1866 (14 Stat. 292), provided for the organization of the A. & P. R. Co., and granted lands to it to aid in the construction of a railroad between a point in Missouri and the Pacific ocean. Section 18 authorized the S. P. R. Co., a California corporation, to connect with this railroad near the California boundary, and, to aid in the construction of a railroad from there to San Francisco, declared that it "shall have the same grants of land subject to all the conditions herein provided." Act March 3, 1871 (16 Stat. 573), provided for the organization of the T. P. R. Co., with a grant of certain lands, and authorized (section 23) the S. P. R. Co. to construct a connecting railroad from a point on the Colorado river to San Francisco, "with the same rights, grants, and privileges," and subject to the same conditions, as were granted to it by Act July 27, 1866, § 18. *Held*, that the lands granted to the A. & P. R. Co. along the overlapping routes did not pass conditionally to the S. P. R. Co. by the act of 1871, though the A. & P. R. Co. had not complied with its grant at that time, but should be excepted from that grant; and the forfeiture by the A. & P. R. Co. (Act July 6, 1886) of such lands inured to the benefit of the United States rather than to that of the S. P. R. Co. and its grantees. *U. S. v. Southern Pac. R. Co.*, 13 Sup. Ct. 152, 163, 146 U. S. 570, 615, followed.

Bill by the United States against the Southern Pacific Railroad Company and others to recover lands. Decree for complainant.

Joseph H. Call, Sp. Asst. U. S. Atty., and the United States Attorney General, for the United States.

Joseph D. Redding, for defendants.

ROSS, District Judge. This is a suit in equity brought by the United States, the chief object of which is the establishment of

the alleged title of the government to about 700,000 acres of land situated in Los Angeles and Ventura counties, of this state, designated, according to the public surveys of the United States, as odd-numbered sections, and lying within the primary or 20-mile limit of the grant of July 27, 1866, made by congress to the Atlantic & Pacific Railroad Company, and also within the primary limits of the subsequent grant of March 3, 1871, made by congress to the Southern Pacific Railroad Company, and which lands are claimed by the last-named company, and those holding under it, by virtue of its grant. For nearly 100,000 acres of these lands the United States subsequently issued its patents to the Southern Pacific Railroad Company, a large part of which land, so patented, that company conveyed, for a valuable consideration, to third persons, all of which patents and some of which conveyances were executed prior to the institution of this suit. The Southern Pacific Company also contracted in writing with various other persons to convey to them, severally, other portions of said patented lands, and still other of said lands embraced within the limits of its grant. These persons are also made parties defendant to the bill, the objects of which include the annulling of the said patents, and the quieting of the complainant's alleged title to the whole of the lands embraced by the suit. The bill also makes parties defendant D. O. Mills, Garrit L. Lansing, and Lloyd Tevis, as trustees of certain mortgages executed by the Southern Pacific Railroad Company upon the lands covered by its grant, to secure the payment of certain bonds issued by it.

By the first section of the act of July 27, 1866 (14 Stat. 292), congress incorporated the Atlantic & Pacific Railroad Company, and authorized it to construct and operate a railroad from a point near the town of Springfield, in the state of Missouri, westward through Albuquerque, "and thence along the 35th parallel of latitude, as near as may be found most suitable for a railway route, to the Colorado river, at such point as may be selected by such company for crossing; thence, by the most practicable and eligible route, to the Pacific" ocean. To aid in the construction of the road, there was granted to the Atlantic & Pacific Company, by the third section of the act, every alternate section of public land not mineral, designated by odd numbers, to the amount of 10 sections on each side of the road whenever it passes through a state, "and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is designated by a plat thereof filed in the office of the commissioner of the general land office, and whenever," etc. The eighteenth section of the act provided as follows:

"That the Southern Pacific Railroad, a company incorporated under the laws of the state of California, is hereby authorized to connect with the said Atlantic & Pacific Railroad formed under this act, at such point near the boundary line of the state of California as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with said road; and, in consideration thereof, to aid in its construction, shall have the same grants of land, subject to all the conditions and

limitations herein provided, and shall be required to construct its road under the like regulations as to time and manner with the Atlantic & Pacific Railroad herein provided for."

On March 3, 1871, congress passed an act entitled "An act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes." 16 Stat. 573. By the twenty-third section of that act it was provided as follows:

"That for the purpose of connecting the Texas Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles to the Colorado river, with the same rights, grants and privileges, and subject to the same limitations, restrictions, and conditions, as were granted to said Southern Pacific Railroad Company of California by the act of July 27, 1866: provided, however, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Railroad Company, or any other railroad company."

These grants were the subject of full consideration in the cases entitled U. S. v. Southern Pac. R. Co. (Nos. 67-69, consolidated), Same v. Colton Marble & Lime Co. (No. 88), and U. S. v. Southern Pac. R. Co. (Nos. 177, 178), reported in 45 Fed. 596, and 46 Fed. 683. My views in regard to them, while meeting with the approval of two of the justices of the supreme court (Justices Field and Gray), were by a majority of the court overruled. The cases in the supreme court will be found reported in 146 U. S. 570, 615, 13 Sup. Ct. 152, 163. A careful examination of the opinions of the majority of the court in those cases shows that it decided, among other things, that it was not the intent of congress that any of the lands embraced by the grant of July 27, 1866, to the Atlantic & Pacific Company should pass conditionally to the Southern Pacific Company by the grant of March 3, 1871, but, on the contrary, that congress intended that all lands embraced by the prior grant to the Atlantic & Pacific Company should be definitely excepted from the later grant to the Southern Pacific Company, and that the Atlantic & Pacific Company having forfeited the lands granted to it by the act of July 27, 1866, by reason of its failure to comply with the conditions upon which the grant was made, and congress having, by the act of July 6, 1886, declared the forfeiture, the latter resulted in restoring the lands to the government.

"The forfeiture," said the court, "was not for the benefit of the Southern Pacific; it was not to enlarge its grant as it stood prior to the act of forfeiture. It had given to the Southern Pacific all that it had agreed to in its original grant; and now, finding that the Atlantic & Pacific was guilty of a breach of a condition subsequent, it elected to enforce a forfeiture for that breach, and a forfeiture for its own benefit."

The court further observed:

"If the act of forfeiture had not been passed by congress, the Atlantic & Pacific could yet construct its road, and that, constructing it, its title to these lands would become perfect."

In those cases the defendant company contended that no map of definite location of its line between the Colorado river and

the Pacific ocean was ever filed by the Atlantic & Pacific Company or approved by the secretary of the interior. The supreme court said that contention was based upon these facts:

"The Atlantic & Pacific Company claimed that, under its charter, it was authorized to build a road from the Colorado river to the Pacific ocean, and thence, along the coast, up to San Francisco; and it filed maps thereof in four sections. San Buenaventura was the point where the westward line first touched the Pacific ocean. One of these maps was of that portion of the line extending from the western boundary of Los Angeles county, a point east of San Buenaventura, and through that place to San Miguel Mission, in the direction of San Francisco. In other words, San Buenaventura was not the terminus of any line of definite location from the Colorado river westward, whether shown by one or more maps, but only an intermediate point on one sectional map. When the four maps were filed, and in 1872, the land department, holding that the Atlantic & Pacific Company was authorized to build, not only from the Colorado river directly to the Pacific ocean, but also thence north to San Francisco, approved them as establishing the line of definite location. Subsequently, and when Mr. Justice Lamar was secretary of the interior, the matter was re-examined, and it was properly held that, under the act of 1866, the grant to the Atlantic & Pacific was exhausted when its line reached the Pacific ocean. San Buenaventura was therefore held to be the western terminus, and the location of the line approved to that point."

And the court held that:

"The fact that its line was located and maps filed thereof in sections is immaterial. *St. Paul & P. R. Co. v. Northern Pac. R. Co.*, 139 U. S. 1, 11 Sup. Ct. 389. Indeed, all the transcontinental roads, it is believed, filed their maps of route in sections. So the question is whether the filing a map of definite location from the Colorado river, through San Buenaventura, to San Francisco, under a claim of right to construct a road the entire distance, is good as a map of definite location from the Colorado river to San Buenaventura, the latter point being the limit of the grant. We think, unquestionably, it is."

In the present case it is urged on the part of the defendants that in the former cases the supreme court determined the questions in relation to the location of the line of the Atlantic & Pacific Company as one of law; that there were no issues of fact in either of those cases in respect to the character of the maps there spoken of, or of the surveys upon which they were based, whereas, in the present case, the pleadings tender issues of fact in respect to all of those matters, upon which a large amount of evidence has been introduced; and this evidence, the defendants contend, establishes that the Atlantic & Pacific Company never did definitely locate its line between the Colorado river and the Pacific ocean, and that the pretended maps of definite location were but fraudulent pretenses, and amounted at most to but a general designation of its contemplated route. In my opinion, the evidence in the present case shows that to be true. It is unnecessary, however, to analyze it, and show the reasons for this conclusion; but it is as well to state that it finds strong support in the fact that if the maps filed by the Atlantic & Pacific Company in 1872, of its route between the Colorado river and the Pacific ocean, were maps of the definite location of its road, it never did file any map or maps designating its general route; for it is not pretended that the Atlantic & Pacific Company made more than one designation of the line in question. Yet the court, in *U. S. v. Southern Pac. R. Co.*, 146 U. S. 600, 13 Sup. Ct. 152, in speaking of this very grant of

July 27, 1866, as well as in the case of *Buttz v. Railroad Co.*, 119 U. S. 55, 7 Sup. Ct. 100, in speaking of the similar grant to the Northern Pacific Company, held that "congress provided for two separate matters,—one, the fixing of the general route; and the other, the designation of the line of definite location." Nevertheless, in view of the rulings of the supreme court in the former cases regarding the grants in question, by which this court, of course, must be controlled, I do not see that it is essential to the government's case that the line of the Atlantic & Pacific Company should have been definitely located; for the surveys made opposite the lands in controversy, and maps thereof filed by it, constituted at least a designation of the general route of the road, upon which designation the law operated to withdraw all lands within the limits of the grant for the benefit of the grantee. *Buttz v. Railroad Co.*, 119 U. S. 55, 7 Sup. Ct. 100; *St. Paul & P. R. Co. v. Northern Pac. R. Co.*, 139 U. S. 1, 11 Sup. Ct. 389. The facts that the Southern Pacific Company had previously, to wit, on the 3d day of April, 1871, filed in the office of the commissioner of the general land office a map designating the general route of the line it was authorized to build, and did build, under and by virtue of the act of March 3, 1871, and that thereafter, to wit, on the 21st of April, 1871, an order was made by the commissioner of the general land office withdrawing all lands within the primary as well as the indemnity limits of that grant from sale, location, pre-emption, or homestead entry, could not, under the rulings of the supreme court in the former cases, in any way affect the prior grant, which up to the time of its forfeiture, on July 6, 1886, remained effective and paramount. While, up to the time of the withdrawal for the benefit of the Southern Pacific Company, and for nearly one year thereafter, the Atlantic & Pacific Company had not filed any map indicating its line of road between the Colorado river and the Pacific ocean, still, when it did do so, in 1872, by maps showing, if not the definite location of its line, at least its general route (its right under its grant being, as decided by the supreme court, wholly unaffected by the subsequent grant to the Southern Pacific Company, and consequently by the proceedings had and taken thereunder), the law itself operated to withdraw all public lands within the limits of the grant to the Atlantic & Pacific Company for the benefit of the grantee (cases *supra*); and, the rights of that company continuing, as held by the supreme court, until the act of forfeiture passed by congress July 6, 1886, and the forfeiture being for the benefit of the United States, the necessary result is that, when it occurred, the lands were restored to the government, and did not pass to the Southern Pacific Company, or to its grantees, who necessarily took with notice of the grants, for such grants are laws as well as contracts. *Missouri, K. & T. Ry. Co. v. Kansas Pac. Ry. Co.*, 97 U. S. 491; *U. S. v. Southern Pac. R. Co.*, 146 U. S. 598, 13 Sup. Ct. 152.

It results, I think, that there must be a decree for the government; and it is so ordered.

BOUND v. SOUTH CAROLINA R. CO. et al. Ex parte WALKER. Ex parte CALDER.

(Circuit Court, D. South Carolina. May 19, 1894.)

1. RAILROAD COMPANIES—MORTGAGES—TRUSTEES—COMPENSATION.

On maturity of bonds secured by a railroad mortgage after most of them had been retired, and the holders of nearly all outstanding had agreed to an extension of time, the trustee of the mortgage, on his own motion, and without request by the bondholders, brought suit to foreclose. The suit was never prosecuted to a decree, proceedings on a second mortgage being afterwards instituted in the federal court. *Held*, that the suit by the trustee was unnecessary, and he should not be allowed compensation or counsel fees therefor.

2. SAME.

In foreclosure proceedings on a second mortgage of a railroad, the lien of the first mortgage was not questioned. The holders of the bonds secured thereby had consented to an extension of time. *Held*, that the sole duty of the trustee under the first mortgage was to see that the amount due thereunder was determined, and a decree made conserving the interests of the bondholders; and for anything further he should not be allowed compensation or counsel fees.

This was a suit by Frederick W. Bound against the South Carolina Railway Company and others to foreclose a second mortgage on said company's railroad. H. Pinckney Walker and James M. Calder, trustees in the first mortgage of said railroad, filed petitions for compensation and counsel fees.

McCrady & Bacot and E. W. Hughes, for petitioners.
J. W. Barnwell and Mitchell & Smith, for respondent.

SIMONTON, Circuit Judge. The petitions are on behalf of two trustees of what is known in this case as the "old first mortgage" of the South Carolina Railroad Company. The petitions seek compensation to the trustees, including remuneration of the counsel employed by them. The two trustees did not act together, and their cases will be separately considered.

H. P. Walker, Trustee.

The old first mortgage of the South Carolina Railroad Company was executed in 1868, for the purpose of securing certain bonds of that company issued for taking up, by exchange or otherwise, certain bonds of the Louisville, Cincinnati & Charleston Railroad Company, for which the company was liable, guarantied by the state of South Carolina. The bonds aggregated \$3,000,000 in all, and some of them were payable in sterling, and some in money of the United States. They were used as designed, and nearly every guarantied bond was retired. The trustees of this mortgage were Henry Gourdin, H. Pinckney Walker, and James M. Calder. The mortgage is an ordinary railroad mortgage. No special provision is made in it for compensation to the trustees, and such compensation must depend on the law and practice of this court. *Dodge v. Tulleys*, 144 U. S. 451, 12 Sup. Ct. 728. Under a mortgage of this character, the duties of the trustees are usually dormant until and unless

there be a default in payment of the bonds secured by it. Jones, R. R. Sec. § 375. It is made primarily to serve the purposes of the mortgagor. The trustees are selected by the mortgagor; and, prior to any active interference by the trustees for the protection of the bondholders, any compensation to which they may be or may become entitled should be met by the mortgagor. With regard to this mortgage, no such default in the payment of interest on the bonds has ever occurred as to require the active intervention of the trustees. Default having occurred on the mortgage second in lien to it, proceedings were instituted in this court on 5th July, 1878, by Calvin Claflin et al. against the South Carolina Railroad Company, and that second mortgage was foreclosed. The first mortgage was not disputed or disturbed, the sale under foreclosure being subject to it. The trustees of the first mortgage appeared in that suit representing their mortgage, the bonds not yet being due; and the counsel who appeared for them (each of the three having his own attorney) were fully compensated and the trustees protected. Afterwards, one Coghlan, who held some of the guarantied bonds of the Louisville, Cincinnati & Charleston Railroad Company, obtained judgment in this court on his bonds. Henry Gourdin having departed this life, H. P. Walker, as trustee, without the other trustee, began proceedings in this court seeking to intervene in the Coghlan suit; but without success. On appeal to the supreme court of the United States, the action of this court was sustained. Proceedings for foreclosure of the mortgage, all the bonds having matured, were then instituted by Mr. Walker in the circuit court of the state of South Carolina, sitting for Charleston county; Calder, trustee, being made a party defendant.

At this time, of the \$3,000,000 bonds issued under that mortgage, a very large number had been retired and paid, leaving less than \$300,000 in value outstanding; and of these the payment of nearly all of them had been extended by the holders. The trustee, Mr. Walker, acted *suo motu*, neither claiming nor averring the request of any one of the bondholders as the reason for his action. Pending this case, the main cause in which these petitions are filed was begun in this court by F. W. Bound, holder of second consolidated mortgage bonds of the South Carolina Railway Company, seeking foreclosure of this second mortgage. This court took possession of the res, and appointed a receiver. Thereupon the case in the state court died a natural death, and the whole litigation was completed here. In a proceeding of this kind, in which compensation is sought, not under express contract, and scarcely under an implied contract, but under the principle which controls the court *ex equo et bono*, the trustee himself cannot be remunerated, nor can he be protected from obligations to his counsel, unless the course adopted by him and the services therein rendered are required by his official position, and are rendered necessary for the protection, preservation, or the benefit of his trust. Carefully considering all that the trustee, H. P. Walker, did up to this time, nothing appears to have been done which was either requisite or necessary for the protection, preservation, or benefit of his trust. The bonds, reduced 90 per

cent. in number, were perfectly safe. There having been no default in interest on them, they needed no protection; and the action of the large majority of the holders of them in extending the time for the payment after maturity shows that no benefit could be derived to the holders by enforcing payment of them. When this Bound Case was instituted, and especially when the holders of the first consolidated mortgage insisted on enforcing their lien, action on the part of the trustees of this first mortgage became requisite and necessary. What action on their part was requisite and necessary? The amount due on them was \$270,000. They were, next to Coghlan's claim of some \$60,000, an unquestioned first lien on property carrying subordinate liens of some \$6,000,000. No party to the suit could get any relief without providing for them; and, when they were to be provided for, the question was as to the amount due. No part of the money coming to these bonds was to be paid to or distributed by the trustees. All that they were to do was to see a proper decree entered protecting and conserving the rights of these bondholders.

With regard to questions made between the other classes of bondholders, they were supremely indifferent. Such was the character of the service required of them; and this service was well and efficiently performed. Everything else was done outside of the requirement of their duty; and, valuable as it was in the cause, there can be no authority calling upon the bondholders *ex equo et bono* to pay for it. The whole record has been carefully reviewed, and the testimony adduced considered. It is manifest that Mr. Walker was most vigilant and active in the performance of the duties of the trust, bearing almost the whole burden, and his attorneys exhibited the same degree of vigilance and activity.

James M. Calder, Trustee.

At his first appearance in this cause, Mr. Calder pleaded his ill health and his absence as reasons for forbidding him to take an active part in the litigation. He took the wisest course,—employed competent counsel, and thenceforward submitted himself to the discretion of the court, keeping, however, a watchful eye on the interests of his client.

The duty devolving upon the court is invidious to a degree. With strong sympathy for the counsel, created by years of active professional life, and with personal esteem and affection for the gentlemen interested in these presents, the court is called upon to administer the law "with a jealous regard to the rights" of these bondholders. *Trustees v. Greenough*, 105 U. S. 537. While on the one hand the trustees must be protected from any loss or pecuniary responsibility in discharging the duties devolving upon them, on the other the bondholders, who are under no contract obligation to them, must be protected from payment for services which were not essentially necessary and proper for their preservation, protection, or benefit. Much of the service of the counsel was of this character; much of it was not. Reviewing the whole case, considering that the effective service of Mr. Walker had been rendered when death

cut short his career, and the peculiar interest he and the attorney representing him exhibited in the proceedings, there is allotted to his counsel, Messrs. McCradys & Bacot, \$2,500, and to his personal representative \$1,000; to Mr. Calder's counsel, E. W. Hughes, Esq., \$750; and to Mr. Calder himself, \$800.

The special master will apportion this gross amount upon the first-mortgage bonds of the South Carolina Railroad Company. Some of these bonds were payable in sterling. Under an erroneous construction of this mortgage, a valuation had been filed on these bonds of \$4.44 to the £. By the special effort of Messrs. McCradys & Bacot, this valuation was changed to \$4.86 to the £. This service was rendered specially to these bonds, and must be specially paid by them. The special master will deduct from the sum going to each sterling bond 10 per cent. of the difference between \$4.44 and \$4.86, and pay the same to Messrs. McCradys & Bacot.

ALTSCHUL v. HOGG et al

(Circuit Court, D. Oregon. June 1, 1894.)

No. 2,014.

QUIETING TITLE—NATURE OF CLAIM.

W., complainant's grantor, granted to H., for two years, power to sell certain land, for not less than \$445,000, H. to have 90 per cent. of any amount obtained in excess thereof. On the last day of the two years, H. came to W., stated that he had sold to defendant corporation for \$445,000, that T., who was with him, was its attorney, and demanded a deed. W. said he would give it as soon as possible, and sent for his attorney. The next day W. sent to H. for any contract he had made, but none was furnished. T. stated that he did not think there was any in writing, and had not been informed of the terms of any that had been made. He was informed that if any had been made, with reasonable time for preparing deed, W. would be glad to carry out its terms. Seven years thereafter, defendant began actions for specific performance and breach of contract, which have not been prosecuted and are still pending. During the two years to which the power was limited, H., claiming to act thereunder, executed to defendant, for a consideration of five dollars, an option on the land. Thereafter he executed to it a deed thereof, for five dollars, dated within the two years, but acknowledged long thereafter. H. said nothing to W. about these instruments, but, after the date thereof, stated that he was negotiating for a sale. Between the date of the option and deed, defendant executed a mortgage of the land, reciting that it had the right to become the purchaser on payment of \$600,000; and, by its answer in this suit to have any claim of defendant to the land declared void, it alleged that the tender claimed to have been made by H. by certified check was \$600,000. H. was the president and principal stockholder of a corporation which owned most of the stock of defendant. During the 10 years since the expiration of the power of H., the owners of the land have made large and necessary expenditures in connection with the land, which defendant has not paid for, and does not offer to pay. Defendant, moreover, is insolvent. *Held*, that complainant is entitled to a decree.

Suit by Charles Altschul against T. Egenton Hogg, the Willamette Valley & Coast Railroad Company, and others. Decree for complainant.

Henry Ach and C. E. S. Wood, for plaintiff.
Wallis Nash, for defendant C. C. Clark, receiver.

BELLINGER, District Judge. This is a suit to declare void any claim of right on the part of the defendants to lands comprising a grant to the Willamette Valley & Cascade Mountain Wagon-Road Company, and to enjoin the defendants, or either of them, from asserting any claim or right in such lands adverse to plaintiff's claim therein. The controversy is between the complainant and the Willamette Valley & Coast Railroad Company, by its receiver. The complainant's title comes from one Alexander Weill. The railroad claims under a contract of sale made by T. Egenton Hogg, as the attorney in fact of Weill. Prior to the execution of this power, the legal title to the lands in question was in one Clark, by conveyance from the road company for Hogg, Weill, and himself. Clark conveyed to one Cahn, in trust for himself, Hogg, and Weill. On February 18, 1879, Hogg conveyed to Weill all his right and interest in the land grant, and in the stock, franchises, and property of every description of the road company and of the Deschutes River Bridge Company. On the 9th of the following April, Weill acquired the interest of Clark in the properties in question from Clark's heirs and widow. By the agreement of sale under which Weill acquired Hogg's interest in the property, it was stipulated on the part of Weill as follows:

"Said Weill grants to said Hogg full and irrevocable power for a term of two years, commencing on January 1, 1879, and ending January 1, 1881, in which to negotiate and conclude a sale of all the lands, stocks, and franchises of said wagon-road company; provided, that no sale shall be made for a sum or amount of money less than (\$445,000) four hundred and forty-five thousand dollars, which amount is now estimated as a sum equal to all the outlays, advances, payments, charges, expenses, and disbursements with which the property will be chargeable, for principal and interest, at the date of any sale which may be made by said Hogg within the period aforesaid; and any avails or realizations that may be realized or received upon any such sale in excess of said sum of \$445,000, and the further sum of all the charges, expenses, outlays, disbursements, and amounts that shall be hereafter expended, paid, laid out, and incurred in selecting the lands and procuring the certification thereof, provided for in this agreement, including the sum of all taxes that may be assessed on said lands, with interest at the rate of five (5) per cent. per annum charged thereon, shall be divided between the parties hereto in the following proportions, that is to say: To said Weill ten per cent. of all avails of such sale over and above the aforementioned sums and the expenses of negotiating the sale, and the remainder to said Hogg. And said Alexander Weill covenants and agrees that, upon any such sale of the said property being concluded by said Hogg as is herein provided, he will convey, or cause to be conveyed, to the purchaser or purchasers the legal title to the extent of all the interest he now has, or may at any time hereafter acquire, of, in, and to the said lands and property, free of all incumbrance committed or suffered by him; but, in case said Hogg shall fail to negotiate and conclude a sale of all the said lands within the said time, his said power to sell as aforesaid shall cease and determine on the 1st day of January, 1881; and time is agreed to be of the essence of this provision."

This is the power under which the railroad company now claims. By this agreement, Hogg bound himself to act as land agent, at Weill's expense, to select the most desirable lands within the grant to an amount of not less than 400,000 acres, nor more than 600,000

acres. On the last day that this authority had to run (December 31, 1880), Hogg presented himself to Weill in the city of New York, where both were living, and announced that he had sold the lands in question for \$445,000, for which sum he professed to have a certified check, which he offered Weill, at the same time demanding a conveyance of the lands and rights which he claimed to have sold. According to Weill's testimony, he informed Hogg that it was impossible to comply at once with this demand, but that, if time was given to have a deed prepared, he would comply with such demand; and he requested an opportunity to examine any contract of sale entered into by Hogg as Weill's attorney. Upon this, and while Weill was in the act of sending a clerk to request the presence of his attorney, Hogg and Mr. Turner, attorney for the Farmers' Loan & Trust Company, and another gentleman who had accompanied Mr. Hogg to Mr. Weill's office, departed. In October, 1887, the Willamette Valley & Coast Railroad Company, by Hogg, as its president, began an action in the supreme court of New York against Weill and those associated with him in business for damages for failure to make a conveyance of the property in question in pursuance of Weill's alleged contract of sale made by Hogg, as his attorney in fact. Shortly afterwards the company began in the same court a suit in equity to compel a specific performance of the same contract. In this case, as in the other, Hogg verified the complaint as the president of the plaintiff company. These proceedings have not been prosecuted, and are still pending. The Farmers' Loan & Trust Company is made defendant herein, as the mortgagee of all the property and rights of the Willamette Valley & Coast Railroad Company. The Oregon Pacific Railroad Company has no apparent relation to the matters in controversy. It is a party with the other company in the deed of mortgage to the loan and trust company, and this probably explains why it is joined as a defendant in this suit. All the parties, with the exception of the Willamette Valley & Coast Railroad Company, have suffered decrees pro confesso to be taken against them. On September 29, 1880, Hogg, in his own name, entered into a contract with the Willamette Valley Company whereby he sold, for the expressed consideration of five dollars, to the company, "the right and option to become the purchaser" of the land grant. It is recited in the contract that the option so sold is "under a certain agreement, dated the 18th day of February, 1879, and made between Alexander Weill, of the first part, and T. Egerton Hogg, of the second part." He reserves in this contract 10,000 acres to provide against contracts made by the original owners. In the mortgage deed to the Farmers' Loan & Trust Company, already referred to, it is recited that the Willamette Valley Company has acquired the right to become the owner of the road grant and stock of the road company and Deschutes Bridge Company, "which stock and lands are subject, before the title thereof can be acquired by the said Willamette Valley & Coast Railroad Company, to the payment of six hundred thousand dollars." The Willamette Valley Company duly executed this instrument, containing this recital of its rights to become the purchaser of the property in question, "subject, before the

title thereof can be acquired by the said * * * company, to the payment of six hundred thousand dollars." Notwithstanding this, Hogg, in Weill's name, as attorney in fact, by a deed dated November 3, 1880, for the consideration of five dollars, undertakes to convey absolutely the property in question to the Willamette Valley Company. The acknowledgment to this deed is dated March 28, 1882. No intimation of either of these sales was given to Weill. In the latter part of the same month, November, 1880, Hogg called at different times at the office of Weill, and stated that he was negotiating for a sale of the property to certain parties, represented by a Mr. Short, and, finally, that such negotiations had failed. On December 30, 1880, Hogg sent a letter to Weill, in which he said:

"If my parties should be able to provide the money to complete the purchase of the wagon-road company's lands, etc., will you accept payment in a check or checks certified by the Chemical Bank, City Bank, Bank of New York, Bank of Commerce, or any banks of like standing? Please send answer at foot of this, and oblige * * *."

Weill answered this letter in the affirmative. Hogg's letter, in his own handwriting, is in evidence. If the phrase, "my parties," in this letter, refers to the Willamette Valley Railroad, it is, of course, impossible that Hogg should have completed a sale and made a conveyance of the property nearly two months before he had ascertained whether such parties would "be able to provide the money to complete the purchase." If he sold and conveyed when the parties were not able to provide the money to pay for the property sold, he acted in violation of the trust reposed in him, and in excess of his authority. If, as is probable, the deed dated November 3, 1880, was in fact executed on March 28, 1882, the date of its acknowledgment, it is evidence of a fraudulent contrivance between Hogg and the pretended vendee company to effect a transfer of the land grant to the latter. There is no explanation of these facts consistent with fair dealing. It is probable that the deed dated November 3, 1880, was in fact executed on the date of its acknowledgment,—March 28, 1882,—and that it was in consequence of the discovery by Hogg that, while he had pretended in the instrument of September 29, 1880, to transfer his "right to purchase under his agreement with Weill," that agreement gave him no such right, but simply made him Weill's attorney in fact to make sale of the grant, and, moreover, while, as such attorney, he was authorized to sell for \$445,000, yet he was liable to account to his principal for 10 per cent. of whatever amount the property sold for, no matter how much above \$445,000 that figure might reach. If, therefore, the sale of his so-called "option" should be construed to be within the "power," he would be liable to account for 10 per cent. of the difference between the \$445,000, for which he was authorized to sell and the \$600,000 consideration agreed to be paid. These considerations probably suggested the device of an absolute conveyance for \$445,000, antedated so as to appear to have been executed during the continuance of the power. Hogg became a large stockholder in the Willamette Valley Railroad Company in August, 1880,

and immediately or shortly thereafter transferred his stock in such company to the Oregon Pacific Railroad Company, receiving in return, as the purchase price for such transfer, a large amount of paid-up stock in the latter company, and becoming its president. It appears from the recitals in the mortgage deed executed by the two companies to the Farmers' Loan & Trust Company in October, 1880, that the Oregon Pacific Company was the owner of at least seven-eighths of the stock of the Willamette Valley Company. Hogg, as a large stockholder in and president of the Oregon Pacific, which owned seven-eighths of the stock of the Willamette Valley Company, was, in effect, a large owner in the latter company. The two companies were one property, and were necessarily under one control. Under these circumstances, Hogg could not represent Weill in a contract with the Willamette Valley Company. If the rule was otherwise, the relation of Hogg to the alleged purchasing company, with the other facts in evidence, is conclusive of the mala fides of the particular transaction.

As already stated, upon receipt by Weill, on December 30th, of Hogg's letter asking if a certified check for the money would be accepted if his (Hogg's) parties should be able to provide the money to complete the purchase of the lands, Weill answered that it would. On the forenoon of the succeeding day, Weill sent Hogg a second letter, stating that he is led to think from Hogg's note of the preceding day that he (Hogg) may avail himself of "the refusal" which he has for the lands in the agreement of February, 1889, and requesting that anything to be signed by Weill be handed to him at once, so that he may submit the same to his attorney. There was no answer to this letter, but thereafter Hogg appeared with Turner and another gentleman in Weill's office, and made the following statement: "Here is a certified check for \$445,000 for your Oregon property. I have sold it to a company which Mr. Turner here represents as attorney. I wish you would give me a deed for the property at once,"—to which Weill answered, in substance, that he was ready to do so within a reasonable time, and he added: "But you must only ask of me that which is possible. If you are acting in good faith, we will certainly come to a satisfactory conclusion." Weill turned to a clerk, whom he requested to run over to his lawyer's office, and ask him to come at once; but in the meantime Hogg and his companions left the room. It is contended that Hogg's statement amounted to a tender of \$445,000, and that Weill's failure to produce a properly executed deed on the instant, conveying, by exact description, several hundred thousand acres of land to a grantee whose purchase and name had just been made known (Weill testified that the name of the pretended purchaser was not stated), places Weill in default, and entitles the defendant to be considered as the equitable owner of the lands in question. It is not worth while to consider such a claim. Hogg well knew that Weill could not produce, executed for delivery, the required deed at a moment's notice, and that he was under no obligation to do

so; and the demand, with its attendant circumstances, shows that he did not expect a deed, nor want one. Whether he in fact had a certified check can never be known. He could safely produce such a check, or assume to produce it, without risk of being required to deliver it, when he required an impossible thing as a condition of delivery. If he had in fact been ready to pay the \$445,000, he would have been willing to receive a deed as soon as it could be prepared. Weill immediately sent a letter to Hogg's office, asking to be allowed to inspect any contract of sale that had been made, adding: "Thus far I have had no intimation as to the terms, nor even the name of the purchaser. An immediate reply will oblige. * * *" To this, Hogg answered that the purchaser was the Willamette Valley Company; that he had frequently told Weill this before, and had told him the same thing at the meeting between them that day. The request in the letter of Weill to be allowed to see the contract made in his name was not referred to in Hogg's answer. Mr. Turner was referred to by Hogg as the attorney for the purchaser, the Willamette Valley road, whose owner was the Oregon Pacific, whose president and large stockholder was Mr. Hogg. Mr. Turner was within a few days called upon by Mr. Weill's attorney, in the spirit of carrying out any reasonable agreement of sale that had been made. But Mr. Turner said he had not seen the agreement between Hogg and Weill, and was not aware of its contents; that he was of the impression there was not any contract in writing between Hogg and the alleged purchaser; and that he had not been informed as to the terms of that contract (the contract claimed to have been entered into between Hogg, acting for Weill, and the company whom Turner represented as attorney). Weill's attorney informed Turner that if there had been an actual sale, with a reasonable time to procure the deeds, they would be very glad to carry out its terms. It does not appear that Mr. Turner made any reply to this. "He didn't profess to know anything about any of the agreements." All of which goes to show that there was no agreement. I assume that Mr. Turner was willing to accommodate Mr. Hogg so far as to accompany him to Mr. Weill's office upon some plausible or partial explanation of what was wanted, and that he withdrew from all participation in Hogg's scheme when fully informed of its character. He was not a witness in the case, and, notwithstanding the fact that his client, the Farmers' Loan & Trust Company, as mortgagee of the Willamette Valley and Oregon Pacific Companies, is interested as to the property rights and interests of these companies, it has declined to appear and make defense, although served with process.

The answer of the Willamette Valley Railroad Company in this suit alleges that the tender claimed to have been made by Hogg was of \$600,000, and conforms, therefore, as to price, to the recital in the mortgage deed of the two companies to the Farmers' Loan & Trust Company that the Willamette Valley Company "has acquired the right to become the owner" of the property in question, "upon payment of six hundred thousand dollars." It was not

claimed upon the hearing that the certified check which Hogg professed to tender Weill was for more than \$445,000, nor is any explanation of this discrepancy attempted. Hogg, as president of the Oregon Pacific Company, the owner of nearly all the stock of the Willamette Valley Company, executed the mortgage deed containing this recital. In all that was done or professed to have been done under this power there was nothing consistent or straightforward. The sale of an option by Hogg, as Weill's attorney, to a company in fact owned by himself, without communicating the fact to his principal; the pretended tender of a certified check for \$445,000; the recital in the deed by Hogg, as president of the Oregon Pacific Company, on October 1, 1880, that the Willamette Valley Company had the right to "become the owner" of the property in question upon payment of \$600,000; the pretended deed by Hogg, as attorney in fact for Weill, conveying absolutely the same property on November 3, 1880, acknowledged more than two years later,—admit of no explanation consistent with fair dealing and honest motives. In more than 10 years that have elapsed since the expiration of Hogg's power, the owners of the property have expended large sums of money in complying with the conditions upon which the grant was made by congress, in defending their title in the courts, and for other necessary expenses in connection with these lands. The pretended purchaser of the property or of the option to purchase has not offered to pay any of these expenses, and does not propose to do so now. Its insolvency confesses its inability to pay such charges or purchase price of the alleged sale. The plaintiff is entitled to the relief prayed for, and such will be the decree.

LA CHAPELLE v. BUBB et al.

(Circuit Court, D. Washington, E. D. July 2, 1894.)

ALLOTMENT TO INDIANS OF LAND ENTERED FOR HOMESTEAD — INDIAN AGENT — INJUNCTION.

Land entered by complainant under the homestead law, on which he had made valuable improvements, was included by the government in allotments made to certain Indians in fulfillment of a treaty stipulation, and his homestead filing was canceled. *Held* that, the land not being within the boundaries of an Indian reservation, an Indian agent had no authority to eject complainant therefrom forcibly, and that complainant's possession should be protected by injunction pending a determination of the validity of his claim.

This was a suit by Alfred W. La Chapelle against Capt. John W. Bubb, U. S. A., as Indian agent of the Colville Indian Agency, and certain Indian defendants, for an injunction to restrain said Indian agent from forcibly dispossessing the complainant of land which he claimed as a settler under the homestead law of the United States. Complainant moved for an injunction pendente lite.

T. M. Reed, Jr., for complainant.

Wm. H. Brinker, U. S. Atty., and F. C. Robertson, Asst. U. S. Atty., for defendants.

HANFORD, District Judge. The land in controversy is not within the limits of an Indian reservation. The complainant in good faith settled upon it, and filed in the proper United States district land office an application to enter said land under the homestead law, and has since resided upon and cultivated the same, and made valuable improvements thereon, and is now prepared to make proof of full compliance with the requirements of said law, so as to become entitled to a patent. The government, however, after receiving said homestead application, has included said land in allotments made to the Indian defendants herein, in fulfillment of a treaty stipulation made with Chief Moses and other Indians of the Colville and Columbia Indian reservations, and canceled the homestead filing made by the complainant; and the defendant Bubb, as Indian agent, now proposes and intends to eject the plaintiff from said premises by force, and has given notice to that effect. The rights of the complainant and of the Indian defendants, respectively, to the land described in the complaint, have been the subject of a contest in the land department; and, upon a final hearing of that matter, the secretary of the interior has made a decision adverse to the plaintiff, pursuant to which his homestead filing was canceled, as aforesaid. The complainant contends that said decision is erroneous, by reason of unfairness in the proceedings and of misconstruction of the law.

Manifestly, the plaintiff's contention is in good faith. Until a judicial determination of the questions of law affecting the same, his claim to the land in controversy cannot be extinguished. If he has a superior right in law, irreparable injury will be done by dispossessing him. It is no part of the function pertaining to the office of an Indian agent to forcibly eject persons from premises not within the boundaries of an Indian reservation. If the Indians are entitled to possession, they should make application for judicial process to enforce their rights according to the laws of the land. This court will not, at the present stage of the case, express any opinion as to the validity of the plaintiff's claim to the land. Being the owner and in possession of valuable improvements which he has placed upon the land, it is the duty of the court to protect his possession until the final hearing upon the merits.

Injunction granted.

PUGET SOUND NAT. BANK OF SEATTLE v. KING COUNTY et al.

(Circuit Court, D. Washington, N. D. June 18, 1894.)

No. 141.

COLLECTION OF TAXES—REPEAL OF STATUTE—SAVING CLAUSE.

The repeal, by Laws Wash. 1893, pp. 323-385, of all previous acts providing for assessment and collection of taxes, did not affect pending proceedings for collection of personal property taxes by a county treasurer under a warrant annexed to an assessment roll, issued to him pursuant to statute in force at the date thereof, as section 75 of the act continues in force such warrants, previously issued, as to taxes due and unpaid.

This was a suit by the Puget Sound National Bank of Seattle against King county and others for an injunction to restrain the col-

lection of taxes upon the stock of the complainant under an assessment against the bank, as agent for its shareholders, for the year 1891. A demurrer to the bill was overruled (57 Fed. 433), and an answer was filed. Complainant filed exceptions to the answer.

Carr & Preston and J. B. Howe, for complainant.
John F. Miller and S. H. Piles, for defendants.

HANFORD, District Judge. A demurrer to the complainant's bill having been overruled in accordance with the opinion heretofore rendered in this case (57 Fed. 433), the defendant has answered, denying the equities of the bill, and also setting forth in detail the assessment and levy of the taxes sought to be collected, and the issuance of a warrant to the county treasurer, annexed to the assessment roll, in which the complainant is assessed upon its stock as agent for its several shareholders. To said answer the complainant has filed exceptions for alleged insufficiency.

Since the commencement of this suit the legislature of the state has enacted an entirely new revenue law, covering the entire subject of assessments and procedure for the collection of taxes for state and county purposes, which enactment contains a section repealing all previous acts of the legislature of the territory or state of Washington providing for the assessment and collection of taxes. Laws Wash. 1893, pp. 323-385. In the argument upon the exceptions the sole contention has been that by the repeal of the law under which the tax was levied all authority to enforce payment has been withdrawn, and in proof of the complete annihilation of the former revenue laws and of all proceedings dependent thereon counsel have cited *Thurston Co. v. Scammell*, 7 Wash. 94, 34 Pac. 470, in which decision the supreme court of this state declares that the repeal of an act upon which a pending action is founded is a complete bar to all further proceedings. Said decision was made in a suit for the collection of taxes upon real estate, which suit was authorized by a statute. The supreme court was not called upon to consider the effect of said act of 1893 upon pending proceedings for the collection of personal property taxes by a county treasurer under a warrant annexed to an assessment roll requiring him to collect the personal property taxes by distraint. It is true, as contended by counsel, that the repeal of a tax law would affect proceedings for the collection of taxes by seizure and sale of property in the same manner as pending suits authorized by the statute if the repeal were unconditional and without a saving clause; and in their argument counsel for the complainant have assumed that the act of 1893 is without a saving clause. This I find to be erroneous.

At the time this statute was enacted the treasurer of King county had in his possession, annexed to an assessment roll for the year 1891, an unexecuted warrant directed to him as such county treasurer, directing the collection from the complainant of the taxes which are the subject-matter of this suit, which warrant was issued pursuant to statutes in force at the date thereof. 1 Hill's Code, §§ 1038-1040, 1092-1096. All the vitality and force of said warrant is

preserved and continued by the seventy-fifth section of the act of 1893, which reads as follows:

"Sec. 75. The power and duty to levy and collect any tax due and unpaid shall continue in and devolve upon the county treasurer and his successors in office after his return to the county auditor, and until the tax is paid; and the warrant attached to the assessment roll shall continue in force and confer authority upon the treasurer to whom the same was issued, and upon his successors in office, to collect any tax due and uncollected thereon. This section shall apply to all assessment rolls and the warrants thereto attached, which have been heretofore issued upon which taxes may be due and unpaid, as well as those hereafter issued."

Exceptions overruled.

FIRST NAT. BANK OF WALLA WALLA v. HUNGATE.

(Circuit Court, D. Washington, S. D. June 18, 1894.)

1. TAXATION OF NATIONAL BANK STOCK—COLLECTION FROM BANK.

On an assessment of bank stock under 1 Hill's Code Wash. §§ 1038-1040, making banks agents for their respective shareholders, and authorizing the collection from each bank of taxes on its stock assessed against it as such agent, if the statute is not complied with by charging the bank on the assessment roll, and it is not even referred to by its proper corporate name in the assessments against its shareholders, the warrant to the collector confers no authority to seize the property of the bank for the purpose of enforcing payment of taxes charged against shareholders.

2. SAME—UNJUST DISCRIMINATION—RELIEF IN EQUITY.

Failure to exhaust the means of redress afforded by the laws of Washington for equalization of assessments does not preclude a national bank from obtaining relief, in a federal court in the state, against the collection from it of taxes on its stock, on the ground of unjust discrimination in the valuation of such stock. *Andrews v. King Co.*, 23 Pac. 409, 1 Wash. St. 46, followed.

3. SAME—TENDER OF TAX.

Failure of such bank to make and keep good a tender of so much of the tax as was justly due does not bar such relief, where nothing is due from the bank, there being no assessment against it, and where the county officers have declared that they will not accept less than the whole amount levied.

This was a suit by the First National Bank of Walla Walla against H. H. Hungate, as treasurer of Walla Walla county, for an injunction to restrain the collection from complainant of taxes, for the year 1892, upon bank stock assessed against the individual shareholders of the complainant. Defendant demurred to complainant's amended bill.

B. L. & J. L. Sharpstein, for complainant.
Miles Poindexter, for defendant.

HANFORD, District Judge. The amended bill of complaint shows that for the year 1892 the assessor of Walla Walla county assessed the individual shareholders of the complaining bank separately for a certain number of shares of First National Bank stock, and unjustly discriminated against said shareholders by valuing their shares at 300 per cent. of the face value, which is considerably

above the actual cash value of said complainant's stock, while a large amount of other moneyed capital in the county owned by individual citizens of this state was intentionally omitted from the assessment roll, and permitted to entirely escape taxation. The bill also alleges that one of the shareholders applied at the proper time to the county board of equalization to reduce the assessment on his shares, and that the board refused to make any reduction, or in any manner correct the inequality of said assessment, and at the same time made a declaration of a general policy to refuse to change the assessments affecting bank stock, and to not accept any tender that might be made of less than the entire amount of tax levied thereon. After levy of the tax, the same shareholder tendered to the county treasurer 60 per cent. of the amount of the tax on his shares in full payment, which was refused. The tender has not been kept good by deposit, but in the bill the bank offers to pay such portion of the taxes levied as this court may adjudge legal and collectible from the bank.

The laws of this state in force at the time of said assessment made all banks therein agents for their respective shareholders, and authorized the collection from each bank of taxes upon its stock assessed against it as such agent. 1 Hill's Code, §§ 1038-1040. Compliance with the provisions of this statute is prerequisite to enforcement of obligations and the exercise of rights created thereby. The complainant is not charged upon the assessment roll as agent for its shareholders, nor charged at all for any tax upon its stock, nor even referred to by its proper corporate name in the assessments against its several shareholders; therefore the warrant to the tax collector confers no authority upon him to seize the property of the bank for the purpose of enforcing payment of taxes charged against the individual shareholders; and the law does not authorize the bank to pay said taxes, and charge the same against the shareholders.

Unjust discrimination in the valuation of national bank stock, as compared with the assessment of other moneyed capital in the hands of individual citizens of the state, is prohibited. Rev. St. U. S. § 5219. Shareholders of national bank stock have this statute as a guaranty that they cannot be taxed upon their stock heavier than other moneyed capital in the state; and, when appealed to in their behalf, the courts are bound to give effect to the law. If inequality is shown to the prejudice of shareholders, either the assessment must be declared to be entirely void, or at least the excess of the tax above the rate imposed upon other moneyed capital must be abated. *People v. Weaver*, 100 U. S. 539; *Pelton v. Bank*, 101 U. S. 143; *Cummings v. Bank*, Id. 153; *Boyer v. Boyer*, 113 U. S. 689, 5 Sup. Ct. 706; *Puget Sound Nat. Bank v. King Co.*, 57 Fed. 433. A court of equity is the proper forum to grant relief; and an injunction is the proper remedy. *Cummings v. Bank*, supra.

Taxpayers against whom unjust discrimination has been attempted by county assessors in this state are not precluded from obtaining relief in a court of equity by failure to exhaust the means of redress afforded by the laws authorizing the county commission-

ers to equalize assessments. This point was involved in the case of *Andrews v. King Co.*, 1 Wash. St. 46, 23 Pac. 409. In that case the lower court refused an injunction to a taxpayer who alleged that, by the method of assessing, the valuation of mortgages was relatively higher than the valuation placed upon other kinds of property, and held that a court should not be called upon to perform the labor of revising an entire assessment roll, and that the complainant, instead of delaying until after the tax roll had been made, and taxes levied and partly collected, should have applied to the board of county commissioners to equalize the assessments, and, if aggrieved by an erroneous decision of the board, he should have sought relief by an appeal to the court, under a statute then in force, authorizing an appeal from any order or decision of the county commissioners. The opinion of the supreme court shows that the question whether the plaintiff had another adequate remedy than the one invoked was considered. The lower court was reversed, and it was distinctly held that a general rule or method of assessing property for taxation, which operates to discriminate against and unduly burden any particular class of property, is unlawful in this state; that an assessment according to such rule or method is in fact fraudulent, and that an aggrieved party is entitled to an injunction to prevent the collection of a tax levied upon such unlawful and fraudulent assessment. The decision of the supreme court must therefore be understood as declaring that the law vesting in the board of county commissioners power to equalize assessments does not provide an exclusive remedy nor limit the power of a court of equity. According to that decision the plaintiff would be clearly entitled, by laws of this state, to the relief prayed for, if this suit had been brought in a court of the state, and the same remedy should be available.

Under the circumstances alleged in the amended bill, failure to make a legal tender, and keep it good, does not constitute a bar to relief in equity. The complainant is not called upon to make a tender, for the reason that it is not liable for any part of the tax, there being no assessment against the bank. Moreover, a tender of less than the whole tax levied would be useless. If the bank were legally liable for part of the tax, it would be excused from making a tender by the declaration of the board of county commissioners to not accept less than the whole amount levied, which is nothing less than a notice of a refusal to accept a tender.

The foregoing are my conclusions touching the several questions argued by counsel, and I am constrained thereby to overrule the demurrer.

GLENN v. ROOSEVELT et al.

(Circuit Court, S. D. New York. July 17, 1894.)

EVIDENCE—COMPARISON OF HANDWRITING.

Laws N. Y. 1880, c. 36, which provides that comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine shall be permitted to be made "by witnesses," and that "such

writings and the evidence of witnesses respecting the same may be submitted to the court and jury," does not authorize the submission of the writings to the jury without any comparison by witnesses.

On motion for a new trial.

Burton N. Harrison, for plaintiff.
Thos. F. Wentworth, for defendants.

LACOMBE, Circuit Judge. An examination of the signatures of Cotting to the checks which were put in evidence, and of the signature to the St. Louis subscription list, shows that the jury probably based their conclusion on the comparison of these writings which they were allowed to make. Certainly, if it was error to allow them to make such comparison, their verdict should not stand. The checks were put in evidence under the state statute (chapter 36, Laws 1880), which provides:

"The comparison of a disputed writing with any writing, proved to the satisfaction of the court to be genuine, shall be permitted to be made by witnesses in all trials and proceedings, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute."

In the case at bar the checks were proved to the satisfaction of the court to be genuine. No comparison of them with the disputed signature was made by any witness, but they were nevertheless submitted to the jury as evidence of the genuineness or otherwise of the writing in dispute. The plaintiff seasonably objected, and now assigns this as error. The statute in question may have been, as defendants contend, remedial, but it should not, for that reason, be so construed as to open the door for the admission of evidence calculated to mislead the jury. There are such variances in the handwriting of an individual at different times and under different circumstances that it is not difficult to select samples of genuine writing so dissimilar to the one in dispute that a jury, uninstructed as to the fundamental characteristics which underly the variances, may easily fall into error when making their comparison. The case at bar is a conspicuous instance. All the checks, which, of course, bear the signature registered at Mr. Cotting's bank, have a scroll beneath the name, and a capital C of the standard shape. The name as written on the subscription list is without the scroll and has a lower case c written large. In all other respects there is such similarity between them all that it is difficult to understand how any fair-minded person can escape the conviction that they were written by the same hand. Still the jury, impressed no doubt by the different type of the C and by the scroll, reached the opposite conclusion. It is suggestive that no genuine signatures of Cotting to anything but bank checks were introduced for purposes of comparison. The statute, it will be seen, permits the comparison "to be made by witnesses," and it is the "writings and the evidence of witnesses respecting the same," which may be submitted to the jury. Literally construed, it does not warrant the submission to the jury of the genuine writings, unless a comparison with the disputed writing has been made by witnesses. Certainly the "evidence" respecting the genuine

writings which is to be submitted to the jury cannot be the evidence of their genuineness, for that is addressed solely to the court, who is to determine that question to his satisfaction without interference by the jury. And no other "evidence" respecting these genuine signatures is competent, except such as the statute provides for, viz. a "comparison * * * by witnesses." It is such evidence, therefore, which the statute couples with "such writings" as proof proper to submit to the jury. The diligence of counsel has presented upon their briefs the entire body of state authorities construing this statute, and in them there is found nothing which requires a different construction. The verdict is set aside, and a new trial ordered.

TEXAS & P. RY. CO. v. NOLAN.

(Circuit Court of Appeals, Fifth Circuit. May 15, 1894.)

No. 217.

1. NEGLIGENCE—AVOIDING CONSEQUENCES OF CONTRIBUTORY NEGLIGENCE.

The rule that plaintiff cannot recover if himself guilty of negligence contributing to his injury, though not applicable where defendant, by the exercise of reasonable care, might have avoided the consequences of plaintiff's negligence, applies, without qualification, where the party inflicting the injury is not chargeable with negligence indulged after the position of the injured party was discovered, or, by the exercise then of reasonable care, would have been discovered.

2. APPEAL—HARMLESS ERROR—INSTRUCTIONS.

Giving an instruction not applicable to the case cannot be held to have injured defendant, where other instructions gave the correct rule, and the jury could not have found for him under any proper instructions.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

This was an action by the widow of James Nolan against the Texas & Pacific Railway Company for damages for the death of said Nolan. At the trial the jury found for plaintiff, and judgment for plaintiff was entered thereon. Defendant brought error.

T. J. Freeman, for plaintiff in error.

R. C. De Graffenried, for defendant in error.

Before McCORMICK, Circuit Judge, and LOCKE, District Judge.

McCORMICK, Circuit Judge. This is a suit by the widow of James Nolan, on her own behalf and for their four minor children, to recover damages for the killing of her husband. James Nolan was a locomotive engineer, about 40 years of age, and had worked for the Texas & Pacific Railway Company about 20 years. For 7 or 8 years just before and up to January, 1893, he had run, as a locomotive engineer for that company, in and out of Longview junction, the point in Texas where the International & Great Northern Railway Company's road intersects that of the Texas & Pacific. His family, the defendants in error, resided in Longview junction. Their home was near the passenger depot at that place. This depot is a union depot. At this point the course of the main track

of the Texas & Pacific Railroad is east and west. Just north of this depot are the main track, and a number of switch tracks parallel to the main track. These switch tracks extend about 200 yards west of the depot, and east of it to their connection with the main track. South of the depot are the tracks of the other company. About 30 feet west of this depot, crossing all of these tracks at a right angle, runs a road crossing, 19 feet wide, in constant and frequent use by the general public. The village at Longview junction and the town at Longview station, a half mile further west, blend into each other, and, between them, contain three or four thousand inhabitants. Longview junction is 45 minutes' run west of Marshall. On the morning of July 22, 1893, James Nolan and his wife went to Marshall on the train. She intended to remain at Marshall over night, and he intended to return to their home by the train leaving Marshall at 4 p. m. on that day. He missed that train by a few minutes, and had to wait for the 12:30 train that night. He boarded that train, and took a seat in the smoking apartment of the sleeper. The waiter on the sleeper was in that apartment, asleep. When the porter of the sleeping car came in, he asked Nolan if he wanted a sleeper. Nolan did not answer. Just then the conductor entered, and said to the porter: "Let him alone. He is only going to Longview. He is an old engineer; has been down to Marshall, and is going home." On arriving at Longview junction the train conductor came back in the sleeper for the purpose of getting Nolan off, and the conductor and the porter took Nolan by the arm, and put him off the train. The porter thought Nolan was drunk. Nolan had several bundles under his arm and in his hand. The train was standing on the second track north of the depot, so that the engine stood on the roadway, 30 feet west of the depot. Nolan had to take this roadway to go to his home, which was two or three blocks north from the depot. On the first track north of that on which the train stood, cabooses were blocked both east and west of the roadway, with only about 16 feet clear over the roadway. The engine was breathing with a loud noise, and was popping off steam. On the second track north of the one on which the train stood, a yardman in charge of a switch engine at or near the west end or head of this track, about 175 or 200 yards west of the roadway, was engaged in kicking cars across the roadway to be coupled to companion cars east of it. Near the crossing there was a switchman to catch the detached car when it was kicked east, and couple it to the train that was making up. North of this track on which they were making up a train the tracks were blocked with cars so that the view north was obstructed, except along the line of the roadway. When Nolan had been assisted off the train he immediately passed west alongside the train until he reached the roadway, and then turned north on it, going towards his home. He was struck by a box car being shot across the roadway, run over, and instantly killed, within three minutes of the time he was put off the train. The place where he was killed was very dark. There was no light or person on the car that struck him.

No signal, by light or sound, was given of its coming. There were nine feet between this track and the one on which the cabooses were blocked. Until Nolan had passed the track on which the cabooses were blocked, he could not have seen the car that struck him. The engine of the passenger train was making so much noise that he could not have heard the noise made by the moving of the car that struck him. The line of the track on which this car moved was so dark that the switchman placed to look out for it did not see it, or see Nolan until the car was right on him,—within 15 feet of him,—running at the rate of 5 or 6 miles an hour or more. When this switchman saw Nolan and the car, at the same instant, Nolan appeared to be looking ahead, in the direction of the road he was on. When the car had passed on, Nolan's body was between the rails; his head towards the west, near the west line of the roadway, his face down, and his right arm across the north rail of the track. There is some conflict in the testimony as to whether Nolan was drunk. This being substantially all the evidence offered in the case, the railway company requested the court to give the following special charges, numbered, respectively, 1 and 5:

"It being manifest from the evidence in this case that the death of James Nolan was the result of his own contributory negligence, the plaintiff is not entitled to recover, and you will return a verdict for the defendant." "You are charged, gentlemen of the jury, that the plaintiff, in her petition, alleges, as the acts of precaution taken by James Nolan before stepping upon the track, that, 'before stepping upon the track upon which he was struck, he did carefully look and listen and watch to see if any cars were approaching;' and you are charged that under the facts of this case the language used in the petition, above quoted, states the measure of care required of him before stepping upon the track; and if you believe from the facts that he did not 'carefully look and listen and watch to see if any cars were approaching' before he stepped upon the track, and that such acts of care on his part would have apprised him of the danger in time to have averted it, the plaintiff cannot recover."

—Which the court refused to give.

A part of the court's general charge was as follows:

"The general rule of law applicable to a case of this character is that it is the duty of the defendant to provide safe approaches to and from its depot. By the term 'safe' is not meant that the ground at the crossing itself is in perfect condition, but it has a broader meaning. It means that it must be safe, not only in construction,—reasonably safe,—but also that it will be kept in that condition, and free from foreign objects passing over it while parties traveling are departing and arriving in a reasonable time and in a reasonable manner, and as they are necessarily expected to arrive and depart. As to what is diligence,—proper diligence,—in any case of that character, depends largely upon the surroundings. At a depot where it is remote from population, and where there are few arrivals or departures, less diligence would be necessary than in a place where arrivals are frequent and large. As to whether a flagman and light would be necessary would depend upon the same conditions. In a large and crowded city, where parties are passing frequently, and may be reasonably expected to pass frequently, it requires a higher degree of diligence than in a place that is seldom used. As applied to this particular case, if the evidence shows that the place where the train stopped, and where Nolan left the train, was one frequently used,—often used,—then in that state of case the general rule would be that it would be the duty of the defendant to use that degree of care commen-

surate with the probable danger. It might be necessary to have a flagman. It might be necessary to have a light. It might be necessary that the train should not be turned loose, without a brakeman to control its motion, when it was kicked up a siding. As to all these matters, I regard them as questions for the jury, and not for the court. You are instructed it would be the duty of the company, if you believe from the evidence that the passenger traffic was such there that trains were frequently passing out and in, and that was a natural approach to or from the depot, and one provided by the company, that before the company could turn loose a car, without means of stopping it, it would be its duty to use all reasonable precautions to give notice of the approach of such a train, to prevent injury to any party that might be passing on this crossing; and if the company should fail to use such diligence, and a party was injured in consequence, the company would be liable, unless the right of action was defeated by contributory negligence, which I will now speak of."

The court gave special charges requested by the plaintiff, as follows:

"No. 2. Although the rule is that, even if the defendant be shown to have been guilty of negligence, the plaintiff cannot recover, if Nolan himself is shown to have been guilty of contributory negligence which had something to do in causing the accident, yet the contributory negligence on Nolan's part would not exonerate the defendant railroad company, and prevent the plaintiff from recovering, if it be shown that the railroad company might, by the exercise of reasonable care and prudence, have avoided the consequences of Nolan's negligence. No. 3. Upon the issue of contributory negligence the burden of proof is on the railroad company, defendant, to show that plaintiff was negligent, and that his negligence contributed to the injury."

To the refusing of each of said special charges asked by the defendant, and to the giving of said portions of the general charge, and the giving of special charges 2 and 3 asked by the plaintiff, the defendant below duly excepted. There was a verdict and judgment for plaintiff. The defendant sued out this writ of error, and assigns as error (1) the refusal to give its requested charge No. 1; (2) the refusal to give its requested charge No. 5; (3) the giving of the plaintiff's special charge No. 2; (4) the giving of that portion of the general charge to the giving of which the defendant excepted; (5) the giving of plaintiff's special charge No. 3.

If we have not misconceived the effect of the testimony, the first two of these assignments do not require any notice, further than to say that it is difficult for us to conceive in what light this evidence could be so set or read as to make it appear, to able lawyers, to warrant the asking of these requested charges.

We pass, for notice further on, the third error assigned. The action of the court complained of in the fourth and fifth specifications of the assignment of errors was substantially correct. It is supported by the decisions of the supreme court, and by accepted precedents and text writers cited in the opinion of that court. *Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, and authorities therein cited.

The action of the trial court complained of in the third error assigned appears to us to be subject to the criticism suggested by counsel for plaintiff in error in their printed brief, and in Mr. Freeman's oral argument. The language of the given special charge is in substance, and almost literally, similar to a charge

passed on by the supreme court in *Coasting Co. v. Tolson*, 139 U. S. 558, 11 Sup. Ct. 653, where that court announces that "the qualification of the general rule, as thus stated, is supported by decisions of high authority, and was applicable to the case on trial." In the case just cited the agents of the defendant company saw the position of the party injured before he was injured. They were acquainted with the locality, and qualified to judge of the hazard of his position, and might have had the boat so handled as to have avoided the injury. The general rule and the qualification are also announced in the *Ives Case*, above cited, at page 429, 144 U. S., and page 679, 12 Sup. Ct., with citations of authority supporting it, beginning with *Davies v. Mann*, 10 Mees. & W. 546, in which the qualification was first announced. In this earliest case the plaintiff had turned his animal loose to graze on the highway, with the animal's forefeet hopped so that he could not readily get out of the way of passing wagons. The servant of the defendant either saw the animal, or could have seen him in time to have avoided the injury if he had moderated his pace to a careful one. We think a careful examination of the cases will show that the general rule, without the qualification, applies in all cases where the party inflicting the injury was not chargeable with negligence indulged after the position of the injured party was discovered, or, by the exercise then of reasonable care, would have been discovered. In this case the proof tends to show that Nolan knew the custom of the company in doing such work in this yard. His knowledge of that custom did not relieve it of its negligent character if, under the circumstances there, it was negligent, but it imposed on him a higher degree of care. If, with this knowledge on his part, and the duty it devolved on him, the antecedent want of ordinary care on the part of the defendant can be held sufficient to entitle the plaintiff to recover, notwithstanding his negligence contributed to cause his death, it would be idle to inquire whether or not he was guilty of contributory negligence. Such a construction would not qualify the settled rule. It would destroy the rule. There is no proof of any other or subsequent want of care on the part of the defendant, and hence, while the qualification may be held now to be as well settled as the rule itself, in our opinion, it was not applicable to the case on trial. It appears, however, from explanations inserted by the trial judge into the bill of exceptions tendered by the defendant, that in other parts of the general charge than those excepted to by the defendant, and in special charges 2, 3, and 4 requested by the defendant, and given by the judge, the correct rule was given to the jury. We are, moreover, unable to see how the jury could have found for the defendant, in this case, under any proper instructions. While, therefore, we cannot approve of the requested charge under consideration, as applicable to the case on trial, it seems clear to us that it cannot have injured the defendant. The judgment of the circuit court is affirmed.

BROWN v. VAN METER.

(Circuit Court of Appeals, Eighth Circuit. June 25, 1894.)

No. 376.

CHATTEL MORTGAGES—TITLE AND POSSESSION — ABSOLUTE BILL OF SALE—REPLEVIN.

In an action for possession of personal property, by one alleging title and right to possession, defendants pleaded a bill of sale from plaintiff to them, alleging that it was an absolute conveyance, and produced evidence to sustain their allegations. Plaintiff admitted that he executed the instrument set forth, but gave evidence that it was a mortgage. *Held*, that such evidence did not change the legal effect of the instrument on the question at issue, under Mansf. Dig. Ark. § 4754,—in force in the Indian Territory,—which provides that, in the absence of stipulations to the contrary, the mortgagee of personal property shall have the legal title thereto, and the right of possession.

In Error to the United States Court in the Indian Territory.

The defendant in error, John Van Meter (hereafter called the plaintiff), brought an action for the possession of personal property against Lizzie Brown and Ben Brown (hereafter called the defendants) in the United States court in the Indian Territory, and obtained the judgment which this writ of error is brought to reverse.

He alleged in his complaint, which was filed May 23, 1889, that he was the owner and entitled to the possession of the property, and that the defendants unlawfully detained it from him. The defendants answered that the defendant Lizzie Brown had purchased of the plaintiff, and he had conveyed to her by a bill of sale, a large portion of this property, in March, 1887. The plaintiff replied that the bill of sale was not made to convey the property, but was for the purpose of securing certain rents that might become due from him to the defendant Lizzie Brown. On the trial there was evidence tending to prove that the bill of sale was an absolute conveyance of the property, and, on the other hand, that it was made to secure the rents, and not as the evidence of a sale.

C. L. Herbert, for plaintiff in error.

S. O. Hinds, N. A. Gibson, W. B. Johnson, A. C. Cruce, and Lee Cruce, for defendant in error

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

Under the statutes of the state of Arkansas, which were in force in the Indian Territory (26 Stat. 95), the mortgagee in a chattel mortgage which contains no provisions to the contrary holds the title to, and the right of possession of, the mortgaged chattels, as against the mortgagor, until the mortgage debt is paid. Section 4754 of Mansfield's Digest of the Laws of Arkansas provides that, "in the absence of stipulations to the contrary, the mortgagee of personal property shall have the legal title thereto and the right of possession." Jones, Chat. Mortg. § 426.

The court below charged the jury that if the instrument in writing, from the plaintiff to Lizzie Brown, was not executed for the purpose of conveying the title to the property therein de-

scribed, notwithstanding said instrument might have been intended as a mortgage, the jury would find for the plaintiff. The statement of the case, and the statute we have quoted, demonstrate the error of this charge. An effort is made to sustain it on the ground that the defendants could not hold the property in this action, under the bill of sale, if it was in fact a subsisting mortgage, because, in their answer, they declared upon it as an absolute conveyance. Let us see. The allegations of title and right to the possession in the complaint gave the plaintiff the right to prove any claim to the property that gave him the right to possession. *Miller v. Adamson*, 45 Minn. 99, 47 N. W. 452. The defendants pleaded the plaintiff's bill of sale to the defendant Lizzie, and alleged that it was an absolute conveyance of the property. On the trial they produced evidence tending to sustain these allegations, and the plaintiff admitted that he executed the instrument set forth in the answer. Now, that instrument was as complete a defense to this action, under the statutes of Arkansas, if it was a subsisting mortgage, as it was if it was an absolute conveyance. The evidence that it was a mortgage was not produced by the defendants, but by the plaintiff. That evidence did not change the legal effect of the instrument upon the question at issue,—the right to the possession of the property in question; and the defendants were entitled to a peremptory instruction to that effect, just as they would have been entitled to an instruction that any immaterial evidence produced by the plaintiff, such as that the bill of sale was a deed or a lease, or any other instrument whose legal effect gave them the right of possession, would not defeat the right which the instrument that they had pleaded and proved vested in them.

It is undoubtedly true that if the plaintiff had proved, under proper pleadings, that the bill of sale was a mortgage, and that the debt that it was given to secure had been paid before the commencement of the action, he might have recovered. A chattel mortgage is without force or effect after the mortgage debt is paid, and the title and right of possession is in the mortgagor from the moment of payment. It is unnecessary to consider whether or not the pleadings were such as to warrant evidence of the payment of the mortgage debt, for the case must be retried, and this question will undoubtedly not recur.

The judgment below is reversed, with costs, and the cause remanded, with directions to grant a new trial.

WILLIAMS v. WILLIAM J. ATHENS LUMBER Co., Limited, et al.

(Circuit Court, E. D. Louisiana. June 8, 1894.)

TAX SALE—PRIMA FACIE TITLE.

A purchaser at a tax sale, in good faith, who has a title from the competent and proper officer, valid in form, and without patent defect, and who has been in possession for 10 years, may, under the constitutional provisions of the state of Louisiana (article 210), defeat the claim of the original

owner, although the tax deed was insufficient, by reason of informalities attendant upon the advertisement and sale of the property in question. *Giddens v. Mobley*, 37 La. Ann. 417, followed.

This was an action by Thomas S. Williams against William J. Athens Lumber Company, Limited, in liquidation, and others, for the recovery of certain real property.

Kernan & Wall, for plaintiff.

Fenner, Henderson & Fenner, for defendant W. J. Athens Lumber Company, Limited.

Morris Marks, for Jacob Prince, called in warranty.

PARDEE, Circuit Judge. This is a petitory action to recover from the defendants about 800 acres of land (described in the petition) in the parish of Livingston, state of Louisiana, the plaintiff relying upon patents direct from the state to himself, issued in 1868. The defendants rely upon a tax collector's deed of sale made on the 1st day of April, 1876, and confirmed by the state auditor on the 29th day of December, 1876, under the provisions of Act No. 47, approved March 14, 1873. The defendants also pleaded the prescription of three and five years, an estoppel in pais, and the prescription of ten years. Trial by jury was waived, and the cause submitted to the court. As in so many other cases, the informalities attendant upon the advertisement and sale of the property in question for taxes were so many and so grave that, as a title to the lands in question, the deed of the tax collector, although confirmed by the auditor of the state, and duly recorded in the proper office in the parish where the land was situated, is insufficient to show title in the grantee. It is not necessary to point out these informalities, which probably go to the extent claimed by the plaintiff, and render the said tax deed absolutely null. The exception of the prescription of three and five years is based upon the following statutes: Section 5 of Act 105 of 1874, declaring that "any action to invalidate the titles to any property purchased at tax sale under and by virtue of any law of this state shall be prescribed by the lapse of three years from the date of such sale;" and article 3543 of the Revised Civil Code of the state, providing that "all informalities connected with or growing out of any public sale made by any person authorized to sell at public auction shall be prescribed against by those claiming under such sale after the lapse of five years from the time of making it, whether against minors, married women or interdict persons." In *Barrow v. Wilson*, 39 La. Ann. 403, 2 South. 809, the previously adjudged cases bearing on the prescription claimed were reviewed, and the court held that section 5 of Act 105 of 1874 was a statute of prescription, and that, under facts similar to the facts in this case, such prescription barred the plaintiff's action for the land covered by the tax title. This decision, however, has been somewhat reconsidered and modified in the case of *Breaux v. Negrotto*, 43 La. Ann. 426-441, 9 South. 502, where it was held that the opinion in *Barrow v. Wilson* was erroneous to the extent of holding that in respect to failure of notice the prescription of three years was

tenable. In the present case it is claimed that there was no notice given by the tax collector to Williams, the delinquent debtor, and that, therefore, the statute of three years, referred to, does not apply. The statute of 1873, under which the sale was made, provides that in all cases of vacant property, or when the owners are unknown or absent, and have left no known agent, the taxes upon which property shall not have been paid, the parish or district judge shall, on the application of the tax collector, appoint a curator ad hoc, upon whom notice shall be served. In the tax deed given by the tax collector no mention is made of the appointment of a curator ad hoc, except that in the costs and charges recited in the deed a fee is charged and collected for such curator. No evidence has been offered tending to show that Williams, the owner, was unknown, or an absentee, in the sense of the law, or, if absent, that he left no known agent; nor is there any evidence for or against the proposition that Williams was duly notified; although there is evidence, incidentally, showing that at the time of the sale Williams was actually absent from the parish. Evidence also is offered tending to show that in none of the records of the parish of Livingston is there anything to show that a curator ad hoc was appointed to represent Williams in the matter of delinquent taxes. Under these circumstances, the defendants contend that, as to the appointment of a curator ad hoc, the evidence that no judicial record can be found of the appointment is not sufficient to establish that no appointment, if one was necessary, was made; and that, as the tax deed shows on its face a charge for the fee of the curator ad hoc, and considering the lapse of time, the maxim "*omnia rite acta*" will prevail. Citing *Gibson v. Foster*, 2 La. Ann. 509; *Mather v. Lehman*, 44 La. Ann. 619, 10 South. 939.

With regard to the estoppel in pais, the proved facts are that, after the purchase by Jacob Prince at the tax sale, and the delivery and recordation of the tax title, and in the year 1879, he tendered back to said Williams the lands in question, upon Williams' refunding to him the amount paid for said lands, saying that he did not wish to hold the same if Williams desired them, which offer was refused by Williams, who said that he did not want and would not have the lands, and would not claim them; and thereafter the said Jacob Prince paid all the taxes upon the said lands, and made improvements upon the same. It does not appear that Prince made and tendered any deed of release, or made any other than a verbal offer to restore the lands to Williams on payment of the amounts which Prince had paid for the lands and had disbursed for the payment of taxes. The contention with regard to this estoppel is that, as Williams declared his intention of not attempting to recover the lands, and by his conversation led Prince to believe that his title would not be contested, so that thereafter he expended money and time in improving the same, it would be unjust to permit Williams, particularly after the lapse of so many years, and when the land has actually increased in value, and large and valuable improvements have been made on the same, to come in and claim the property because of defects in the tax title. The text-books sup-

port this contention. Bigelow, Estop. 566; Herm. Estop. 1054. There is not much doubt that in a court of equity the estoppel claimed in this case would be given full effect, and the only question here is whether it is equally available in a court of law.

The exception of prescription of 10 years is based on the following facts, established by the evidence, to wit: The tax deed and the confirmation thereof by the auditor of the state were duly recorded, one in 1873 and the other in 1874, in the proper records of Livingston parish, from which time the defendant Jacob Prince and his grantees have paid all taxes assessed against the property. In 1879 the defendant Prince entered into actual possession of the lands in question, made improvements thereon, and from that time to the institution of the present suit he and his grantees have been in as full, complete, and active possession as the character of the lands—which were timber and uncultivated lands—required. The constitution of 1868 (section 118) declares that all deeds of sale made by collectors of taxes shall be received by courts in evidence as *prima facie* valid sales, and the constitution of 1879 (article 210) declares the same. The defendant Jacob Prince and his grantees have held constructive possession under the tax collector's deed, *prima facie* valid, and paid taxes on same, for nearly 20 years, and actual corporeal possession as owner for nearly 15 years. In the case of *Giddens v. Mobley*, 37 La. Ann. 417, as stated in the syllabus, it is decided as follows:

"The good faith necessary to enable a claimant under a tax title to plead prescription is simply that he shall not have acquired the property *mala fide*. Where the tax deed is valid in form, and there is no defect stamped on its face, and the sale has been made by the proper officer, the purchaser is a possessor in good faith. A possessor and owner cannot be deprived of his right to plead prescription because he might by inquiry and careful examination have discovered that his vendor had no title. The constitutional direction that all deeds from tax collectors for land sold by them for taxes shall be received as *prima facie* valid has placed tax titles on the same footing as other titles under judicial sales, and subjected them to the same rules as sheriffs' deeds. Before that constitutional change was made, an assessment could not be presumed, but must be proved. By virtue of that change it is presumed without proof, and *prima facie* the tax deed is valid. If that deed is valid in form, and the defect is want of authority, or right in the officer to make it, and not in the manner of making it, the knowledge that the officer had no right to make the sale is not brought home to the purchaser. No symbolic ceremony, such as livery of seisin at common law, is necessary to constitute a taking possession of land. The authentic act of sale of land described by location, extent, etc., is a taking possession of it, and a notice to the world that he who thus claims it claims as owner. Especially is this true of land in a state of nature, with forest unreclaimed. The purchaser at a tax sale in good faith, who has a title from the competent and proper officer, valid in form, with no defect stamped upon it, and patent, and who has possessed by himself, or by himself and his authors, ten years, has acquired an indefeasible title, and may successfully defeat the claim of the original owners thereto."

These principles cover and provide for this case as though expressly declared for it. Judgment will be entered for the defendant the W. J. Athens Lumber Company, Limited, maintaining the exception of prescription of 10 years, rejecting the demand of the plaintiff, with costs, and recognizing the title and ownership of the W. J. Athens Lumber Company, Limited, to the lands in question.

PARROTT v. NEW ORLEANS & N. E. R. CO.

(Circuit Court, E. D. Louisiana. June 27, 1894.)

1. MASTER AND SERVANT--CONTRIBUTORY NEGLIGENCE OF SERVANT--PLEADING.

The petition in an action against a railroad company for injuries to a foreman of a switching crew while uncoupling cars, resulting from a defect in defendant's roadbed, alleged that, in the performance of his duties as foreman, he was compelled to uncouple certain loaded cars, part of a train then in motion on defendant's railway, and while so doing was injured. *Held* that, it being prima facie negligence to go between cars of a moving train, such allegation, not stating any circumstances, either of special orders, general duty, or the necessities of the case, which required plaintiff to go between the cars, nor the rate of speed of the train, showed contributory negligence on his part, and rendered the petition bad.

2. SAME--NEGLIGENCE OF MASTER--PLEADING.

The petition in an action against a railroad company for injuries to an employé resulting from a defect in defendant's roadbed, alleged to have been either a defect in original construction, or caused by washing, did not aver that defendant had notice of the defect, or that it had existed for such a time and under such circumstances that defendant could be charged with notice. *Held* that, considering the defect as caused by washing, the petition was bad for want of such averments, and an allegation that the defect had continued for an unreasonable length of time, being an averment of a conclusion, did not supply the omission.

This was an action by Charles W. Parrott against the New Orleans & Northeastern Railroad Company for personal injuries. Defendant filed exceptions to plaintiff's petition.

O. B. Sansom, for plaintiff.

Harry H. Hall, for defendant.

PARDEE, Circuit Judge. The plaintiff, who was an employé of the defendant company, sues to recover damages for an injury resulting from and through a defect in the defendant's roadbed. In his petition, among other things not necessary to recite, he says:

"That heretofore, to wit, October 16, 1893, at the city of New Orleans, in said district, defendants were, and had been for a long time, carrying on the business of common carriers to and from said city of New Orleans; and then and there defendants were possessed of divers roadbeds, railways, appurtenances, and appliances, including a large number of cars and coaches, locomotive steam engines and tenders, all of which things defendants used and employed in and about their said business as common carriers. And defendants also hired and employed a large number of men, as switchmen, brakemen, and foremen, to go upon said cars and coaches, and upon said roadbed, to couple and uncouple cars and coaches, and generally it became and was necessary for all said switchmen and brakemen to couple and uncouple said cars and coaches while the same were in motion upon said railways; and then and there defendants hired and employed plaintiff as foreman of a certain switching crew, and, in discharging said duties as foreman, plaintiff was compelled and obliged to go upon and walk upon defendants' said roadbed, and among the rails there placed by defendants as part of their said railway, and to couple and uncouple said cars and coaches while the same might be in motion. That then and there it became and was defendants' duty to construct, maintain, and preserve all their said roadbed, railways, and appliances reasonably sufficient and safe for switchmen, brakemen, and foremen to walk upon and use while performing their said work and duties,—that is to say, coupling and uncoupling cars and coaches for defendants; but de-

fendants neglected their said duty, and neglected to maintain their said roadbed, railways, and appliances reasonably safe for defendants' switchmen, brakemen, and foremen to walk upon and use while performing their said duties and work for defendants. And plaintiff specially avers that defendants carelessly allowed and permitted a certain part of their said roadbed, and a certain appliance, commonly called a 'frog,' and certain rails there converging, situate and being on Press street, between Marais street and Urquhart street, in said city, to become and remain for an unreasonable length of time unsafe and dangerous to all switchmen, brakemen, and foremen whose duties compelled them to go upon said roadbed to couple and uncouple cars and coaches in motion. And plaintiff further avers that said roadbed, railways, and appliances became and were unsafe and dangerous as aforesaid because no sufficient quantity of dirt, earth, or ballast had ever been placed or deposited upon said roadbed at the place last above mentioned, or if a sufficient quantity of earth, dirt, or ballast ever was there placed or deposited, the same was washed away or removed for an unreasonable length of time; and in consequence of the absence of said dirt, earth or ballast, a soft and slippery mud puddle formed and existed at the place last above mentioned, and so remained for an unreasonable length of time; and defendants also constructed and laid two certain rails at the place above mentioned, converging and leading into the aforesaid appliance commonly called a 'frog,'—all of which things were supported by certain cross-ties lying and being in said mud puddle,—which converging rails, frog, and cross-ties were then and there, and had been for an unreasonable length of time, loose, moving, and slipping about in all directions; and the same became and were, for an unreasonable length of time, dangerous to the lives and limbs of all persons going upon said roadbed to couple or uncouple cars or coaches for defendants. And then and there, on the day and year aforesaid, plaintiff, in the performance of his duties as foreman, was compelled to uncouple and cut off three certain cars, laden with coal, then being part of a large train of freight cars then in motion upon defendants' said railway on Press street, between Marais and Urquhart streets aforesaid, for said cars to run off upon a side track of said railway; and plaintiff then and there, observing all reasonable care and caution, walked upon said roadbed to pull out the coupling pin from the drawhead of a certain car (being the third car from the end of said train), and while so doing, and exercising all reasonable care and caution, plaintiff necessarily walked into said soft and slippery mud puddle, and then and there, in consequence of the slippery and dangerous condition of the said roadbed, and in consequence of the absence of a sufficient quantity of dirt, earth, or ballast, at the place above mentioned, plaintiff's right foot slipped forward and between said converging rails, and, notwithstanding plaintiff made all possible efforts to withdraw his said foot, it remained fast," etc.

The defendant company excepts to the petition on two grounds: First, that it shows the plaintiff was guilty of contributory negligence; second, that it does not show the negligence of the defendant company.

1. Contributory negligence is a defense, and the absence of it need not be proved. *Railroad Co. v. Gladmon*, 15 Wall. 410. Still, if the complaint against the railway company, by its statement of facts, shows that the plaintiff was himself guilty of negligence contributing to his injury, the complaint is bad, notwithstanding it may contain an averment that he was without fault. *Railroad Co. v. Goldsmith*, 47 Ind. 43.

It is *prima facie* negligence to go between the cars of a moving train. The plaintiff, in his petition, admits that he went between the cars of a moving freight train in order to uncouple them. He avers a general duty devolving on foremen, brakemen, and switchmen to go on the defendant's roadbed, and between cars when in motion, in order to couple or uncouple them, and he says:

"Plaintiff, in the performance of his duty as foreman, was compelled to uncouple and cut off three certain cars, laden with coal, then being part of a large train of freight cars then in motion upon defendant's said railway on Press street, between Marais and Urquhart streets aforesaid, for said cars to run off upon a side track of said railway; and plaintiff, then and there, observing all reasonable care and caution, walked upon said roadbed to pull out the coupling pin from the drawhead of a certain car, being the third car from the end of said train, and while so doing," etc.

He does not say that in order to uncouple these particular cars he was compelled, either by duty, orders of his superiors, or the necessity of the case, to go between the cars while in motion, nor does he aver at what rate of speed the train was moving. It is true he says that, in the performance of his duties as foreman, he was compelled to uncouple and cut off three certain cars, laden with coal, then in motion, but he does not say how or by what he was compelled to go between the cars. Certainly, without a rule or order of the company, or some extraordinary condition then existing, defendant's compulsion, so far as he alleges it, existed in his own mind, and with reference to the easiest way to perform the duty in question.

2. The petition avers that the defect in the roadbed was either from a defect in original construction, or a defect caused by washing, but it does not aver that the defendant company had notice of the defect, or that the same had existed for such a time and under such circumstances that the defendant company could be charged with notice, if not possessing actual notice. The general rule is that a pleading is to be construed against the pleader, and if this rule is applied in this case the defect in the roadbed must be considered as resulting from the cause most favorable to the defendant, i. e. by washing; and, if it was caused by washing, it follows that, to hold the defendant company responsible for negligence, it must either have been brought to the attention of the company, or have existed for such a time that the company's knowledge of it can be reasonably presumed. The plaintiff's averment that it had so remained for "an unreasonable length of time" is an averment of a conclusion, and not of a fact.

The plaintiff relies upon *Snow v. Railroad Co.*, 8 Allen, 441, and *Gardner v. Railroad Co.*, 150 U. S. 349, 14 Sup. Ct. 140. In *Snow v. Railroad Co.* the defect in the roadbed had existed for more than two months. The plaintiff had known of it for that length of time, and had complained of it to the repairer of the tracks of the defendant railroad. And when he stepped between the cars they were in motion, at a very slow rate, having been started on his signal; and the easing back of the engine, or motion of the cars, was necessary in order to uncouple, because it was an ascending grade. In *Gardner v. Railroad Co.*, *supra*, the defect in the roadbed had existed for a month. The plaintiff was ordered to do certain coupling and uncoupling of cars, out of the line of his employment, and more dangerous. The injury occurred where there was a down grade, and the cars, according to necessity and general usage, were in slight motion at the time. The defect complained of was in a planking at the crossing of a thoroughfare or highway, and more or less

conspicuous. The last paragraph of the chief justice's opinion throws a flood of light on the matter in hand:

"Tested by this rule, we are of opinion that the case should have been left to the jury, under proper instructions, inasmuch as an examination of the record discloses that there was evidence tending to show that the crossing was in an unsafe condition; that the injury happened in consequence; that the defect was occasioned under such circumstances, and was such in itself, that its existence must have been known to defendant; that sufficient time for repairs had elapsed; and that the plaintiff was acting in obedience to orders in uncoupling at the place and time, and as he was; was ignorant of the special peril; and was in the exercise of due care."

In my opinion, in the present case the plaintiff's petition should show whether or not the defect in the roadbed which caused the injury was or was not known to him, and also whether the defect was known to the managing agents of the company, either by actual knowledge of the same, or by its existence for such a length of time, under circumstances more or less patent, from which notice to the company should be presumed.

The petition should also show such circumstances, either of special orders, general duty, or the necessities of the case, as required the plaintiff to go between the cars of a moving train at the time he was injured. The rate of speed at which the train was moving at the time plaintiff entered between the cars thereof in order to uncouple them is a material fact bearing on the question of negligence, under what is alleged to be the general duty of foremen, brakemen, and switchmen in the defendant's employment to enter between moving cars to couple or uncouple them.

Let the plaintiff amend within 10 days to meet the views herein expressed, or let the petition be dismissed.

BARBER ASPHALT PAVING CO. v. CITY OF HARRISBURG.

(Circuit Court, E. D. Pennsylvania. May 1, 1894.)

No. 48.

INTERPRETATION OF CONTRACT—IMPLIED WARRANTY.

A company contracted with a city to do certain paving, the expense to be assessed against the abutting property. The city agreed to turn over to the company all assessments paid into its treasury, and to assign the remaining assessments to the company, which agreed to accept the same in payment of the amount due, with the further stipulation that "the city shall not be otherwise liable under this contract, whether the said assessments are collected or not." After both parties had complied with the contract, the statute authorizing the assessment was adjudged unconstitutional, and the company was unable to collect the sums unpaid. *Held*, that the contract gave rise to no implied warranty that the city had power to make the assessment, and it was not liable for the balance of the contract price. *Horter v. City of Philadelphia*, 13 Wkly. Notes Cas. 40, and *Dickinson v. City of Philadelphia*, 14 Wkly. Notes Cas. 367, followed. *Hitchcock v. Galveston*, 96 U. S. 341, distinguished.

This was an action by the Barber Asphalt Paving Company against the city of Harrisburg to recover money alleged to be due for street paving. Defendant demurred to plaintiff's statement of claim.

George Fred'k Keene, Charles H. Bergner, and A. S. Worthington,
for plaintiff.

Wm. H. Middleton, City Sol., for defendant.

DALLAS, Circuit Judge. By a contract in writing between the plaintiff and the defendant, the former agreed to do certain paving, and, having fully complied with and performed the contract on its part, it brings this suit to compel the defendant to pay for the work. The defendant demurs to the statement of claim, and, in support of its demurrer, relies upon the following clauses of the contract:

"And the city of Harrisburg, on its part, will pay to the said the Barber Asphalt Paving Company, in accordance with the specifications, and out of the assessments made and levied for the purpose, the following prices: * * *. It is also understood and agreed that the payments aforesaid provided for shall be paid as follows: First, out of the amount of the assessments paid into the city treasury by the property owners, and, when that fund is exhausted, then the city of Harrisburg will assign to the said the Barber Asphalt Company the municipal claims assessed and levied upon the properties abutting on and along the said Market street between the points above mentioned, or mark the same of record to the use of the said company, and also permit the use of the corporate name of the said city in any legal proceedings necessary or proper to enforce the collection of the said assessments. It is also understood and agreed that the said company shall accept the said assessments in payment of the amount due it under this contract, and the city shall not be otherwise liable under this contract, whether the said assessments are collected or not."

When the contract was made, and until after the work thereunder had been completed, both parties supposed that the defendant could lawfully make and enforce the assessments referred to in the foregoing extracts. In reliance upon this supposition, assessments were made, and municipal claims based thereon were filed, marked to the use of the plaintiff, and by it accepted. The owners of some of the abutting properties paid without suit, and the sum of these payments (\$13,470.59) the defendant paid over to the plaintiff. Every obligation of the defendant was precisely fulfilled in accordance with the terms of the contract. It became, and was, an executed contract. This is unquestionable; but the plaintiff, nevertheless, insists that the defendant is still liable to it for the amount (\$21,729.99) of the claims which have not been voluntarily paid, because those claims, by reason of the absence of lawful power in the defendant to levy the assessments, are invalid and, therefore, worthless. The lack of power alleged is established by decisions of the supreme court of Pennsylvania in three cases in which it has pronounced the statute (Act Gen. Assem. May 24, 1887) upon which, alone, the existence of such power depended, to be unconstitutional. *Shoemaker v. Harrisburg*, 122 Pa. St. 285, 16 Atl. 366; *Berghaus v. Same*, 122 Pa. St. 289, 16 Atl. 365; *Klugh v. Same*, 122 Pa. St. 289, 16 Atl. 366. These cases were commenced—in the name of this defendant, to the use of this plaintiff—by writs of scire facias on asserted municipal claims which had been marked to the use of the plaintiff, as has been mentioned, and the judgments therein conclusively determine that all such claims are absolutely void, and the plaintiff's expectation of collecting the balance of its compensa-

tion against the abutting properties is, therefore, disappointed. But does it follow from this that it is entitled to recover from the defendant? If it is—as it is not alleged that the defendant has committed any wrong—it must be because it has, by contract either express or implied, assumed the liability now sought to be fixed upon it. The pertinent part of the only express contract has been fully quoted. It is impossible to find in it any undertaking by the defendant to pay otherwise than by special assessments, and this undertaking is coupled with that of the plaintiff to “accept the said assessments in payment.” But the contention of the plaintiff’s counsel, as I understand it, though not so expressed, amounts to this: that, as incident to the express contract, there was an implied warranty by the defendant that it had lawful power to levy the assessments, and that, a breach of that warranty having been shown, a right of action accrued. The theory upon which this position is founded might be accepted, even as against a municipality, without conceding its applicability to this case; for it is never admissible to imply a contract at variance with that which the parties have expressed, and, in the present instance, the expressed intent precludes an implication of the warranty alleged. Since the year 1874 (P. L. p. 230), the defendant has had authority to apply its general revenues to paving its streets. On May 24, 1887, the act was approved (Act Gen. Assem., *supra*) by which it was intended to confer upon it the power to charge the cost upon the abutting properties. The defendant’s supposed right to do this was derived solely from the last-mentioned act, and this was known to the plaintiff as well as to the defendant, when, on August 13, 1887, within three months after the passage of the empowering act, and admittedly with reference to it, the contract in suit was entered into. The plaintiff desired to do the work, and the defendant, of course, desired to have it done; but it was not willing to impose the expense upon its treasury. Hence, with the manifest object of excluding the possibility of inference that the defendant might be required to make payment from its general resources, it was provided that it should pay by special assessments, and that “the city shall not be otherwise liable under this contract, whether the said assessments are collectible or not.” The agreement was not merely that the defendant would pay in the manner stated, but also that it should not be liable to pay in any other manner. To me this seems the reasonable and natural construction of the language used, and, if this understanding is correct, it results that the warranty contended for cannot be implied, and that the plaintiff’s case must fall for want of any contract to support it.

A number of decisions of the courts of several of the states have been cited; but it is impossible to reconcile them, for they are not harmonious, and it would be profitless to discuss them, for none of them is of binding authority, or has determined my judgment. Suffice it to say, the subject has been twice considered by the supreme court of Pennsylvania (in which state this contract was made), and the decision of that tribunal, in each of the cases re-

ferred to, accords with the conclusion which I have now reached. In *Horter v. City of Philadelphia*, 13 Wkly. Notes Cas. 40, that court said:

"In this case, the plaintiffs expressly agreed, in the event of a failure to collect the assessment bills, that no recourse should be had against the city. The plaintiffs knew the restricted power of the city, and had the same knowledge it had of the legal invalidity of the particular assessment in question. The city did all which she agreed to do. With this full knowledge and means of knowledge, the plaintiffs voluntarily assumed the risk of collecting the assessment. Having failed in the attempt so to do, they cannot now repudiate their agreement, and make the city liable to them."

The opinion of the same court in *Dickinson v. City of Philadelphia*, 14 Wkly. Notes Cas. 367, is as follows:

"The contract on which this suit was brought expressly stipulates that 'all costs of paving, excepting intersections, and for curb and gutter stones, shall be collected by the contractor from the owners of the property fronting on the said Market street,' and also that the city 'shall be at no expense for said paving, excepting crossing stone and intersections of streets, and the necessary gutter stone for the intersections.' The exemption of the city from all liability to pay for the paving is thus stated in clear and unmistakable language. The city shall incur no expense, and the contractor shall look to the owners of the property fronting on the street for his work and materials. If he has failed so to collect his claim, in the language of *Horter v. City of Philadelphia*, supra, he cannot now repudiate his agreement, and make the city liable to pay him."

Careful reading of the reports of these cases, and especially of the points which were made in argument, discloses that neither of them is distinguishable from this one in principle, and that in them substantially the same questions which are now raised were presented. It is true that in the *Horter Case* the power of the city was, by statute, restricted to the mode of payment agreed upon; but the judgment of the court was rested upon the terms of the contract itself, and although, in the present case, the city of Harrisburg might have contracted to pay otherwise than by assessments, the fact is that it carefully avoided doing so. It is also true that in *Horter v. City of Philadelphia* the defect of power was only as to a single property owner, but as to that one the defect was as complete and absolute as in this instance, and the court seems to have attached no weight to the contention, which was there made, that the city was liable because it "could, in point of law, deliver no assessment bills," etc. In *Dickinson v. City of Philadelphia*, supra, the contract had been made by the commissioner of highways, in pursuance of an act of the legislature. The court, however, did not regard that circumstance as material, but, deeming the controlling facts to be the same, decided the case as they had decided the *Horter Case*, and upon the same grounds.

The cases to which I have particularly referred, and the views which I have endeavored to present, are not in conflict with the judgment of the supreme court of the United States in *Hitchcock v. Galveston*, 96 U. S. 341. There the promise was to pay in bonds of the promisor which it had no authority to issue, and the court held that this defect of power could not be set up to wholly avoid

payment. But in *Horter v. City of Philadelphia*, in *Dickinson v. City of Philadelphia*, and in the case now before this court the promise was not to pay in obligations of the defendant, but in claims against others, the collection of which was to be at the risk of the plaintiff, without recourse to the defendant. In *Hitchcock v. Galveston*, the debt was the defendant's, and the only question was as to the manner of payment. In this case the plainly-expressed agreement is that the contractor shall look to the abutting properties, and to them only. By its terms he is bound, and no consideration of the supposed hardship to result from maintaining them would justify any attempt on the part of this court to defeat their legal effect. As was said by the supreme court in *Peake v. New Orleans*, 139 U. S. 361, 11 Sup. Ct. 541: "We trust that this court will never falter in its duty of brushing away all false pretenses, and holding every municipality obedient to the spirit, as well as the letter, of all its contract obligations. At the same time, it is equally the duty of this court, as of all others, to see to it that no burden is cast upon taxpayers, citizens of a municipality, which does not spring from that which is justly and equitably a debt of the municipality; and, when a contract for local improvements is entered into, the contractor must look to the special assessments, and to them alone, for his compensation, and if they fail, without dereliction or wrong on the part of the city, neither justice nor equity will tolerate that it be charged as debtor therefor." The demurrer is sustained, and judgment for the defendant.

FISHER v. NEWARK CITY ICE CO.

(Circuit Court of Appeals, Third Circuit. April 27, 1894.)

No. 8.

1. CONTRACT OF SALE—INTERPRETATION.

A contract provided that plaintiff should cut, house, and deliver on board defendant's vessels 15,000 tons of ice during the months of June, July, August, and September, at \$1.60 per ton; to be paid for as follows: \$3,750 on signing the contract; an equal amount the following March, if three-fourths of the whole was then stored in specified houses; 75 cents per ton additional as the ice was delivered until the amount advanced was exhausted; and thereafter \$1.60 a ton,—the ice to become defendant's property when cut, provided, however, that plaintiff should have a right "to make up the quantity to be delivered as aforesaid by purchase or otherwise," indemnifying defendant for any additional expense occasioned thereby. *Held*, that plaintiff was bound to store in his own houses three-fourths of the entire amount as security for the advances, but that any ice purchased under the proviso need not be stored in his own houses, but might be delivered elsewhere, plaintiff paying any additional expense thereby caused.

2. SAME—DAMAGES FOR BREACH.

The measure of damages for breach of contract where there had been a part payment and partial delivery *held* to be not the balance of the purchase money, but only the profit the seller would have made if the delivery had been completed.

In Error to the Circuit Court of the United States for the District of New Jersey.

This was an action by Fred. S. Fisher against the Newark City Ice Company to recover damages for breach of a contract. The case was tried to the court without a jury, and judgment rendered for defendant. Plaintiff sued out this writ of error.

The circuit court made the following findings of fact:

(1) The plaintiff and the defendant entered into and executed a contract dated February 13, 1890, for the sale and delivery of 15,000 tons of ice by the plaintiff to defendant, which contract is made part of the declaration in this cause.

(2) That in pursuance of the terms of that contract the defendant paid to the plaintiff on the day aforesaid \$3,750, part of the consideration thereof.

(3) The subject-matter of this contract was the delivery of 15,000 tons of ice by the plaintiff to the defendant at a certain fixed price per ton. Such ice, previous to delivery, was to be stored in certain buildings then erected, or to be erected, and in said contract particularly stated. In said contract there was this proviso: "Provided, however, said Fred. S. Fisher shall have the right to make up the quantity to be delivered as aforesaid by purchase or otherwise, indemnifying the said Newark City Ice Company for any additional expense they may be put to."

(4) The ice which was the subject of the sale, and was to be delivered pursuant to the terms of the contract, was to be cut from the Kennebecasis river, in front of certain lands leased or controlled by the plaintiff, and was, by the terms of the contract, to be stored in the building then in course of erection or to be erected by the said plaintiff upon lands owned by the said plaintiff, and situated on the Kennebecasis river, in the parish of Rothesay, and county of Kings, being the same land which the plaintiff had previously bought from one Susanna Hicks.

(5) By the terms of the contract, or of a supplemental contract, hereafter referred to, the said plaintiff was permitted to store a certain portion of said ice, if necessary, in a building to be erected upon lands leased by him from the Wetmore estate in the immediate neighborhood of the other ice house, or in any other building to be approved by the defendant. At the time that said contract was made the plaintiff was engaged in cutting ice at the places named.

(6) Afterwards, on the 7th day of April, 1890, a certain supplemental contract was entered into between the plaintiff and the defendant, which is attached to the declaration, and forms a part thereof. This contract, under the view I take of the case, is of no special consequence.

(7) The ice in question was to be delivered to the defendants during the months of June, July, August, and September of that year; such delivery was to be made "free on board" certain vessels suitably and properly dunnaged for a voyage from the place of delivery to Newark, which vessels were to be furnished by the defendant.

(8) The defendant did send to the place of delivery, to wit, the ice houses heretofore spoken of, vessels upon which, at intervals, the plaintiff did deliver the ice in question up to about September 10, 1890.

(9) On or about that day it came to the knowledge of the defendant's agents that practically all the ice stored in the ice houses referred to had been delivered; the quantity remaining being variously estimated by the different parties, but admittedly less than a cargo.

(10) The plaintiff in fact stored 11,250 tons of the ice which was to be delivered in the building mentioned in the contract.

(11) On September 10, 1890, the agent of the defendant served upon the plaintiff personally a notice, of which the following is a copy:

"St. Johns, N. B., 10 Sept., 1890.

"Frederick Fisher, Esq., City—Dear Sir: By your contract of the 13th of Feby., A. D. 1890, with us, you agreed to cut and deliver to us 15,000 tons of ice, to be packed and delivered f. o. b. on board of vessels properly dunnaged

for a voyage to Newark during the months of June, July, August, and September, for which we are to pay you the sum of \$1.60 per ton; said ice to be stored in the building named in the said contract. A large sum is still due us for advances made to you on said contract, and we have removed all the ice in said building with the exception of a small amount, not enough for a cargo, and would now call on you to fulfill said contract.

"[Signed]

Newark City Ice Co.

"Per S. D. Addis, Agt."

(12) Although, upon receipt of this notice, the plaintiff expressed his intention to fulfill his contract according to its terms, the only action he took thereafter was to offer ice to the amount of a cargo or more from Palmer's ice house, and the tender of ice, made at Newark, as hereinafter stated.

(13) At the date of the second supplemental contract, to wit, April 7, 1890, the defendants paid the further sum of \$3,750 as part of the consideration of said principal contract.

(14) During the months of June, July, August, and September the plaintiff delivered on board of vessels furnished by the defendant 6,156 45-2000 tons of ice, being parcel of the 15,000 tons to be furnished under the contract.

(15) The ice was to be paid for by the defendants, in addition to the \$7,500 advanced, at the rate of 75 cents per ton as the ice was shipped; said 75 cents per ton to be paid by sight drafts drawn by the said plaintiff on the said defendant, with bill of lading attached, and weight of ice to be verified by sworn weighers, whose certificates were to be attached to the bill of lading. On repayment in full of said advance by delivery of ice, sight drafts, as aforesaid, were to be drawn for the ice thereafter shipped at \$1.60 per ton.

(16) That on or about September, 1891, and after the ice stored as per contract had been exhausted, the plaintiff offered to the defendant, through his agents, Charles A. Palmer and Charles H. Fisher, under the contract, 2,389 1294-2000 tons of ice, then being on vessels afloat and in the port of New York or elsewhere, which ice, it was alleged by the plaintiff, came from the Kennebecasis river, and was of the same quality as the ice required by said contract; also 4,000 tons of ice of a similar character, then stored in ice houses on the river Kennebecasis, but not in the houses mentioned in said contract; and 4,000 tons of similar ice, then stored at Chamcook, a place about 50 miles distant from the place where the other ice was stored under the contract.

(17) While the evidence is exceedingly unsatisfactory as to the title to the ice in the vessels afloat in New York harbor and elsewhere, for the purposes of this decision I assume that such ice was owned by the plaintiff.

(18) The title to the ice at Chamcook was admittedly in the plaintiff and his brother as joint owners.

(19) For the ice actually received by the defendant the plaintiff has been fully paid.

Roger Foster, for plaintiff in error.

John R. Emery, for defendant in error.

Before ACHESON and DALLAS, Circuit Judges, and BUTLER, District Judge.

BUTLER, District Judge. In this case, (which was tried without a jury,) involving the construction of a contract, and the defendant's alleged liability for failure to perform, forty-eight errors are assigned. Most of them are unnecessary, and many are trivial. Such a practice tends to waste of time, and obscurity, and deserves discouragement.

The only assignment which requires notice is that involving the construction of the contract. The instrument is inartificially and carelessly drawn; but the intention of the parties is, we think, reasonably clear. It provides, substantially, that the plaintiff shall cut, house and deliver on board the defendant's vessels, 15,000 tons

of ice, of a given quality, during the months of June, July, August, and September, 1889; the defendant paying therefor \$1.60 per ton, as follows: \$3,750 on signing the contract, a further sum of equal amount the following March, in case three-fourths of the whole quantity of ice is then stored, in specified houses, and 75 cents per ton additional as the ice is delivered, until the amount advanced is exhausted by shipments, and thereafter pay \$1.60 a ton as shipped. It also provides that the ice shall become the defendant's property when cut. If the contract contained nothing more it should receive the construction adopted by the circuit court. The plaintiff in such case would be required to cut and store the entire quantity of ice named. But it contains the following additional paragraph:

"Provided, however, the said Fred. S. Fisher shall have a right to make up the quantity to be delivered as aforesaid by purchase or otherwise, indemnifying the said Newark Ice Co. for any additional expense it may be put to."

This language was intended to, and does, qualify the preceding terms respecting storage; otherwise it has no significance whatever. It was not intended to relieve the plaintiff from *cutting*, with his own hands or those of his employees; he needed no such relief. He had a right without this provision to avail himself of anybody's cutting. The defendant was only interested in his procurement of the ice and storing it. He needed relief, however, against the obligation imposed by the preceding language to *store the entire quantity*. The defendant was interested in the storage of the three-quarters, named, which was necessary to secure his advances; but no further. This quantity was required to be stored in March, before the last advancement should be made. To require the plaintiff to store (in his own houses) such part of the balance as he should purchase (stored already elsewhere) would subject him to heavy and unnecessary expense; and it was relief against this which the proviso was intended to afford. The stipulation that he "shall bear any additional expense" to the defendant arising from such purchase, seems to remove all doubt of this. It is such "additional expense" as the defendant may incur in taking the ice from other houses, that is contemplated. If the ice was stored in the plaintiff's houses his purchasing could not entail any additional expense on the defendant. The scheme in the minds of the parties seems plain. It was for a sale and purchase of 15,000 tons of ice, on which \$7,500 should be advanced. It was important the purchaser should be secured for this sum; and hence the provision for storing three-fourths of the quantity, and a lien upon it for the one-third of the price paid. It was no doubt understood from the beginning that a chattel mortgage on the ice stored should be executed and recorded, as was done when the last advancement was made. The provision for a transfer of title as soon as it was cut afforded no security; and the storage of an additional quantity subsequently to the mortgage would not have increased the security which that instrument afforded. That the plaintiff was not required

or expected to store more than three-fourths by the last of March is made clear by the language referred to. Whether ice of the specified quality (12 inches thick) could be cut after that date is not shown; but we think it is safe to assume that it could not. The parties foreseeing that the plaintiff might not succeed in storing the full amount while the season for cutting lasted, added the proviso for his protection.

The construction stated accords, therefore, not only with the terms of the contract, but with what seems to have been the intention of the parties.

With this construction it becomes necessary to ascertain whether the plaintiff was ready to perform. Nothing shown relieved him from the burden of proving such readiness. He loaded all the vessels forwarded. The tender of certain cargoes afloat, on payment of freight, is unimportant. It appears, however, that he had 4,000 tons on hand. It is immaterial that another was interested in this; he had entire control of it. The refusal to take it excused him from making further provision to deliver. The evidence shows, however, that he could have complied with his contract, and was ready and anxious to do so. The only question open, therefore, is that of damages. The plaintiff is not entitled to the balance of purchase money; but only to such sum as will cover his loss—in other words, the profit he would have made if the ice had been taken and paid for according to the contract. This may be ascertained by deducting from the unpaid purchase money the value of the undelivered ice in the market (in Canada) at the time it should have been taken, and the expenses of loading, etc., saved to the plaintiff by the failure to take it.

The case must go back to the circuit court for the purpose of ascertaining the damages, and entering judgment against the defendant therefor.

After the above opinion was handed down, and an order entered in accordance therewith, the defendant in error moved to amend the reversing order by striking out therefrom so much thereof as directs as follows:

"And it is further ordered that this cause be remanded to the said circuit court for the purpose of ascertaining the damages in accordance with the opinion filed, and entering judgment against the defendant therefor."

At the same time the defendant in error moved for leave to file a petition for a rehearing of the cause so far as the same relates to or is covered by the said portion of the said order of reversal.

John R. Emery, of counsel for defendant in error, in support of the motion.

The defendant in error assigns the following reasons for said motion:

"First. Because on the said writ of error and on the opinion of the court the only proper judgment is a judgment of reversal and a direction for a new trial. The order is made as if the cause were heard on an appeal in equity, and not a writ of error.

"Second. Because the said court, sitting as a court of review on a writ of error, has no power or jurisdiction to decide any questions of fact or to direct that any questions of fact shall be considered as settled or determined for the purpose of directing the judgment of the court below upon a reversal of the judgment and order for new trial.

"Third. Because the order of reversal as made deprives the defendant in error of the right of review on the exceptions taken by it during the trial, and which it has the right to have reviewed in case, on a new trial, judgment should be entered against it.

"Fourth. Because such order of reversal shall deprive the defendant in error of defenses which it is entitled to raise upon a new trial.

"Fifth. Because in right and justice the said cause should be retried by the court below upon evidence to be produced on such new trial.

"Sixth. Because, for other reasons, the said amendment should be made."

Roger Foster, of counsel for plaintiff in error, in opposition.

The court had power to enter the order in the form that it adopted. Such a form is authorized by section 701 of the Revised Statutes, which provides as follows: "The supreme court may affirm, modify or reverse any judgment, decree or order of a circuit court, or district court acting as a circuit court, or of a district court in prize causes, lawfully brought before it for review, or may direct such judgment, decree, or order to be rendered, or such further proceedings to be had by the inferior court, as the justice of the case may require. The supreme court shall not issue execution in a cause removed before it from such courts, but shall send a special mandate to the inferior court to award execution thereupon." The same power is given to the circuit courts of appeals by section 11 of the Evarts act. The object of Rev. St. U. S. § 649, and of the stipulation providing that the court "shall make special findings upon the facts herein," would be nullified were a new trial to be ordered, upon which entirely different findings upon the facts might be made. A similar course has been frequently adopted by the supreme court of the United States. In *Railway Co. v. Hoyt*, 149 U. S. 1, 17 [13 Sup. Ct. 779], the case was also tried by a court without a jury, which made special findings. The opinion concludes as follows: "The conclusion of this court is that the judgment awarded the lessees is erroneous, and must be reversed, with costs, and that the cause should be remanded, with directions to the court below to enter judgment in favor of the plaintiff in error for the above amount of rent due it, with interest thereon from October 1, 1889, the date of judgment below, and it is accordingly so ordered." In *Insurance Co. v. Boykin*, 12 Wall. 433, where a general verdict had been rendered below against all the defendants, the court reversed the judgment, and directed that the damages be divided between the different defendants. The supreme court said, speaking through Mr. Justice Miller: "Indeed, it was for a long time denied that a court of error could award a venire facias de novo. In the case of *Phillips v. Bury*, reported at great length in *Skin*. 447, which was an action in the king's bench and writ of error to the peers, who reversed the judgment below, the case was carried back and forward several times between the peers and the king's bench on the question of which court should render the judgment on the verdict, and it was finally settled that the house of lords should give the judgment which the king's bench ought to have given, *Eyre, C. J.*, saying that, where judgment is upon a verdict, if they reverse a judgment, they ought to give the same judgment that ought to have been given at first, and that judgment ought to be sent to the court below. So in *Slocomb's Case*, *Cro. Car.* 442, on a general verdict, where judgment was reversed in the king's bench, it was, in the language of the reporter, 'agreed by all the court, if the declaration and verdict be good, then judgment ought to be given for plaintiff, whereof Jones at first doubted, but at last agreed thereto, for we are to give such judgment as they ought to have given there.' In 1 *Salk.* (Anon., 1 *Salk.* 401. See, also, *Butcher v. Porter*, 1 *Show.* 400) it is said: 'If judgment be below for plaintiff, and error is brought, and that judgment reversed, yet, if the record will warrant it, the court ought to give a new judgment for the plaintiff,'—which is precisely the case before us. See also, *Butcher v. Porter*, *Id.* And in *Mellor v. Moore*, 1 *Bos. & P.* 30, on the authority of these and other cases, the court

of exchequer chamber held that, when a judgment is reversed on demurrer in favor of plaintiff, the case is sent down, and a writ of inquiry goes; but when it is upon a verdict they should give the same judgment that ought to have been given at first, and that judgment ought to be sent below. In *Gildart v. Gladstone*, 12 East, 668, on a case from the common pleas having been reversed on a special verdict, Lord Ellenborough said: "The court are bound, ex officio, to give a perfect judgment upon the record before him." The provisions of our statute of 1789, already cited, show that the lawyers who framed it were familiar with the doubts which seemed at that time to beset the courts in England as to the precise judgment to be rendered in a court of errors on reversing a judgment, and they in plain language prescribed the rule which has since become the settled law of the English courts on the same subjects." In *Bank v. Smith*, 11 Wheat. 171, 172, 182, where a demurrer to the evidence had been sustained, and judgment below entered for the defendant, the supreme court, on a reversal, ordered that judgment be entered for the plaintiff for the damages that were due him, saying: "We are accordingly of opinion that the evidence was sufficient to entitle the plaintiffs to recover; that the judgment of the court below must be reversed, and the cause sent back, with directions to enter judgment for the plaintiffs upon the demurrer to evidence for the amount of the note and interest." In *Insurance Co. v. Piaggio*, 16 Wall. 378, where judgment had been rendered for the plaintiff, the court, on writ of error, instead of granting a new venire, modified the judgment by disallowing a certain amount of damages therein included, and directing that the court below enter judgment for a less amount with interest. The practice adopted by the court in this case is in accordance with the former practice in the house of lords and the exchequer chamber, which were accustomed, when reversing a judgment in favor of the defendant in a case like that at bar, to direct a writ of inquiry as to the damages to be issued by the court below.

The special findings here are to be treated as a special verdict. Rev. St. U. S. § 649.

2 Tidd, Pr. p. 1180: "When a judgment against the plaintiff is reversed on a writ of error brought in the king's bench, that court, having the record before them, may in all cases give such judgment as the court below should have given; and, if necessary, may award a writ of inquiry to assess the damages. And so, when judgment is given against the plaintiff in the king's bench on a special verdict, by which the damages are assessed,—as where judgment is given on demurrer,—the exchequer chamber or house of lords, * * * not having the record before them, but only a transcript, cannot give a new and complete judgment, but only an interlocutory judgment quod recuperet; and, the transcript being remitted, the court of king's bench will award a writ of inquiry, and give final judgment." Citing *Phillips v. Berry*, 1 Ld. Raym. 5, 10, 1 Salk. 403, 1 Skin. 447, Carth. 319; *Denn v. Moore*, 1 Bos. & P. 30; *Faldowe v. Ridge*, Cro. Jac. 206. See, also, *Stephens v. Cowan*, 6 Watts, 511, 513, 514.

2 Tidd, Pr. p. 1179: "If judgment be given against the defendant, and he bring a writ of error upon which the judgment is reversed, the judgment, it is said, shall only be quod judicium reversetur; for the writ of error is brought only to be eased and discharged from that judgment. But, if judgment be given against the plaintiff, and he bring a writ of error, the judgment shall not only be reversed, if erroneous, but the court shall also give such judgment as the court below should have given, for the writ of error is to revive the first cause of action, and to recover what he ought to have recovered by the first suit, wherein an erroneous judgment was given."

The motion was denied without any opinion being filed.

In re MITCHELL et al.

(District Court, E. D. Wisconsin. June 25, 1894.)

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — LICENSE TAX ON TRAVELING SALESMEN.

A state statute imposing a license tax upon persons traveling from place to place for the sale of goods, "at retail or to consumers," by sample or otherwise (Rev. St. Wis. § 1570), is void as an interference with interstate commerce in so far as it applies to agents soliciting orders by sample for goods which belong to a resident of another state, and which are at the time outside of the state, and are proper articles of commerce.

Applications by B. J. Mitchell, W. W. McClure, C. E. Devendorf, and Harry Birkell for writs of habeas corpus.

Clarence H. Childs, for petitioners.

Henry Fitzgibbon, for respondent.

SEAMAN, District Judge. These several petitioners are imprisoned in Winnebago county upon convictions in justice court for alleged violation of section 1570 of the Revised Statutes of Wisconsin, and amendments thereof, which provide that no person who is not licensed by payment of a fee prescribed by a subsequent section shall travel from place to place within the state for sale of goods "at retail or to consumers," by sample or otherwise, with numerous exceptions of permanent traders and other classes, not including any under which the petitioners can claim exemption. They were all in the employ of W. A. Edwards, a dealer in various articles of merchandise, residing and having his place of business at Minneapolis, Minn., and all were soliciting orders for sale of the employer's goods for future deliveries, and having only samples with them. It is undisputed and conceded that the goods which they respectively offered for sale were at Minneapolis, and not in Wisconsin, and were legitimate and proper articles of commerce. No orders were in fact taken, and no sales or deliveries were actually made.

The aid of this court is invoked on the ground that the arrest and imprisonment in each case violates well-settled rights of interstate commerce, of which the power to regulate is expressly reserved to congress by the United States constitution. Upon the state of facts here presented, it is clear that the petitioners were in the exercise of "interstate commerce," as defined by the supreme court in numerous decisions, and they were not infringing any law of the United States. The only justification for their imprisonment is asserted under the state statute entitled "Of Peddlers" (chapter 67, Rev. St., as amended by chapter 510, Laws Wis. 1889; section 1570, Sanb. & B. Ann. St.). It is unnecessary to determine whether the terms of this statute would intend the imposition of a license fee in these cases; but it is sufficient that the attempted enforcement is against a clear exercise of interstate commerce, and an interference therewith which is "repugnant to that clause of the constitution of the United States which declares that congress shall have power to regulate commerce among the several states." *Robbins v. Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592. The decisions of the supreme court are

numerous and conclusive to this point, and are well summarized in the opinion of Mr. Justice Brewer, handed down April 30, 1894, in *Brennan v. City of Titusville*, 14 Sup. Ct. 829. For their protection in this constitutional right the petitioners are entitled, respectively, to the writ, and it will be granted.

RUDOLPH et al. v. WILLIAMS et al.

(Circuit Court, S. D. New York. December 6, 1893.)

PATENTS—WHO ENTITLED—PRIORITY OF INVENTION.

In a suit to obtain a patent under Rev. St. § 4915, the evidence was substantially the same as that in interference proceedings in the patent office between the parties, in which priority of invention had been awarded to defendant; his testimony, substantially corroborated, being sufficient to discharge the burden of proof resting on him therein, while complainant's testimony to his prior conception of the invention was uncorroborated, and its credibility impaired by circumstances, and as to reduction of the invention to practice, on which the parties directly contradicted each other, complainant was supported only by indefinite and unreliable testimony of others. *Held*, that the bill must be dismissed on the weight of evidence.

This was a suit by Henry Rudolph and others against Benjamin A. Williams, George N. Williams, and others, to obtain an adjudication that complainants were entitled to a patent.

The bill in this action was filed under section 4915 of the Revised Statutes, which, so far as applicable to the present controversy, reads as follows:

"Whenever a patent on application is refused, either by the commissioner of patents or by the supreme court of the District of Columbia upon appeal from the commissioner, the applicant may have remedy by bill in equity; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear."

The question involved is purely one of fact. It is whether Henry Rudolph or George N. Williams, Jr., is the inventor of the "method of feeding the reciprocating saw blade of a stone-sawing machine, which consists in imparting to said saw blade, during its reciprocating movements, a forward or feeding movement during both its backward and forward strokes; said feeding movement corresponding in extent or rate to the speed at which the saw blade is moving, forward or back, at all times, substantially as set forth." The matter in controversy was the subject of interference proceedings between these parties. The examiner of interferences awarded priority of invention to Rudolph. His opinion was reversed by the examiners in chief, and their decision awarding priority to Williams was affirmed by the commissioner.

The opinion of the commissioner of patents on appeal from the decision of the examiners in chief in the interference proceedings was as follows:

Mitchell, Commissioner. The issue in controversy is as follows: "The herein described method of feeding the reciprocating saw blade of a stone-sawing machine, which consists in imparting to said saw blade, during its reciprocating movements, a forward or feeding movement during both its backward and forward strokes, said feeding movement corresponding in extent or rate to the speed at which the saw blade is moving forward or back, at all times, substantially as set forth."

Prior to the making of the invention herein involved, diamond saws had been constructed so as to cut only during the forward movement of the saw, that is to say, the feeding mechanism of the saw blade operated only during the forward movement of the saw and was inoperative during its backward movement. The downward pressure of the saw blade was relieved during its backward movement by means of a "lift" mechanism. The method or process in issue was reduced to practice when the invention was perfected by disconnecting the "lift" mechanism, thereby permitting the saw to cut while traveling in each direction, and by adding a second ratchet and ratchet lever with appropriate mechanism for imparting a continuous or nearly continuous rotary movement in the place of the previous intermittent movement. There are therefore two elements present in the method of the issue, to wit, imparting a backward and forward movement to the saw with pressure upon the stone during both movements, and feeding the saw to the stone upon both strokes, the feeding movement corresponding in extent or rate to the speed at which the saw blade moves.

This preliminary discussion as to the construction of the issue seems to be necessary in order to determine what proof is required to show conception of the invention. Obviously it is not sufficient to prove conception of the idea of making a diamond saw cut both ways, for that would simply be the result of the method involved in the issue. It should be determined when the conception extended to the method of doing it substantially as it was finally done; that is to say, by taking off the lift and putting on a ratchet apparatus of such a kind as would give the continuous movement to the feed-operating shaft instead of an intermittent movement.

Williams' preliminary statement avers that he conceived the invention in July, 1886; that he disclosed it to Benjamin A. Williams in the same month; that he explained the invention to Rudolph—his rival in this interference—some time between the 1st of August and the 1st of September; that he instructed Rudolph to put such invention on a stone-sawing machine belonging to himself, giving him full instructions as to the invention, and how to apply it; that it operated successfully some time during the month of October; that about October 25, 1886, he made a pencil drawing and submitted it to his solicitor, from which to apply for letters patent.

In support of this statement Williams testifies that he conceived the invention in July, 1886; that about the middle of that month he explained to his cousin Benjamin A. Williams the nature of the mechanism or device which he intended to employ; that he reduced the invention to practice through Rudolph, his engineer; that he first directed Rudolph to remove the lifting apparatus from the saw, as he wished to see how the machine would work without the "lift;" that the saw ran without the lift for about a month; that at the end of the month he instructed Rudolph to have the ratchet attachment made and put upon the machine, which he did some three or four weeks afterwards; that the object in removing the lift was to ascertain by trial whether it was necessary to relieve the blade in order to permit the detritus to escape from the channel in the stone, it having always been considered impossible to run a diamond saw without a lift, on account of the supposed tendency to clog the blade, thereby causing breakage; that this trial proved to him that there was nothing to prevent feeding the saw during both the forward and backward stroke; that after the apparatus was changed to feed during both movements of the saw the lift was never replaced; that the saw has been used ever since continuously, and that his first idea that Rudolph claimed the invention was some time in November or December, 1886, from common report. Williams further testifies that the ratchet device did not feed exactly at first, and was removed without having actually been the means of sawing any stone; that it was soon refitted and replaced; that after it had been run successfully a part of the day it was removed, because he did not wish outside parties to know that he had succeeded in making a diamond saw cut in both directions, and that he cautioned his men to say nothing about it, as he thought of taking out a patent. Williams further testifies positively that he did not derive his first ideas of the invention from Rudolph, nor did he receive from any one any suggestions as to how the invention ought to be embodied in a working attachment to a stone saw.

Benjamin A. Williams, a cousin of the applicant, states that in July, 1886, Williams told him how to make a saw cut both ways by applying ratchets to make the saw feed in both directions; that he said "he was going to take off the lift and put on this other ratchet;" that his cousin ordered the changes referred to; that the device was taken off for fear some outside party would see it and apply for a patent; that it was put on again and the saw run, as soon as the solicitor advised them it was safe to do so, and that it was left on the machine at work and "it is there still."

George N. Williams, father of the applicant, also gives corroborating testimony.

Henry Muller also testifies on behalf of Williams. Muller was in charge of the saw to which the attachment was originally applied at the time when it was applied. He testifies that so far as he knew Mr. Williams ordered the attachment to be put upon the saw; that his reasons for thinking so are that he saw Mr. Williams explaining to Mr. Rudolph, but was not able to understand what he was saying, but that Rudolph told him "that Mr. Williams wanted to get the saw fixed so that it would cut both ways, and he said Mr. Williams wants to take a patent on that;" that this was about July, 1886; that when the attachment was taken off "Mr. Williams came up and told us to take it off;" that when it was put on "Mr. Williams told us to put it on again," and that nobody but Mr. Williams "gave any orders about putting on or taking off the attachment" in his presence; that Rudolph told him that Williams had shown him drawings for the attachment, and that Rudolph never told him that he showed Williams how to make and put on the attachment.

William Murphy, formerly in the employ of Williams, testifies that he made acquaintance with Rudolph on the evening when the latter took charge of Mr. Williams' boiler and engine; that from that time to the present he had seen him frequently; that he had several conversations with Rudolph concerning the feed attachment in his engine room, and that Rudolph always gave him "to understand that it was Mr. George N. Williams that first proposed the altering of the saws to cut both ways."

This body of testimony on behalf of Williams is in a broad way consistent, seems to be truthful, and is fitted to discharge the burden of proof which rests upon him, unless Rudolph shall establish an earlier date by testimony equally weighty and credible.

Rudolph testifies that he conceived the invention on October 26, 1879, while on a visit which he made with the witness Zetsche to a stone yard in Mott Haven; that while there he saw a diamond saw in operation and noticed that it was cutting only in one direction; that he saw it would be a simple matter to make it cut both ways; that he "made a little sketch and explained it to Zetsche which way that saw could be made to cut backward also forward from both ends;" that this sketch was not preserved; that to accomplish this result he intended to put "an extension in the 'rocker arm' which had been placed on the machine and put another lever to the feed shaft where I would have placed another ratchet;" that he would take the "lift" off the machine and run the saw without it; that where a double ratchet was put on the machine the lift would be of no use; that he fixes the date of his visit to the Mott Haven stone yard by his shipping on that date, October 26, 1879, his furniture to Peekskill, and introduces in evidence a duplicate receipt, dated October 26, 1879, from the captain of the steamer which had transported his furniture to Peekskill. He testifies that the sketches he showed Zetsche on this date were for a double ratchet motion for a diamond saw, and were rough sketches made at the time with lead pencil, and that Zetsche understood the invention. On cross-examination, however, he states that he does not think that Zetsche perfectly understood the invention at the time he says he described it to him in 1879.

Adolph Zetsche, who is a machinist, swears that he went into the Mott Haven stone yard with Rudolph on October 26, 1879; he fixes the date because it was his birthday; that when they were coming out of the yard Rudolph told him that "by putting on another arm and ratchet he could make the saw feed both ways; he described a little of it there, but not much, and I did not take much notice of it;" and in answer to the question, "On this

occasion you have just referred to, did Mr. Rudolph make any sketches to illustrate or explain his idea?" he says, "He made a little of it; but mostly I suppose I forgot."

This is the evidence upon which rests the so-called "conception of 1879." Even if Zetsche's testimony is to be credited it is not clear that he derived from Rudolph any conception of the method to be employed for securing the desiderated result. In a fair sense it may be said that Rudolph's conception in 1879 of the subject-matter in issue rests upon his uncorroborated testimony, which certainly is not a sufficient basis for a decision in his favor upon that question, unless such testimony is absolutely unimpeached and unaccompanied by circumstances tending to impair its credibility. Unfortunately for Mr. Rudolph it appears that October 26, 1879, fell on Sunday; that the stone yard was not open on Sundays, and that there was no diamond saw there at all at that time. In rebuttal Rudolph says that he was in error as to the day of his visit to the stone-yard, and that it should have been October 28, 1879; but, this explanation involves a conflict between his testimony and Zetsche's, who distinctly says that the event took place on October 26, 1879, because it was his birthday. Zetsche was not called in rebuttal. It is impossible to find from this testimony that Rudolph conceived the invention in 1879.

Rudolph went into the employ of R. A. & G. N. Williams, Jr. (the latter partner being the other party to this interference), on May 17, 1886, to act as engineer and oversee the machinery in their stone yard. He says that on the day of his being employed he looked over the machinery and remembered when he first thought of the improvement in 1879. On cross-examination, however, he testifies that he had forgotten all about the invention until his recollection was revived on getting his situation at Williams' yard. He says also that he told Zetsche at that time that he would now go to work to try his invention, if Mr. Williams would give him permission, and also that he told his family; that he made more sketches of the invention at Zetsche's home on the evening of May 17, 1886, and told him (Zetsche) that he would let him do the work for him whenever he got the privilege to put the invention on the saw.

Zetsche states that Rudolph reminded him of his invention on the same day that he got the job, and said that he had got a good show to put it on if the boss would let him; that a sketch was made by Rudolph and shown him, and that he guesses this sketch was thrown away. Rudolph testifies to other sketches made in June or the beginning of July, 1886, in the presence of his wife and daughter, and that these sketches were not preserved.

Adele Rudolph testifies that her father said on the day that he took his position in Williams' stone yard, that the saw cut only one way and that he knew how he could make it cut in both directions, doing double the work in the same time, and that her father made some sketches at home in the evening, right after Decoration day.

The trouble with this testimony is that it is indefinite, and, it must be added, unreliable. No sketches are produced in evidence, nor is there any description by any witness clearly showing that Rudolph conceived, not only the result to be accomplished, but the method of its accomplishment. If Rudolph considered himself the inventor, and if the reduction to practice under the direction of Williams was a reduction to practice of ideas previously thought out by Rudolph, it is very strange indeed that the witness Muller, who had charge of the diamond saw that was altered, should have been told by Rudolph himself that Mr. Williams wanted to get that saw fixed so that it would cut both ways, and that Mr. Williams was to get a patent upon it, without asserting himself any claim whatever to the invention.

It is true that Peterson testifies that about June 11, or 12, 1886, Rudolph explained to him that the saw at that time cut on only one stroke, and that he thought he could make it cut on both strokes, and that Rudolph said he was going to take out a patent on it. Peterson fixes the date by a letter from one James Callery which he says he received at that time. This letter referred to private business solely, and Peterson admits that Rudolph called frequently upon him before and after June, 1886, and that he received numerous other letters from this same James Callery. Cross-question 41 and

its answer are as follows: "Can you swear positively that in one of his later visits to you, in 1886, Mr. Rudolph did not call at the same time that you received a letter from Mr. Callery? A. I can't swear positively, but he may have been there on the same day when I received a letter from Mr. Callery, but I don't remember that he was."

It should be added that none of the witnesses for Rudolph speak of the removal of the lift as part of Rudolph's conception and sketches, and that feature, as has been seen, is an essential part of the method of the issue. Williams' conception, which is proven to have been in July, 1886, included the removal of the lift, as well as the alteration in the ratchet mechanism.

Rudolph's testimony as to the reduction to practice is diametrically opposite to that of Williams. He says that he was first to remove the lift, and communicated the invention to Williams. Williams testifies that he communicated the invention to Rudolph, and instructed Rudolph to remove the lift and do the mechanical work to make the alteration. It is difficult to conceive of a more direct conflict of testimony. As has been seen, however, Williams' testimony as to the reduction to practice is substantially corroborated, and I am compelled to accept it as in the main correct. This involves the rejection of the testimony of Rudolph as to a matter where he clearly could not have been mistaken. A familiar rule requires that little if any weight should be attached to the balance of his testimony where it is coincident with the dictates of self-interest.

There are several other items of evidence to which I do not deem it necessary to advert in detail. I have examined the decision of the examiners in chief with reference to them, and concur with the conclusions with respect to such testimony reached in that opinion. And I concur also in the general conclusion of the examiners in chief that Williams is the real inventor of the method disclosed in the issue, and that the testimony, so far as it tends to the opposite result, is not to be credited.

The decision of the examiners in chief is affirmed.

James C. Chapin, for complainants.

Walter S. Poor, for defendants.

COXE, District Judge. It is argued by the defendants that a court of equity should not, under the provisions of section 4915, award a patent to a party who has litigated the question of priority of invention through all stages of the patent office, and been defeated, simply because the court, if the question had been originally presented to it, would have reached a different conclusion. It is insisted that something more than the ordinary quantum of evidence is required of a complainant who seeks to secure a decree, upon a simple question of fact, at variance with the deliberately expressed judgment of the patent office officials, and, it is suggested, that the action must proceed upon the same lines as though it were a bill filed to set aside a judgment at law. There is certainly force in these propositions,¹ but it is unnecessary to discuss them for the reason that, upon the record now presented, the court is of the opinion that the weight of evidence sustains the contention of the defendants. There is too much of suspicion, improbability and contradiction surrounding the complainants' evidence to justify the court in giving it credence.

The evidence here is substantially what it was in the interference proceedings, and as the salient points have been clearly stated in the three opinions there rendered it is unnecessary to recapitu-

¹ Note. See *Morgan v. Daniels*, 153 U. S. 120, 14 Sup. Ct. 772.

late them here. The reasons for the decision in Williams' favor are found at length in the opinion of the commissioner. They cannot be stated with greater cogency. I agree with him.

The bill is dismissed.

NEW YORK FILTER CO. v. O. H. JEWELL FILTER CO. et al.

(Circuit Court, S. D. New York. July 7, 1894.)

PATENTS—SUITS FOR INFRINGEMENT—REHEARING—NEWLY-DISCOVERED EVIDENCE.

After a decision directing an interlocutory decree for an injunction against the defendants, they cannot be allowed to amend their answer and take new proofs as to anticipations of the patent sued on, without proof of their previous diligence in preparing their case. The expression by their solicitor, in oral argument, of his belief on the subject, is insufficient.

This was a suit by the New York Filter Company against the O. H. Jewell Filter Company and others for infringement of a patent. A decree for complainant was granted directing an injunction and an accounting. 61 Fed. 840. Defendants moved for leave to amend and to take new proofs.

M. H. Phelps, for complainant.

Lysander Hill, for defendants.

SHIPMAN, Circuit Judge. This is a motion by the defendants for leave to amend their answer, and for an order that the taking of testimony be reopened, with leave to the defendants to take evidence respecting the anticipations of the patented process which are referred to in the affidavits accompanying the motion. The bill of complaint was based upon the alleged infringement by the defendants of the patent to Isaiah Smith Hyatt, applied for September 20, 1883, and granted February 19, 1884. In June, 1888, a bill in equity for an infringement of this patent was brought by the Hyatt Pure Water Company against the Jewell Pure Water Company, the predecessors of the defendants, in the circuit court for the northern district of Illinois, and, after some testimony was taken, was discontinued, at the request of the complainant, in February, 1889. The bill in this case was brought March 1, 1893, and was amended July 8, 1893, by making the O. H. Jewell Filter Company a defendant. The testimony was closed January 19, 1894. The case was argued March 1, 1894, and the decision, directing an interlocutory decree for an injunction, was filed June 9, 1894. 61 Fed. 840.

The affidavit of Benjamin T. Loomis, a dealer in filters in Baltimore since 1880, says that in the summer of 1882 he invented an improved device for feeding alum in minute quantities into the water which enters the filter, and that in December, 1882, he attached the device to one of his filters, and used it successfully at his place of business in Baltimore for the purification of water used in his shop for drinking purposes, and that in filling orders after December, 1882, when purchasers required this method of purification, he has sold "a considerable number of filters, combined with his

alum solution feeding device," and has had them in his stock. This affidavit is the only one of importance upon this motion. The New Orleans affidavits are, in my opinion, unimportant. The information which they contain is unsubstantial in its character. The defendants gave no affidavits respecting the amount of diligence which they, or either of them, had used in the preparation of their case, or as to any difficulty in obtaining testimony, and furnished no facts showing the reason why this alleged anticipation in the city of Baltimore, by a filter manufacturer of long standing, was not sooner discovered. During the progress of the litigation the complainant had endeavored to make its existence widely known by letters to dealers in filters and advertisements in trade newspapers. The requisites which must appear in the petition for a rehearing of a bill in equity for the infringement of a patent, after a decision upon "final hearing," and before or after a decree for an interlocutory injunction, but before final decree, and which must be found to have existed, are stated in *Reeves v. Bridge Co.*, 2 Ban. & A. 258, Fed. Cas. No. 11,661, and in *Page v. Telegraph Co.*, 18 Blatchf. 122, 2 Fed. 330. The facts in the latter case were that, after a decision had been filed which sustained the validity of the patent sued on, and before the entry of the usual interlocutory decree, the defendant presented a petition, signed and verified only by its solicitor, for the taking of further proofs of newly-discovered anticipations, and for a rehearing upon such new proofs. A demurrer to the petition was sustained upon the ground that it did not show that the defendant "could not, with reasonable diligence, have obtained, prior to the former hearing, the testimony which it now seeks to adduce." Judge Blatchford says in his opinion:

"There is no oath of any officer of the corporation, or of any person who searched for evidence, or anything to show what search was made, or what knowledge or information was had or not had, or what diligence was in fact used, so that the court can judge whether such diligence was due or reasonable."

So in the *Reeves Case*, Judge McKennan says:

"It is incumbent on the defendants to satisfy the court that the omission to produce the evidence which they now seek to make available, before the former hearing of the cause, is not due to any negligence on their part, but that they made diligent efforts to discover and obtain it."

In this case the defendants have said nothing. Their solicitor, in oral argument, has expressed his belief on the subject; but, as pointed out in the *Page Case*, such expression is insufficient. There is in the record an entire absence of the foundation upon which a decree to open the cause can be based. That foundation is proof of the defendants' previous diligence. The case is simply this: The defendants want to amend their answer, take new proofs, and have a new hearing, because they have, in their opinion, ascertained that there is new and reliable evidence of a use of the patented process before the date of its alleged invention by the patentee, and the court is asked to open the case, simply because such evidence can be obtained, no reason being given why it was not obtained in time. The motion is denied.

GROSVENOR, et al. v. DASHIELL.

(Circuit Court, D. Maryland. July 10, 1894.)

1. PATENTS—EXTENT OF CLAIM—BREECH-LOADING CANNON.

In the Seabury patent, No. 425,584, for an improvement in breech-loading cannon, claim 1,—for the combination, with such a cannon, and a breech block therefor, which is withdrawn in a rearward direction, of a breech-block carrier hinged to the breech, and a breech-block retractor hinged to the breech, separate from the carrier, to move independently of the carrier, to draw the breech block thereinto and push it therefrom, but capable of moving with the carrier,—although broad, is sustainable when read in connection with the specification, which accurately describes the device, and states the result to be accomplished, namely, to effect all the necessary movements by a continuous movement of a single lever.

2. SAME—PRIOR STATE OF ART.

The claim is not defeated, nor is its construction limited, by the English patent to Nordenfelt, No. 7,195, of February 16, 1888, as the device described therein appears not to be operative, and, though it embodies an attempt to effect all the movements by the continuous swing of a hand lever, does not solve the problem, and lacks the retractor separate from and moving independently of the carrier.

3. SAME—INFRINGEMENT.

The claim is infringed by the use, without the consent of the patentee, of the device described in the Dashiell patent, No. 468,331, which accomplishes the same result by a combination of the same elements, the mechanism being substantially the same, although varied in form, to render it simpler and more compact.

4. SAME—ACTION FOR INFRINGEMENT—DEFENSES.

Although devices described in a patent to an officer of the navy are being made for the United States, and in its shops, a suit against such officer to restrain their making and use, as infringing a prior patent, is not objectionable, as in effect an attempt to enjoin the United States, where such manufacture is by authority and direction of the defendant, and under a contract with him by which he is paid a certain sum for each article made.

5. SAME—PLEADING AND PROOF.

Failure, in such a suit, to sustain by proof charges in the bill imputing bad faith to officers of the United States, does not preclude relief on the ground of infringement unattended with fraudulent acts.

This was a suit by James S. M. Grosvenor, Samuel Seabury, and others, against Robert B. Dashiell, for infringement of a patent.

Wilson & Wallis and Wm. A. Jenner, for complainants.

S. F. Phillips, F. D. McKenney, Ernest Wilkinson, and John T. Ensor, for defendant.

MORRIS, District Judge. The complainants are the owners of United States patent No. 425,584, dated April 15, 1890, upon application filed July 19, 1889, granted to Samuel Seabury, a lieutenant in the United States navy, for an improvement in breech-loading cannon. The defendant is an ensign in the United States navy, and is the patentee of a similar device by letters patent No. 468,331, dated February 9, 1892, upon application filed November 4, 1890.

In Seabury's specification, he states:

"This improvement relates to breech-loading cannon in which a screw breech block, which is withdrawn in a rearwardly direction, is employed with a swinging carrier or receiver, hinging to one side of the breech of the gun, and

into which the breech block is withdrawn, and which serves as a guide for directing the breech block into and from its seat in the breech, and as a support for the breech block while out of the gun. In such a gun there are three movements necessary to open the breech, namely—First, the turning of the breech block to unlock it; second, the withdrawal of the breech block backward into the receiver; and, third, the swinging aside of the receiver with the breech block in it. * * * The object of this improvement is to provide for the more rapid working, loading, and firing of such breech-loading cannon by effecting all these movements in succession by a continuous movement of a single lever."

Seabury then proceeds, by reference to nine drawings, to fully describe the device patented by him.

The first claim, which is the claim charged to have been infringed by the defendant, reads:

"(1) The combination, with a breech-loading cannon and a breech block for the same, which is withdrawn in a rearward direction, of a breech-block carrier hinged to the breech, and a breech-block retractor hinged to the breech, separate from said carrier, to move independently of such carrier, to draw the breech-block thereinto and push it therefrom, but capable of moving with said carrier while the breech block is therein, substantially as herein set forth."

This claim is a broad one, and quite possibly, taken in its largest sense, it might not be sustainable; but it is to be read in connection with the specifications of the patent, which accurately describe the device, and state the result to be accomplished, namely, to effect all the necessary movements by the continuous action of a single lever operated by hand. Read in connection with the specification, the claim points out with clearness the combination which the patentee claims as his invention, and he is entitled to a fair and reasonable construction of his claim, since there has not been put in evidence any publication or United States patent or device in prior use which limits its construction. It is to be noticed that the claim does not include the mechanism by which the breech block is rotated in order to release it from the screw threads, but is only for the combination of the cannon, the breech block, the retractor, and the carrier; the retractor and the carrier to be hinged to the cannon, and the retractor being capable of moving independently of the carrier, but also capable of moving with the carrier when the block is resting on the carrier.

The patent principally relied upon to defeat the novelty of Seabury's claim, or limit its construction, is the English patent to Thorsden Nordenfelt, No. 7,195, of February 16, 1888. A full-size model, made after the drawings and description contained in this patent, has been produced by the defendant, and, if the model is to be taken as correctly exhibiting the device, it is not an operative machine. It appears to have inherent difficulties in the adjustment of the retractor and the carrier, which, even if defects in the construction of the present model were remedied, would seem to stand in the way of its being useful as a piece of ordnance to be rapidly fired under excitement. It does embody an attempt to solve the problem of how, by a continuous swing of a hand lever, the breach block can be quickly withdrawn and turned aside, and, after the cartridge has been inserted, can, by reversing the lever, be returned to its place; but it does not solve that problem, and, moreover, it

lacks one essential of Seabury's claim, namely, the retractor is not separate from the carrier, and does not move independently of the carrier. The difficulty of operating the model seems to arise from the dependence of the retractor and carrier on each other, and because the retractor is not separate from the carrier, and from the extremely nice adjustment required in the mechanism designed to move one without interfering with or obstructing the other, the two not being independent and separate.

It would be useless to attempt, without models or drawings, to discuss the different patents which have been put in evidence as defeating or limiting Seabury's first claim. The result of my examination of them is that they do not avail to deprive Seabury of the presumption, which his patent gives him, that he is the first inventor of the device described by him, containing the combination covered by his first claim. The claim corresponds with the specification, and is intelligible, and is for the elements of the combination which was the real invention; and, when read in connection with the specifications, discloses the operative means which Seabury had combined for producing the result intended.

Seabury's patent was granted to him April 15, 1890, and in May he took a working model, somewhat simplified in its mechanism, to the bureau of ordnance of the navy department, at Washington, and exhibited it to the chief of that bureau, and was requested to forward proper drawings from which a four-inch gun could be made for trial, if it should be thought desirable by that department to test it. There was also published, May 24, 1890, in the Scientific American, a very full description of Seabury's invention, with a number of illustrations exhibiting it in several modified forms.

The defendant had, prior to 1890, given his attention to devices for improving the breech mechanism of rapid-firing cannon, and in June, 1890, he was attached to the bureau of ordnance as an assistant. In September, 1890, he was assigned to duty at the proving grounds at Indian Head, in Maryland. Some improved breech mechanism was immediately desired for guns about to be manufactured for new ships, and the defendant was urged by his chief to give his special attention to this subject. He informed himself fully of all that had been accomplished by others, and procured a copy of Seabury's patent as soon as it was published in the patent office Official Gazette. He was encouraged by the chief of the bureau to exert himself to produce a mechanism which should be simpler than Seabury's, and in August or September he had been able to complete a model which met with the approbation of his chief, who ordered it to be tested. The defendant filed his application for a patent for the device exhibited in this model on November 4, 1890, and a patent was granted to him February 9, 1892. After the filing of defendant's application for a patent, his device having been tested and approved, a large number of guns were made by the ordnance bureau of the navy, containing his device. These guns were made under an arrangement with defendant that, for the use of his device, he should receive a royalty of \$125 for each gun.

The defendant's device is alleged to be an infringement of the

first claim of Seabury's patent. It may be said to be substantially admitted by the defendant's expert witnesses that, if Seabury's first claim is not construed narrowly, then the defendant's device must be held to be an infringement, because it does accomplish the withdrawal and turning aside of the breech block by means of the combination of a retractor and a carrier, both hinged to the cannon, and moving independently of each other, and also capable of moving together when turning the breech block aside. The mechanism is substantially the same as that used by Seabury, although varied in form, to render it simpler and more compact. The method of hinging the retractor to the cannon is different in form from Seabury's, but I take it to be the same in operation and effect. In the defendant's mechanism, the lever, while operating the rotating rack, turns upon a pin which passes through the retractor, through the lever, and through a projection from the carrier, and the same pin holds the retractor in place. This pin, at the first glance, has the appearance of being the fulcrum on which the retractor hinges; but, as I understand the mechanism, it is not really so, for the retractor does not begin to draw out the breech plug until after the rotating is finished, and then the retractor does not turn on the pin, but is hinged against the breech of the cannon, and turns on that fulcrum, the pin only serving to attach the lever to the retractor, and not being at all the hinge upon which the retractor turns. I think, therefore, it is fairly to be concluded that, in the defendant's mechanism, the retractor is hinged to the breech of the cannon. It may well be that the defendant's device is an improvement upon Seabury's, which required invention to contrive, and that, as an improvement, it was patentable; but, since it uses the combination of elements contained in Seabury's first claim, it must be held to be an invention which is subordinate to Seabury's patent, and, therefore, if used without his consent, an infringement.

Among other defenses, it is contended that this proceeding is in effect an attempt to enjoin the United States, as it is for the United States, and in its shops, that these guns and breech-loading devices are being made. The testimony shows, however, that the manufacture is by authority and direction of the defendant, and under a contract with him by which he is to be paid \$125 for each gun. So far as he is concerned, he is not acting in this connection as an officer of the navy, but as a patentee. He assumes that his own patent gives him the right to do so, and as a patentee he is authorizing and protecting the agents of the government in making and using a device which is an infringement of the Seabury patent. The government cannot itself lawfully use a patented invention without permission of the patentee, and any one who procures such an act to be done, or adopts or accepts its benefits when done, is guilty of an infringement. 3 Rob. Pat. § 897; Id. § 910; *James v. Campbell*, 104 U. S. 357.

It is also urged that complainants are not entitled to relief, because of their charges in the bill imputing bad faith to certain officers of the ordnance bureau, and that, having failed to sustain

these charges by proof, they are not to be allowed to claim relief upon the ground of an infringement unattended with fraudulent acts. I cannot agree with this contention. The complainants having established the validity of the Seabury patent, and the fact of infringement by the defendant, they are entitled, in a court of equity, to be protected by injunction against the continuance of the infringement. It is the right to this relief which gives the complainants their standing in court, and they have it without regard to whether the infringement has been a mistake or in bad faith.

SCHUYLER ELECTRIC CO. v. ELECTRICAL ENGINEERING & SUPPLY CO.

(Circuit Court, N. D. New York. March 16, 1894.)

PATENTS—LIMITATION OF CLAIM—ELECTRIC LIGHT SWITCHES.

In the Perkins patent, No. 247,103, for a circuit breaker for electric lamps, claim 1, for the combination, in an electric light switch, of a ratchet having metallic projections and insulating teeth between them, and a pawl or detent for engaging with the insulating teeth when released from contact with the metallic projections, is so limited by the prior state of the art and its own language that it does not cover switches made under the Crowell patent, No. 436,122, whose only points of resemblance are that they are snap switches, and cannot be turned backward, those features having been open alike to both inventors.

This was a suit by the Schuyler Electric Company against the Electrical Engineering & Supply Company for infringement of a patent.

C. L. Buckingham, for complainant.
Alfred Wilkinson, for defendant.

COXE, District Judge. This is an infringement suit based upon letters patent, No. 247,103, granted September 13, 1881, to Charles G. Perkins for a circuit breaker for electric lamps. The inventor says:

"My invention relates to improvements in that class of switches for incandescent electric lamps in which the break is effected by the snap or instantaneous reaction of a spring when released from contact with a conducting point or plate; and it consists in mechanical details for effecting this, the principal features of which are a ratchet wheel having both conducting and insulating teeth combined in operative relation with a spring pawl or detent, which acts as a contact maker with the conducting portions of the ratchet, and by engagement with the insulating teeth prevents the ratchet from being turned backward when the pawl has been released from contact with the said metallic portions."

After describing the mechanism as shown in the drawings he proceeds:

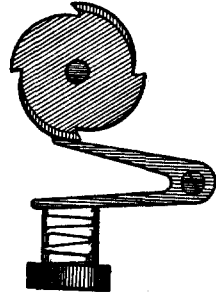
"The principal advantages secured by the constructions above described are, first, that the circuit cannot be completed by turning the key backward, so that when the circuit is broken it must be accomplished by an instantaneous snap or reaction of the spring pawl as it leaves the conducting portion of the ratchet; secondly, that the contact spring cannot be injured by the attempts of incautious persons to turn the key backward, as might be the case with the

lamps now in use; thirdly, good conducting metals which do not possess the requisite resistance for contact springs may be employed with a spiral spring of steel or similar metal; and, finally, the arrangement of the parts is compact and durable."

The accompanying diagram, enlarged somewhat from the drawing of the patent, will serve to illustrate the invention:

The first claim only is involved. It is as follows:

"(1) The combination, in an electric light switch, of a ratchet having metallic projections and insulating teeth in the intervals between the same and a pawl or detent for engaging with the insulating teeth when released from contact with the metallic projections, as and for the purpose specified."



It will not be pretended that the invention is a fundamental one. If there were nothing else in the case the language just quoted would preclude such an idea. The inventor concedes that his invention consists only in mechanical details for effecting improvements in circuit breakers. The device of the patent is an ingenious little contrivance for opening and closing an incandescent electric lamp circuit. It is shown as located in a lamp socket. Such an invention in any other art would probably be entitled to little consideration, but when the courts have to deal with patents relating to electricity they are apt to regard with superstitious awe the smallest contrivance by which that mysterious force is harnessed and set to work. Although this view of the subject may be correct in many instances it is thought that it is hardly applicable to the case at bar. Snap-action circuit breakers, used in connection with alternating insulating and conducting material, were old. So were switches having a wiping contact and a turn in one direction only. This being so, it certainly did not require a profound knowledge of electrical science to produce the patented structure.

In 1871 Gilliland obtained a patent for certain improvements in dial telegraphs in which he describes a disk having marginal notches and intermediate smooth portions which serve, in connection with a spring conductor, alternately to make and break the circuit. When the spring snaps off from a conducting tooth it rests in an insulating notch and the circuit is broken. Backward movement is prevented by a pawl bearing against a collar. The mechanical construction is, of course, different, but the principle is the same as in the Perkins patent.

The patents to Guest, Rogers and Floyd show different means of accomplishing the same result, viz., the quick making and breaking of an electric circuit.

It is perfectly clear, therefore, that the Perkins patent does not cover all snap-action circuit breakers and that it is confined both by the prior art and its own language to the device described. At least it is clear that it cannot be expanded to cover devices differing in size, shape, material, situation, mode of operation and object to be attained; devices whose only points of resemblance are features open alike to defendant and complainant.

The defendant's switches are made under letters patent No. 436,122, granted September 9, 1890, to Howard H. Crowell. They are snap switches it is true, and they cannot be turned backward, but in other respects they are much nearer several structures found in the prior art than to the Perkins switch. They are mounted on a large stationary china base, three inches in diameter, and are intended to be screwed on a wall or other support. They cannot be used in a lamp socket. Neither of the defendant's switches has a ratchet wheel and No. 2 has no insulating teeth or any equivalent therefor. Neither has "a pawl or detent" unless a very broad construction is given to these words. Both belong to a different type of switch from the patented switch.

The court cannot avoid the conclusion that it would be doing injustice to the defendant and others to give the Perkins patent a construction so broad as to suppress improvements like those embodied in the Crowell switches.

The bill is dismissed.

LAMPREY BOILER FURNACE MOUTH PROTECTOR CO. v. ECONOMY FEED WATER HEATER CO.

(Circuit Court, D. New Hampshire. June 25, 1894.)

No. 256.

1. PATENTS—NOVELTY—STRUCTURE FOR CIRCULATION OF WATER ABOUT FURNACE MOUTHS.

In the Lamprey and Bugbee patent, No. 421,588, for an improvement on their patent No. 388,367, for a structure to prevent by circulation of water the burning out of furnace mouths, the improvement covered by claims 1 and 2, consisting of the combination, with the appliance for circulation of water set forth in the earlier patent, of a steam dome connecting therewith, and pipes affording communication with the boiler, which averts the difficulty arising from the steam generated by allowing the steam to collect in the dome and pass from it into the boiler, involves patentable novelty, and was not anticipated by the Sloane patent of May 16, 1882, although that patent involved the same principle and accomplished the same results, nor by other devices previously known.

2. SAME—INFRINGEMENT.

As the structure for the circulation of water described in the patent may be a hollow shell or other contrivance as well as pipes, an M-shaped shell structure for the channels of circulation, combined with the steam dome device, although called a "steam drum," is an infringement.

3. SAME—DELAY IN PAYMENT OF PATENT-OFFICE FEE.

A patent regular on its face is not subject to collateral attack because the patent-office fee was not paid within the time prescribed by Rev. St. U. S. § 4897.

This was a suit by the Lamprey Boiler Furnace Mouth Protector Company against the Economy Feed Water Heater Company for infringement of a patent.

Stephen S. Jewett and Newell & Jennings, for complainant.

H. W. Boardman and F. C. Somos, for defendant.

ALDRICH, District Judge. The complainant claims protection for a structure designed for use in connection with various kinds

of furnaces which must be highly heated. The structure is of iron, and may be so placed as to sustain the mouth of the furnace; but the main purpose is to arrange about the highly-heated parts a successful circulation of water, in order that the troublesome burning out of the furnace mouth may be averted. For a considerable number of years various devices employing water for such purpose have been in operation, but, generally speaking, with unsatisfactory results. In 1888, B. B. Lamprey and A. C. Bugbee procured letters patent (numbered 388,367), in which they claimed an invention consisting of the combination with a furnace and its mouth, a series of pipes extending along the opposite sides and over the top of the mouth of the furnace, with inlet pipes for the supply of water, and outlet pipes for the escape of the heated water and steam, and all so arranged and connected as to brace or support the brickwork, around the mouth thereof. It is claimed that experience with this device disclosed defects of a serious character, so serious as to render the appliance of little or no value. It would seem that the failure resulted from the fact that there was no provision for steam generating in the lining or pipes as the water was passing there-through, and, as a consequence, the steam rising to the highest point in the pipes became superheated, and forced the water back into the boiler, thus leaving the pipes, and furnace mouth as well, exposed to the highly heated and dangerous conditions which the structure was intended to avert. In February, 1890, Lamprey and Bugbee procured a patent, based upon what was claimed to be an improvement on their earlier patent, and which relieved the difficulty to which I have referred. This alleged improvement and invention, which the complainant owns, and on which it now relies, is covered by the first and second claims in letters patent numbered 421,588, dated February 18, 1890, and consists of an appliance to the furnace mouth linings, constructed and arranged for the circulation of water, substantially as set forth in their earlier patent, combined with a steam dome connecting with the lining, a pipe affording means of communication between the steam dome and boiler, and another pipe affording communication between the boiler and lining; but the material and important device is the steam dome, which is designed to be located at a high point, and where the vertical and horizontal pipes unite, and above the line of the pipes through which the water circulates. In other words, it is a space above the header or manifold (the contrivance used in the ordinary steam radiator), into which the steam generated in the pipes may collect, and from which it may pass, together with superheated water, into the boiler. My conclusion is that this device is new, and an improvement upon any device known prior to the patent in suit. It is proper, however, that I should state that I have not been free from doubt as to the proposition urged by the defendant, that the Sloane patent of May 16, 1882, which provides for a drum in connection with its pipes, contemplates a device involving the same principle and accomplishing the same results as the one involved in the patent on which the complainant relies. But, after more careful examination, I have come to the view that the com-

plainant's improvement was not anticipated by the Sloane patent, and that the steam-dome device, as combined with the structure contemplated by the earlier patent of Lamprey and Bugbee, involves patentable novelty, and is of practical utility. The evidence satisfies me that in the old structure, under certain conditions, the circulation of water was retarded by steam generated at the highly-heated points, and that the water was sometimes forced from the pipes, leaving them exposed, thus rendering the appliance worse than useless in respect to the purpose for which it was designed. It would seem that the steam dome or space above the ordinary water line in the pipes, and above the manifold or header, averts the danger, and relieves the difficulty described, and that a combination results therefrom which accomplishes the purpose intended,—that of protecting the furnace mouth by an uninterrupted and continuous flow of water. For these reasons I must sustain the patent.

I should perhaps state my view as to certain positions taken by the defense upon the record and argument. One position is that there is no invention or novelty in the patent under consideration, and a large number of prior patents were introduced, which it is claimed involve all the ideas embraced in the patent in suit; and to sustain this view one McDanniell was called as a witness, who, after testifying as to the state of the art, details a conversation with Lamprey, one of the patentees, during a journey from Bristol in November, 1888, in which the same idea was discussed, not as anything new or novel, but as a known device, which might be applied to the original Lamprey and Bugbee patent. The same witness also says that he subsequently made a rough draft, and submitted it to Lamprey and Bugbee in the presence of one Covell, illustrating the known device, and the manner in which it could be applied to the old Lamprey and Bugbee structure. Lamprey, Bugbee, and Covell all deny that any such conversation took place, thus putting in issue a question which it is always uncomfortable to decide. But, in view of the situation, aided somewhat by the fact that McDanniell subsequently applied for a patent providing for a structure for the protection of furnace mouths with drums at the top or ends of the water legs and over its middle leg, into which steam formed in the channels of the heater might rise, and thence pass through pipes connecting such drums with the steam space of the boiler, I must find that McDanniell did not understand such device was old in 1888, and that the defendant's position as to the conversation is not sustained.

The defense further contended that the patent in suit was invalid for the reason that the patent-office fee was not paid within the time provided by section 4897 of the Revised Statutes. It is not understood that this objection is open to the defense in a proceeding of this character, and I therefore dispose of this point on the ground that patents regular on their face are not the subject of collateral attack.

Defendant also contended that it was entitled to protection for the structure which they had manufactured and put in operation

under the McDanniell patent of April 11, 1893; that their structure is an improvement upon anything previously in use, and that it involves patentable novelty. The defendant's manner of putting the water in circulation is different in this respect: The channels of circulation are created by an M-shaped shell structure, but the principle is the same, and the structure involves the steam-dome idea, which is the essential feature of the later patent to Lamprey and Bugbee; and, inasmuch as the Lamprey and Bugbee patent provides for and describes a structure, which may be "a hollow shell or other contrivance" as well as pipes, the defendant's M-shaped shell structure, combined with the steam-dome idea, must be treated as a violation of the rights of the complainant. The result reached is that the device or appliance employed for the collection and expansion of steam, and located at a point higher than the pipes or channels through which the water circulates, and whether called a "drum" or a "steam dome," is an infringement of the complainant's rights under its patent of February 18, 1890.

Decree for complainant for injunction in accordance with these views, and for an accounting according to the prayer of the bill.

KNIT GOODS PATENTS CO. v. SHUMAN et al.

(Circuit Court, D. Massachusetts. July 20, 1894.)

No. 3,157.

1. PATENTS—INFRINGEMENT—SHIRTS WITH FALSE OR SUPPLEMENTARY FRONTS.

A patent for an improvement in shirts, all the claims of which apply only to shirts which have a double or supplementary front, is not infringed by a shirt having a false front forming part of the shirt, giving the appearance, without the reality, of a double or supplementary front.

2. SAME.

The Barker patent, No. 253,256, for a shirt having a double or supplementary front, even if it covers a patentable invention, is not infringed by a device giving the appearance, merely, of such double front.

This was a suit by the Knit Goods Patents Company against A. Shuman and others for infringement of a patent.

Hey & Wilkinson, for complainant.

James A. Skilton, for defendants.

CARPENTER, District Judge. This is a bill in equity to enjoin an alleged infringement of letters patent No. 253,256, issued February 7, 1882, to Joseph G. Barker, for a Shirt. The specification and drawings show what seems to me the nearest approach to this invention which can be found in the art to which it relates. The patentee most clearly describes his invention as follows:

My invention is designed more especially for application to woollen shirts—such as are worn by bicyclers and other sportsmen—and is an improvement upon the shirt now in very general use among such men, and which is made to open in the center of its front, and is provided upon each side of said opening with a series of eyelet holes, through which a lacing cord of bright-colored silk is run, and tied in a bowknot at the throat, said shirt also being

provided with a pair of flaps upon the inner side of said front, extending from the lower end of the opening to a point some distance below the collar of the shirt, which flaps are buttoned together before the shirt is laced up. This makes a very pretty shirt front, and it is in great demand among the class of men who wear woollen shirts; but there is a serious objection to its use in the fact that a great deal of time is wasted in putting on and taking off the shirt, due to the fact that the lacing cord has to be withdrawn from the eyelets for the greater part of the length of the opening in the front before the shirt can be taken off, and, after the shirt is put on again, the lacing cord has to be passed through all of the eyelets from which it had previously been removed. To obviate this objection, and produce a shirt having all the good features of the old shirt, and that can be put on or taken off as readily as an ordinary shirt, is the object of my present invention; and it consists, first, in a shirt provided with a double front, arranged to be buttoned at one side of the center of said front, and with a lacing cord run through two series of eyelets, one upon each side of the central vertical line of said front, whereby the shirt has the appearance of having its front opening laced up, while at the same time the shirt may be put on or taken off without materially disturbing the lacing cord. It further consists in the application, to a shirt of ordinary construction, of a supplementary front, secured to said shirt at one side and along its bottom by sewing or stitching, and along its other vertical side by means of buttons and buttonholes, or other suitable separable fastenings, said front being provided with two narrow plaits or folds extending from top to bottom thereof, the free or movable edges of which are parallel with and in close proximity to each other, and on a line with the center of the shirt front, in combination with a series of eyelet holes formed in each of said plaits at equal distances from each other and from the edge of said plait, and a lacing cord passed alternately through an eyelet hole in one plait and then through an eyelet hole in the other plait or fold, so as to lace said plaits together, as will be described. It further consists in the combination, in a shirt, of a supplementary front, permanently secured to the shirt body along one of its vertical edges and along its bottom edge by sewing or otherwise, and detachably secured to said body along its other vertical edge by buttons and buttonholes, or other separable fastenings, a series of eyelet holes upon each side of and parallel with the vertical center line of said front, an eyelet formed in each end of the collar or collar band, and a lacing cord run through the eyelet holes in said front, alternately from one series to the other, from the bottom to the top, and having one of its ends passed through one of the eyelet holes in the collar, and the other end through the eyelet hole in the other end of the collar or collar band, and then tied in a bowknot, as will be further described.

The claims of the patent are as follows:

- (1) A shirt provided with a double or supplementary front, having a lacing cord run through two rows or series of eyelet holes arranged upon each side of the central vertical line of said front, and detachably secured to the body of the shirt along one of its vertical edges by buttons and buttonholes, or other separable fastenings, substantially as described.
- (2) In combination with a shirt of ordinary plain construction, a supplementary front permanently secured along its bottom and one vertical edge to the body of the shirt, and detachably secured along its other vertical edge by buttons and buttonholes, or other separable fastenings to said body, a pair of folds or plaits in the center of said front and extending from its top to a point near its bottom, a series of eyelet holes in each of said plaits, and a lacing cord run through said eyelet holes, substantially as and for the purposes described.
- (3) In combination with a shirt of ordinary plain construction, the supplementary front, D, provided with the folds or plaits, n n', and secured along one of its vertical edges to the body of the shirt by buttons and buttonholes, or other separable fastenings, the two series of eyelet holes, o o, formed in the folds n and n', the two eyelet holes, q and q', formed in the opposite ends of the collar or collar band, and the lacing-cord, p, all arranged and adapted to operate substantially as described.

Without pointing out the testimony to this effect, it is sufficient to say that all the elements of the combinations here claimed are old, unless it be that a new element may be found in the lacing, which, serving for the greater part of its length a purpose only ornamental, serves at the neck the purpose of holding in place the lower margin of the collar. I have not been able to find this exact structure in the evidence. It serves, however, only the purpose of fastening, and the part of the lacing cord so employed performs exactly the same function which was performed by the corresponding part of the lacing cord in the old shirt, which is described and shown in the patent. The invention, therefore, seems to me to consist in a device for doing away with the necessity for withdrawing more than one turn of the laces, such device consisting in putting the supplementary part on the outside, instead of on the inside, of the shirt, making the dependent or resulting change in the position of the buttons, and dropping or masking the fastening function of the lacing cord, except for one fold or turn at the neck, at which point the function survives.

This interpretation of the patent seems to me to be in close accordance with the statements of the patent itself, and also with the opinion of the expert called by the complainant, who testifies as follows:

Cross-Int. 13. Please state what separate, independent, and essential new elements you find in the Barker invention of the patent in suit. Ans. It is chiefly the employment of a supplementary front, secured along one of its vertical edges and across its bottom to the body of the shirt by rows of stitches, making a permanent attachment of said parts along said portions of the supplementary front; the opposite vertical edge of the supplementary front being detachably secured to the body by buttons and buttonholes, a lacing cord running through two rows of eyelet holes in the center of the supplementary front and through eyelet holes in the collar or collar band, and tied in a knot thereat. The advantages of this improved construction and combination of parts consist in the facility of putting the shirt on the person and removing it from the person without disturbing the lacing in the center of the supplementary front. Cross-Int. 14. My question called for the separate and independent elements, and not for the entire combination of such elements. Please answer the previous question so interpreted. Ans. The elements of the combination claimed in the Barker patent are not in themselves new, when broadly considered, or when considered separate and independent of each other. Cross-Int. 15. Do you mean to say that none of the elements in the Barker invention are in themselves novel? Ans. I do. It is the combination of these elements in a certain peculiar way which constitutes the Barker invention. Cross-Int. 16. Please state what you understand to be the characteristics in which the combination of these old elements shows invention. Ans. They are—Firstly, the peculiar attachment of the supplementary front to the body of the shirt, so as to dispense with the use of flaps, which were attached to the shirt back of the front, and were provided with buttons and buttonholes; secondly, the retention of the lacing cord in the supplementary front, so arranged as to require only the withdrawal or inserting of one end of the lacing cord through a single eyelet hole in the collar band, and leaving the lacing undisturbed in the operation of putting on and taking off the shirt. The characteristics mentioned in the question are the attachment of the supplementary front along one of its vertical edges and at its bottom to the body of the shirt by rows of stitches, and detachably connecting the opposite edge of the supplementary front by means of buttons and buttonholes, the lacing cord running through two vertical rows of eyelet holes in the supplementary front and through eyelet holes in the collar band,

and, as stated in my previous answer, it is these characteristics of the combination of the enumerated elements which constitute the invention of Barker.

Observing the language of this testimony, it is seen that the witness says that the peculiar attachment of the supplementary front to the body of the shirt dispenses with the use of flaps. It might be thought, from these words, that it is intended to say that nothing remains to perform the function of the flaps. But on examination of the drawings and of the words of the specification it appears that this is not his meaning. The supplementary front is attached to a "shirt of ordinary construction." Looking at the description and the drawings, it appears that these words are not to be taken with minute literalness. The shirt is not of ordinary construction in all respects. The buttons are not in the ordinary place. But the ordinary shirt remains in the invention so far that those parts of the front of the shirt which, in wearing, are concealed by the supplementary part, still remain, and serve the purpose of the inside flaps of the earlier form.

Still further, and in another view of this point, a reading of the whole case of the complainant makes it clear that the old function of the lacing cord, with its resulting inconvenience or inadequacy, is still, in part, retained in the invention. To remove the shirt, the lacing must be disturbed. The counsel for the complainant, in summing up the advantages of the invention, observes that the "lacing is disturbed but little at each operation, so that the wearer is put to little inconvenience, instead of to great trouble, in putting on the shirt." This is not, then, a patent in which the utility is so great as to lead the court to exhaust the force of established rules of construction.

The respondents' counsel argues that this specification discloses no patentable invention. He refers, in support of his argument, to the specification and drawings themselves; and, also, to the prior state of the art, in which I may say that I see nothing which can limit the field of invention further than it is limited by the disclosures of the patent itself, but in which it is easy to see, as I look at it, that the old shirt shown in the patent is but the last of a long series of developments extending in this as well as in various other directions. I have not, however, considered the arguments on either side of this question, because I am clear that the respondents have not infringed the patent. I therefore leave the question of patentable invention to be settled, if settled at all, in an action in which infringement shall be found.

Turning now to the alleged infringing device, I find it to be a blouse or shirt having a false front with a false lacing, the whole fastened throughout its whole surface to the shirt, or, as it might be otherwise described, the false front forming part of the shirt, and being illusive only in that it gives the appearance, without the reality, of a double or supplementary front. The lacing in this, as in the patented device, serves for most of its length little or no purpose except ornament, but the turn at the throat is passed through eyelet holes and tied, and thus serves to fasten the collar or neckband. The whole device, therefore, comes within the class of

shirts which appear to have, but do not have, a double front, and is therefore outside the claims of the patent in suit, all of which apply only to shirts which have a double or supplementary front.

The respondents therefore do not infringe, and the bill must be dismissed, with costs.

LITTLETON et al. v. OLIVER DITSON CO.

(Circuit Court, D. Massachusetts. August 1, 1894.)

No. 3,065.

COPYRIGHT—MUSICAL COMPOSITIONS—MANUFACTURE IN UNITED STATES.

The proviso in section 3 of the copyright act of March 3, 1891, that "in the case of a book, photograph, chromo, or lithograph," the two copies required to be delivered to the librarian of congress shall be manufactured in this country, does not include musical compositions published in book form, or made by lithographic process.

This was a suit by Alfred H. Littleton and others against the Oliver Ditson Company for infringement of copyrights.

Lauriston L. Scaife, for complainants.

Chauncey Smith and Linus M. Child, for defendant.

COLT, Circuit Judge. This case raises a new and important question under the copyright act of March 3, 1891 (26 Stat. 1106). The plaintiffs, subjects of Great Britain, and publishers of music, have copyrighted three musical compositions, two of which are in the form of sheet music, and one (a cantata) consists of some 90 pages of music bound together in book form, and with a paper cover. Two of these pieces were printed from electrotype plates, and one from stone by the lithographic process. The inquiry in this case is whether a musical composition is a book or lithograph within the meaning of the proviso in section 3 of the act, which declares that in the case of a "book, photograph, chromo, or lithograph" the two copies required to be deposited with the librarian of congress shall be manufactured in this country.

The act of March 3, 1891, is an amendment of the copyright law then existing. The principal change made is the extension of the privilege of copyright to foreigners by the removal of the restriction of citizenship or residence contained in the old law, and hence it is sometimes called the "International Copyright Act". Section 1 relates to the subject-matter of copyright, and declares that:

"The author, inventor, designer or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print, or photograph or negative thereof, or of a painting, drawing, chromo, statue, statuary, * * * shall, upon complying with the provisions of this chapter, have the sole liberty of printing, reprinting, publishing," etc.

Section 3 recites the conditions which must be complied with, and says:

"No person shall be entitled to a copyright unless he shall, on or before the day of publication in this or any foreign country, deliver at the office of the librarian of congress, or deposit in the mail within the United States, addressed to the librarian * * * a printed copy of the title of the book, map,

chart, dramatic or musical composition, engraving, cut, print, photograph, or chromo, or a description of the painting, drawing, statue, statuary. * * * for which he desires a copyright, nor unless he shall also, not later than the day of the publication thereof in this or any foreign country, deliver at the office of the librarian. * * * or deposit in the mail within the United States, addressed to the librarian * * * two copies of such copyright book, map, chart, dramatic or musical composition, engraving, chromo, cut, print, or photograph, or in case of a painting, drawing, statue, statuary, model, or design for a work of the fine arts, a photograph of same: provided, that in the case of a book, photograph, chromo, or lithograph, the two copies of the same required to be delivered or deposited as above shall be printed from type set within the limits of the United States, or from plates made therefrom, or from negatives, or drawings on stone made within the limits of the United States, or from transfers made therefrom."

From the language of these provisions it seems clear that "book" was not intended to include "musical composition". In the section which enumerates the things which may be copyrighted, "musical composition" is mentioned as something different from "book", and we find this same distinction twice observed in the preceding part of the section which contains the proviso. It is as reasonable to suppose that "book" and "musical composition" were as much intended to refer to different subjects as "map, chart, engraving," and other enumerated articles.

If congress, in the proviso, had intended to include a musical composition among those copyrighted things which must be manufactured in this country, it should have incorporated it in the list of things subject to this restriction. The omission in the proviso of "musical composition", as well as of "map, chart, engraving", and other things before enumerated, is very significant, as indicating that congress never intended to extend this provision to any of these articles. And so, with respect to "lithograph", if congress had intended to cover by that word a musical composition made by the lithographic process it should have expressed its meaning in clear and unambiguous terms, in view of the language used in other portions of the statute.

If there is any doubt as to the meaning of the statute, it is proper to examine the history of legislation on this subject, in order, if possible, to discover the intent of congress. As the bill passed the house of representatives, this proviso was limited to "book", but when it reached the senate an amendment was offered and passed extending the proviso to various other subjects of copyright, as "map, dramatic or musical composition, engraving, cut, print," etc. A conference committee was appointed, and a compromise was agreed to enlarging the house provision by the addition of "photograph, chromo, or lithograph", and the bill was finally passed in this form. In the debate in the senate, reference was made to the fact that musical compositions had been eliminated from the proviso. The first and fundamental rule in the interpretation of statutes is to carry out the intent of the legislature, if it can be ascertained, and I think an examination of the proceedings in congress shows that it was intended to exclude musical compositions from the operation of this proviso. 22 Cong. Rec. pt. 1, p. 32; pt. 3, pp. 2378, 2836; pt. 4, p. 3847.

"Book" has been distinguished from "musical composition" in the statutes relating to copyright since 1831. (4 Stat. 436.) The specific designation of any article in an act or series of acts of congress requires that such article be treated by itself, and excludes it from general terms contained in the same act or in subsequent acts. Potter's Dwaris on Statutes, pp. 198, 272; *Homer v. The Collector*, 1 Wall. 486; *Arthur v. Lahey*, 96 U. S. 112; *Arthur v. Stephani*, Id. 125; *Vietor v. Arthur*, 104 U. S. 498. If, in a popular sense, and speaking particularly in reference to form, "book" may be said to include a musical composition, the answer to this proposition is that where two words of a statute are coupled together, one of which generically includes the other, the more general term is used in a meaning exclusive of the specific one. *Endl. Interp. St.* § 396; *Reiche v. Smythe*, 13 Wall. 162. The reasoning upon which this rule of specific designation is based is that such designation is expressive of the legislative intention to exclude the article specifically named from the general term which might otherwise include it. *Smythe v. Fiske*, 23 Wall. 374, 380; *Reiche v. Smythe*, 13 Wall. 162, 164. The English cases cited by the defendant to the effect that "book" includes "musical composition" are not material in the present controversy, because the statute law of the two countries is different. The early English statute of 8 Anne, c. 19, says, in the preamble, "books and other writings", while, in the modern English statute 5 & 6 Vict. c. 45, § 2, "book" is defined to include various specific things, as "map, chart, sheet of music," etc. Nor do the American cases cited, *Clayton v. Stone*, 2 Paine, 382, Fed. Cas. No. 2,872; *Scoville v. Toland*, 6 West. Law J. 84, Fed. Cas. No. 12,553; *Drury v. Ewing*, 1 Bond, 540, Fed. Cas. No. 4,095, help the defendant. In none of these cases has the question ever been determined whether a musical composition is a book. It must also be remembered that the question now presented is not strictly whether a musical composition can ever be regarded as a book, but whether congress meant in the act of March 3, 1891, to include musical composition within the terms of the proviso referred to. Nor do I think the dictionary definitions of "book" render us much assistance, because the word is used in so many different senses. It may refer to the subject-matter, as literary composition; or to form, as a number of leaves of paper bound together; or a written instrument or document; or a particular subdivision of a literary composition; or the words of an opera, etc.

Looking at the natural reading of the statute, the intent of congress, and the rules which govern the construction of statute law, I am of opinion that the plaintiffs have complied with the provisions of the act of March 3, 1891, respecting the three musical compositions complained of and that the defendant should be enjoined from reprinting, publishing or exposing for sale these compositions, or any essential part of them, as prayed for in the bill.

Injunction granted.

HOSTETTER CO. v. VAN VORST.

(Circuit Court, S. D. New York. June 29, 1894.)

TRADE-MARKS—INFRINGEMENT.

Selling an imitation, as such, without any suggestion or arrangement that it be sold again for the genuine article, although with assent to such suggestions from others, does not infringe the right of the manufacturer of the genuine.

In Equity. This was a suit by the Hostetter Company against John Van Vorst for infringement of a trade-mark.

James Watson and Albert H. Clarke, for plaintiff.
Patrick H. Loftus, for defendant.

WHEELER, District Judge. This suit is brought for the alleged selling, or procuring to be sold, an imitation, produced by the defendant, as the genuine Hostetter's bitters of the plaintiff. This is denied, and the principal question is whether this allegation is proved. *Hostetter v. Fries*, 17 Fed. 620, 21 Blatchf. 339; *Hostetter Co. v. Brueggeman, etc., Co.*, 46 Fed. 188. The evidence shows well enough that the defendant sells the imitation as such, and that he would sell it to others, to be by them sold again for the genuine, if they would. It does not show any suggestion from him that it could be, nor any arrangement by him that it should be, so sold, but only his assent to suggestions that it might be. The selling of the imitation, as such, does not infringe upon the right of the plaintiff that it should not be sold as the genuine. The defendant owes no duty of preventing such sales; he is only bound not to make, or at most not to encourage, them. The proofs do not show encouragement, even, of them, and so fall short of sustaining this allegation, and of entitling the plaintiff to relief. The conduct of the defendant, however, so invited this litigation that he ought not, in equity, to have costs. Bill dismissed, without costs.

BROUX et al. v. THE IVY.

(District Court, D. Delaware. July 26, 1894.)

SEAMEN—COMPENSATION FOR SHORTAGE OF PROVISIONS — INVALID CONTRACT—ESTOPPEL.

Notwithstanding the adoption by shipping articles of the statutory scale for provisions (Rev. St. § 4612), the master issued provisions according to a "method" of his own, whereby there was a shortage of bread. The seamen protested, and the statutory scale was followed for a few days, but they were dissatisfied with the manner in which the provisions were weighed and served under this scale, and asked the captain to return to his "method," which he consented to do on condition that they would "agree to be perfectly satisfied in the future, and make no more complaints," and an agreement to that effect was entered on the log. *Held*, that the contract was void as being one-sided and without consideration, and did not estop the seamen from suing for the extra compensation allowed by Rev. St. § 4568, in cases of shortage.

This was a libel by Theophile Broux and others against the ship Ivy for compensation for shortage in the provisions issued to libelants as seamen on said ship.

John A. Toomey and Bradford & Vandegrift, for libelants.
Levi C. Bird, for respondent.

WALES, District Judge. This suit is brought by Theophile Broux and 16 others against the American ship Ivy, and all persons intervening, to recover extra wages on account of a reduction in the allowance of provisions which were issued to the libelants while serving on board the said ship during her voyage from Vancouver, B. C., to Wilmington, Del., between April 22 and August 29, 1893, lasting 128 days. The libelants demand this extra compensation under section 4568 of the Revised Statutes of the United States, which is in these words:

"Sec. 4568. If, during a voyage, the allowance of any of the provisions which any seaman has, by his agreement, stipulated for, is reduced, except in accordance with any regulations for reduction by way of punishment, contained in the agreement, and also for any time during which such seaman willfully, and without sufficient cause, refuses or neglects to perform his duty, or is lawfully under confinement for misconduct, either on board or on shore; or if it is shown that any of such provisions are, or have been during the voyage, bad in quality and unfit for use, the seaman shall receive by way of compensation for such reduction or bad quality, according to the time of its continuance, the following sums, to be paid to him in addition to and to be recoverable as wages: First. If his allowance is reduced by any quantity not exceeding one-third of the quantity specified in the agreement, a sum not exceeding fifty cents a day. Second. If his allowance is reduced by more than one-third of such quantity, a sum not exceeding one dollar a day. Third. In respect of bad quality, a sum not exceeding one dollar a day. But if it is shown to the satisfaction of the court before which the case is tried, that any provisions, the allowance of which has been reduced, could not be procured or supplied in sufficient quantities, or were unavoidably injured or lost, and that proper and equivalent substitutes were supplied in lieu thereof, in a reasonable time, the court shall take such circumstances into consideration, and shall modify or refuse compensation, as the justice of the case may require."

Fourteen of the libelants signed the shipping articles, at Vancouver, as able-bodied or ordinary seamen. Of the three remaining libelants, one served as cook, one as cabin boy, and one as second mate who was, before the end of the voyage, disrated and sent forward. The whole number of persons on board the ship, including officers and men, was 21. The officers, including the cabin boy, took their meals in the cabin, and were well supplied with a variety of food, besides the bread, beef, pork, and soup which they had from the general ship's stores in common with the crew. By the shipping articles the crew promised "to conduct themselves in an orderly, faithful, honest, and sober manner," and the master agreed to pay them their stipulated wages, "and to supply them with provisions according to the annexed or above scale," which was incorporated into and made a part of the shipping articles, and is established by section 4612 of the Revised Statutes, and called in the testimony "the government scale." By this scale the crew were to receive one pound of bread per day, one and a half pounds of beef

four times a week, and one and a quarter pounds of pork, one-half pound of flour, and one-third pint of peas three times a week. It was also stipulated that one pound of potatoes, one-half pound of flour or rice, one-third pint of peas, or one-quarter pint of barley might be substituted for each other. When fresh meat was issued the proportion was to be two pounds per man per day, in lieu of salt meat; and flour, rice, and peas, beef and pork, might be substituted for each other. But bread was made indispensable, for which no substitute or equivalent was allowed. The allegations of the libel are that there was a shortage, during the entire voyage, of at least one-third in the quantities of the provisions to which the libelants were entitled; that such shortage was not by way of punishment for any misconduct or neglect of duty on the part of libelants, nor because provisions could not have been procured, or were unavoidably lost or injured in the voyage; that the libelants repeatedly complained to the master of the insufficiency of the food, but, although he promised to do better, he failed at any time during the voyage to give them two-thirds of their lawful allowances. These charges are denied by the master, and his denial is supported, in the main, by the first and second mates and by the carpenter. But, without going into a discussion of the evidence, it is enough to say that there is conclusive proof that there was a shortage of the three articles of bread, pork, and peas; the deficiency in the last two articles, however, was made up by lawful equivalents,—there having been a surplus of beef issued to take the place of pork, and potatoes and rice were substituted for peas when the latter gave out. It is admitted by the expert witness and accountant who was produced on the part of the defendant that the bread fell short of the standard allowance by 466 pounds. This witness arrived at his conclusions by taking the quantities of the different provisions which were on board of the ship at the beginning of the voyage, and deducting therefrom the quantity of each kind remaining unconsumed at the end of the voyage. It is claimed on the other side that the bread shortage was upwards of 900 pounds, and I am inclined to believe that it was nearer the latter weight. The captain says that he did not issue the daily allowance of food according to the government scale, but fed the crew by his own method, up to the 15th of June, when they made a formal complaint of not getting enough, and requested to be allowed the quantities fixed by law. The captain professes to have complied with this request for a few days,—until the 18th of June,—when the libelants asked him to return to his "method," which he consented to do on condition that the libelants would "agree to be perfectly satisfied in the future, and make no more complaints." An agreement to this effect was entered on the log book and signed by 14 of the crew. The libelants became dissatisfied with the manner in which the provisions were weighed and served out to them under the government scale, and there is evidence to the effect that the captain designedly made this mode of issuing the provisions as inconvenient and troublesome as he could. At all events, he was not in favor of it. In the course of his testimony the captain

said that he had no regular scale of his own made out, but fed his crew according to the method which he had used ever since the law came in force, and that he never gave any one, except the cook, authority to supervise the provisions, either as to quantity or quality. The cook testifies that he was forbidden by the captain from giving the men their full allowance of ship bread from the first to the last of the voyage. Kelly, the first mate, uses very guarded language in answering the question:

"Q. Judging from what you saw,—judging as best you could,—what would you answer: that they did get a pound of bread or biscuit, or not? A. Judging from what I saw, they had about the average of what others get on American ships, especially on long voyages."

The hard tack on board did not exceed 850 pounds, and, allowing one pound per day for each person on board the ship, would not hold out for one-third of the voyage; and the deficiency does not appear to have been made good by the quantity of soft bread which was made by the cook and issued to the men. The captain appears to have been determined to have his own way in dispensing food to his crew, and without reference to the government scale. In this he was in fault. His treatment of the libelants in other respects is not complained of, except by Goldspring, the second mate, who was disgraced for alleged neglect of duty and general incompetency, and who frankly acknowledged his dislike of the captain, and his desire to see the present suit succeed. If the testimony of Goldspring stood alone, it might not, perhaps, be of much avail, on account of his hostile relation to the captain; but he is confirmed by the other libelants, whose testimony, with one exception, and notwithstanding the exuberant expressions used by some of them, is fairly entitled to belief. Biedermann, who was the cabin boy, and was dismissed and sent forward on account of his filthy habits and insolence, is discredited by his own testimony and by that of Smith, who succeeded him in the cabin. The libelants admit that the provisions were of average good quality. The complaint is limited to the shortage, and as to this the proof preponderates largely against the defendant in reference to the article of bread alone. The stores of potatoes, rice, and peas were all consumed a short time before the ship arrived at her destination. Considerable quantities of beef, pork, and flour were left over,—sufficient, perhaps, to have lasted, if the voyage had been prolonged, for a few weeks; but, as has already been remarked, a surplus of meat or of other provisions will not make up for the want of bread. *The Hermon*, 1 Low. 515, Fed. Cas. No. 6,411; *The Mary Paulina*, 1 Spr. 45, Fed. Cas. No. 9,224.

The agreement of the 18th of June, to accept the captain's "method" in the place of the government scale, does not estop the libelants from prosecuting this suit. It would be a dangerous precedent for a court of admiralty to approve of any agreement of that kind between captain and crew. The captain was the monarch of the deck. He granted a statutory right to the libelants, with such hindrances as made them willing, after three days of trial, to relinquish it. The contract was one-sided, without consideration, and therefore invalid. Seamen have often been said to be the wards

of admiralty, and it is the duty of the court to protect them. Receipts or releases given by them, even with all the solemnity of sealed instruments, will have no effect, beyond the actual consideration fairly paid. *The Rajah*, 1 Spr. 199, Fed. Cas. No. 11,538.

The court has been asked to determine whether the libelants were in fact as well and sufficiently fed as seamen should be, in compliance with the spirit of the shipping articles; but for the purposes of this suit it is not necessary to decide that question, and if it was I should have some doubt about the proper answer. The men did not receive their allowance of pork; the shortage being 440 pounds, which was made up by the issue of beef,—a cheaper article,—although there was a barrel of pork, weighing 200 pounds, left over. The testimony has convinced me that there was a very considerable shortage in the allowance of bread, which was not, and could not be, made up by a surplus of one or more of other kinds of food.

A decree will be entered for the libelants excepting Thomas Smith, Adam Biedermann, and L. Goldspring, for bread shortage for 128 days, at 50 cents per day, amounting to \$64 for each; for Thomas Smith (deducting his 21 days' service in the cabin, where he was well fed), 107 days, at 50 cents per day, amounting to \$53.50; for Adam Biedermann, 21 days before the mast, at 50 cents per day, amounting to \$10.50; for L. Goldspring, 22 days before the mast, at 50 cents per day, amounting to \$11. Total amount, \$971.

THE FULTON.

LAYTON v. THE FULTON.

(District Court, S. D. New York. June 19, 1894.)

COLLISION—STEAM VESSELS CROSSING—OBSTRUCTING FERRYBOAT'S SLIP.

A ferryboat was struck, while entering her slip, by the stem of a steamboat, which was maneuvering, at an adjoining pier, to swing her stern into her own slip, and it appeared that the ferryboat was entering her slip in a proper manner, and that her side, when struck, was 30 feet from the corner of the pier, and that the steamboat's stem penetrated the ferryboat's side some 15 inches, showing that the steamboat was under headway at the time of collision. *Held*, that the collision was caused by the encroachment of the steamboat upon the entrance to the ferryboat's slip, owing to her inattention to the approach of the ferryboat, and that the steamboat was therefore liable for the collision.

Libel for collision between the ferryboat *Fulton* and the steamer *Sylvan Dell*.

Man & Protheroe, for libellant.

Hyland & Zabriskie, for defendant.

BROWN, District Judge. At about 10 o'clock a. m. of September 21, 1886, as the *Fulton* ferryboat *Fulton* was entering her slip on the New York side, immediately below pier 22, the stem of the libellant's passenger steamer *Sylvan Dell*, which had come down the river and was endeavoring to make a landing at pier 23, struck the starboard side of the ferryboat a few feet ahead of the paddle box,

and very near the middle of the boat. The tide was slack high water. The ferryboat approached her slip in the usual manner, and at the time of collision, as is shown by the great weight of evidence, her bow was at least 30 feet inside of her slip, heading a little down river; and her side was about 30 feet from the southerly corner of pier 22. By the force of the collision, the stem of the Sylvan Dell was broken, and the planks carried away a little on her port side, but much more on her starboard side. Her stem cut through the plank sheer of the Fulton, some 15 inches into the cabin. This latter circumstance is of itself conclusive evidence that the Sylvan Dell at the time of collision was moving ahead, and with considerable force. The blow was about a right-angled one. The Sylvan Dell was endeavoring to swing her stern by a hawser around the end of pier 22, so as to back up into the slip between pier 22 and pier 23, and she was maneuvering for that purpose. The position of the ferryboat at the time of the collision leaves no doubt that the stem of the Sylvan Dell was encroaching upon the entrance to the ferryboat's slip. This was unnecessary, as there was space enough for the Sylvan Dell to swing her stern and back into her slip without impeding the entrance of the ferryboat. I find, therefore, that the collision was owing to the lack of proper attention on the part of the Sylvan Dell to the ferryboat, and to her entrance of her slip, and not to any drifting up by the ferryboat against the stem of the Sylvan Dell. The position and course of the ferryboat were entirely proper in entering her slip, and her pilot had no reason to suppose that the Sylvan Dell in her maneuvers would come down so far as to interfere with his entrance; and, when the Sylvan Dell started ahead, the Fulton was so far forward as to make avoidance of the collision by her impossible. *The West Brooklyn*, 45 Fed. 60. I must find the fault of the collision, therefore, to have been wholly with the Sylvan Dell; and the libel must, therefore, be dismissed, with costs.

GOULD v. GRAFFLIN.

(District Court, D. Maryland. July 10, 1894.)

DEMURRAGE—LIABILITY OF CHARTERER—READINESS TO TAKE CARGO.

A schooner was chartered to load a full and complete cargo, not exceeding 1,150 tons; but her master, on tendering her, stated that she had been leaking, and asked to have 500 or 600 tons furnished, and, if that did not increase the leak, so much more as she could safely carry. *Held*, that the charterer was justified in refusing this, and was not liable for the delay until the master, after a survey, gave notice that he would take a full cargo.

This was a libel by Moses M. Gould, master of the schooner *Florance*, against George W. Grafflin, charterer of said schooner, for demurrage for detention of the vessel by delay of defendant in furnishing cargo.

Robert N. Smith, for libellant.

T. M. Lanahan and Frank Gosnell, for respondent.

MORRIS, District Judge. The schooner *Florence* was chartered by the respondent to proceed from Galveston to Punta Gorda, Fla., and there load a full and complete cargo of phosphate rock, not exceeding 1,150 tons, to be furnished at the rate of 100 tons per day. The libellant stipulated that the schooner should be tight, staunch, strong, and in every way fitted for the voyage. The schooner sailed from Galveston in ballast, and reported in Punta Gorda on March 14, 1893, the master saying he would be ready for cargo on the 16th. He accompanied this tender, however, with the statement that his vessel had been leaking somewhat, and he did not think he would be able to take anything like a full cargo, as he could not tell how much she might leak when she was loaded. He asked to have five or six hundred tons of rock sent to the vessel, and said he would try that, and see if she could safely carry any more. This was not a tender which gratified the charter party. The charterer was not required to load the schooner unless she could carry a full and complete cargo, such as would usually be carried by a tight and seaworthy vessel of her class and tonnage. Here the tender was qualified with the statement that the vessel was leaking, and that the master would have to find out, while loading, whether or not the cargo increased the leak, and how much she could safely carry. It is obvious that the master distrusted the schooner, and did not mean to tender her as ready for a complete cargo until he had observed what effect resulted from putting the cargo into her. He had found she leaked some while light on the voyage from Galveston. He expected stormy weather coming up the coast in March, and he did not mean to risk his vessel, and he intended, as soon as he found that the loading increased the leak, to stop. The charterer's agent was justified in refusing to furnish cargo when the tender of readiness to receive it was accompanied with such qualifications. This attitude of the parties toward each other continued until March 27th, when the master, finding the leak did not increase, had his vessel surveyed by three pilots of the port, who, after examination, certified that she was seaworthy. On March 28th, after the survey, the master notified the charterer's agent as follows: "I declare my vessel in condition for cargo, as per charter party and as per survey, and will take a full and complete cargo, as per charter party." Thereupon, the cargo was promptly furnished, and the schooner sailed with 1,005 tons. I think it is clear that the delay from March 16th, when the master said he would receive 500 or 600 tons, and so much more as he found he could safely carry after he had tested its effect on the leaking of his schooner, to March 28th, when he finally, after a survey, definitely said that he was prepared to receive a full and complete cargo, was not by the default of the charterer. Libel dismissed.

BERRY v. GRACE et al.¹

(District Court, S. D. New York. June 20, 1894.)

**CHARTER PARTY—CARGO FORWARDED FROM PORT OF DISTRESS — ADVANCES—
BOTTOMRY—RIGHT OF FORWARDING VESSEL TO FREIGHT—PRIORITIES.**

Charterers of the ship Y. to carry a cargo from Taltal and Pisagua to New York, at a freight of 17 shillings per ton, made advances, pursuant to provisions of the charter, for which the master of the Y. gave a bottomry note, payable three days after arrival of the Y. at New York, which assigned the freight to pay for such advances. After sailing, the Y. was obliged to put into Callao in distress, where, with the consent of all parties, including the charterers, the ship M. was chartered to carry part of the Y.'s cargo to New York, at the rate of 12 shillings per ton. The M.'s bill of lading, however, called for freight at 17 shillings, the master of the M. giving to the master of the Y. an obligation to repay to the latter the difference of 5 shillings per ton. There was no evidence that the master of the M. had knowledge of the prepayment of any part of the freight to the Y. The Y. sailed from Callao, and was wrecked, and became a total loss. The M. arrived safely in New York, when the charterers claimed to deduct from the freight called for by the bill of lading the entire advances made to the Y. *Held*, that the M., as an independent carrier, properly obtained in a port of distress by the Y., had the right, under the ordinary provisions of the maritime law, to the payment of her own freight, without reference to any previous arrangement between the Y. and the cargo owner of which she had no knowledge; that the bottomry, which hypothecated the freight to secure the advances, was liable to be postponed by subsequent maritime obligations necessarily incurred in order to complete the voyage, and the charter of the M. was a necessary expense of this kind; that such hypothecation, therefore, as against the M.'s claim, only extended to the 5 shillings per ton agreed to be returned by the M. to the Y., which the charterers were entitled, under the bottomry, to retain; but that they were liable for the balance of the freight at the rate of 12 shillings per ton.

This was a libel by Benjamin F. Berry against William R. Grace and others for a balance of freight under a charter party.

Wing, Shoudy & Putnam, for libellant.
MacFarland & Parkin, for respondents.

BROWN, District Judge. By charter made March 28, 1892, the respondents chartered the Yorktown for a voyage from Taltal and Pisagua to carry nitrates to New York on respondents' account, freight to be paid at and after the rate of 17 shillings per ton. Clause 17 of the charter provided that the charterers should supply the master in Valparaiso, or loading port, with such advances as might be necessary, not exceeding £——, which, with the cost of insurance thereof, was to be reimbursed by the master in cash immediately after the arrival of the vessel at the port of discharge; and that any contributions to general average losses, which, if any, should become payable in respect to such advances, should be borne and paid by the owners. The vessel took on board 2,750 tons of nitrates, and the charterers advanced to the master £577.16.11. This was indorsed on the Yorktown's bill of lading as an advance of freight; and as such, it was insured at an expense of \$115.60, which was charged to the owners of the ship. The master at the same time

¹ Reported by E. G. Benedict, Esq., of the New York bar.

executed a bottomry note, dated July 23, 1892, which recited the receipt of the £577.16.11 for advances and necessary disbursements to enable the vessel to proceed on her voyage, which he promised "to pay to said Grace & Co., or to their assigns, or on their order, three days after the arrival of said vessel (Yorktown) at the said port of New York, or at any other port at which the present voyage may end. * * *" The note then provides as follows:

"And for the payment of the said sum, together with the cost of insurance thereon, I hereby bind my said vessel and her owners; and I assign and transfer so much of the freight money as may be necessary, and authorize the said Grace & Co., their assigns and indorsees, to receive and collect such freight money at the port of discharge; and should any contribution to general average losses become payable in respect of the advances aforesaid, it shall be borne and paid by the owners."

The Yorktown, soon after sailing, met with disaster, and was compelled to put into Callao in distress, where she arrived August 12, 1892. For the purpose of lightening the ship according to the recommendation of surveyors, about 1,050 tons were taken out of the Yorktown and stored in the ship Mohican. Afterwards, with the consent and approval of all parties interested, including the respondents, who had a mercantile house at Callao, the Mohican was chartered to carry forward the cargo stored on her to New York, at the rate of 12 shillings per ton. One of the partners of Grace Bros. & Co. assisted in the negotiations of this charter, which was deemed best for all concerned. On October 3, the Yorktown sailed from Callao to New York with about 1,620 tons, more or less; but after rounding Cape Horn she was wrecked on the coast of Brazil, and became with her cargo a total loss. The Mohican, pursuant to her charter, sailed from Callao on October 5, with 1,028 tons of the Yorktown's original cargo on board, and arrived in New York on the 26th of March, 1893.

The Mohican's bill of lading recited the shipment to have been made by the master of the Yorktown, and provided for payment of freight on delivery at New York to respondents' bankers, at the rate of 17 shillings per ton, the original charter price of the Yorktown. At the same time the master of the Mohican gave to the master of the Yorktown an obligation to repay to the latter the difference of 5 shillings freight per ton. The respondents in New York, on receipt of the Mohican's cargo, claimed to deduct from the freight due on the Mohican's bill of lading the entire advance originally made to the Yorktown, paid the sum of about \$1,100 remaining after such deduction, and refused to pay more. The sum paid gave to the Mohican only about one-third of her contract price for forwarding the cargo, according to her own charter rate of 12 shillings per ton. The libellant sues to recover the whole balance, at the rate of 17 shillings per ton for the amount delivered, without any deduction for the advances made to the master of the Yorktown.

Where an advance on account of freight has been made before the ship sails, and a part of the cargo is lost during the voyage, it is sometimes difficult to determine on what part of the cargo the paid freight is to be applied, viz., whether wholly upon the part lost, or wholly upon what is delivered, or upon both, pro rata. In the case of Mat-

thews v. Gibbs, 30 Law J. Q. B. pt. 2, p. 55, a case in some respects like the present, it was decided that the forwarding vessel, upon a transshipment of cargo by the master in a port of distress, could not recover, after she had received her own freight in full, the residue of the original charter rates for the benefit of the original charterer, to the prejudice of the shipper, by excluding all deduction for the shipper's original advances on account of freight; since that would operate as a fraud on the shipper; and a reshipment by the first master on such terms would be in excess of his authority. To the extent of five shillings per ton, that case is pertinent here, but no further. The right of the forwarding vessel in that case to her own freight in full, was not disputed, but was paid before suit was brought.

In the case of Allison v. Insurance Co., L. R. 1 App. Cas. 209, one-half of the freight on the cargo was paid in advance upon its shipment at Glasgow; the balance was to be paid on delivery at Bombay; the shipowner insured with the defendant his freight up to the amount unpaid. On the voyage, one-half of the cargo was lost through sea perils; the remaining half was delivered to the consignee at Bombay. The master on delivery did not claim the other half of the freight, and the shipowner sued his insurers to recover it as lost, through the loss of half of the cargo. The plaintiff had judgment in the court of common pleas, which was reversed on appeal by the court of exchequer chamber. On appeal to the house of lords, the question was elaborately discussed. All the judges agreed that the question should turn on the right of the master at Bombay to claim any further payment of freight upon the cargo delivered. It was held that the master could not have recovered the unpaid freight of the consignee at Bombay, but that it was covered by the insurance, and the judgment of the exchequer chamber was reversed, and that of the common pleas affirmed.

The case last cited, however, was not a case of the transshipment of goods in a port of distress; nor was the advance made on bottomry; nor was the advance insured on owner's account, and at his expense; and in the decision, the special language of the charter, and the presumed intention of the parties, had a controlling influence. Here the shipment on the Mohican was for the benefit of all concerned. There was no expectation that the Yorktown would be lost after leaving Callao; and her freight, payable on the delivery of her own remaining part of the cargo at New York, would be far more than sufficient to repay the original advances. The provision that the Mohican should collect 17 shillings per ton freight was, therefore, a proper provision for the protection of the Yorktown's interest in the freights, and is not in the least indicative of any intent, as in Matthews v. Gibbs, *supra*, to exclude the repayment of the advances out of the freights on the cargo remaining on the Yorktown.

But it is claimed by the respondents, that inasmuch as the shipment on the Mohican was made in the name of the master of the Yorktown, her voyage was made merely on account of the York-

towh; and that the Mohican, therefore, stands precisely in the place of the Yorktown, and can recover no more than the Yorktown herself could have recovered had she arrived in New York and delivered the Mohican's cargo, and no more.

Several considerations, however, seem to me conclusive against the application of such a rule in this case: First, the reshipment was made in a port of distress; it was an act of necessity, for the best interest of all concerned; and for such a service, rendered to all, the Mohican is entitled to the compensation agreed to be paid her. Had her stipulated freight been higher than the original price, she could have recovered it under our law without question. 3 Kent, Comm. 212. The same is the law of France. Code de Com. §§ 296, 393. She is not affected by the mutual obligations of prior interests any further than she is shown to have assumed them. Any such assumption to the prejudice of her own compensation is not to be presumed. The reshipment by a bill of lading in the master's name, and at the original 17 shillings freight, is no evidence of any such assumption, but as I have said, was merely a proper provision to secure the Yorktown's interests; just as the provision for a delivery of the cargo to the respondents' bankers was for their interest.

Second, the note given for the advances was an express instrument of bottomry. The *Pride of the Ocean*, 3 Fed. 162; The *J. L. Pendergast*, 30 Fed. 717, 718. This determines conclusively, so far as it extends, the intention and the rights of the parties. That instrument made the personal obligation to repay the advances conditional upon the arrival of the Yorktown; and the Yorktown never arrived. The condition upon which repayment was to be made was never performed; and all personal obligation to pay was therefore lost. To cover that contingency, insurance upon the advance of freight was effected by the respondents at the expense of the owners of the Yorktown, and for the benefit of whom it might concern. The insurance was for the benefit of the Yorktown, as well as of Grace & Co. The owners of that ship are, therefore, equitably entitled to the benefit of that insurance.

The instrument of bottomry, however, contained, besides the conditional personal obligation to pay, a further express pledge of the freights; that is, the freights unpaid upon the whole cargo, as a further security for the repayment of the advances. In such a case, where the contingency of a separation of the cargo through a necessary transshipment of a part upon another vessel in a port of distress has not been contemplated and provided for, I think that the bottomry bond takes effect upon so much of the cargo and freights remaining as were delivered at the port of discharge, though by another vessel; on the same principle that holds any salvage recovered applicable on the bottomry debt, where the ship is lost, though salvage is not expressly named. See *Miller v. O'Brien*, 35 Fed. 779, and 59 Fed. 621, and cases there cited. This is but a reasonable construction, and is necessary to carry out the evident intention of the parties in making the express pledge of all the

freights. I think the freight upon the cargo delivered by the Mohican was, therefore, bound by the original bottomry note.

But this original bottomry of all freights that might become due, like all other bottomry obligations, was liable to be postponed by subsequent maritime obligations necessarily incurred in order to complete the voyage, and to earn the very freights previously hypothecated. The charter of the Mohican (after the disaster to the Yorktown) was a necessary expense of this precise kind. Without this charter, or some other greater expense, these hypothecated freights could not have been earned. The charter of the Mohican being a necessity, within the master's authority, and proper in all its parts; and being for the benefit of the respondents as cargo owners and as holders of bottomry on freights, as much as for the benefit of the Yorktown as carrier, and inuring directly to the respondents' interest, it was superior in merit and in privilege to the prior bottomry claim; and the respondents, therefore, cannot set up their bottomry hypothecation of freights to the prejudice of the Mohican's own charter hire.

The above principles would have been applicable, even had the transshipment been made at a port where the respondents were not present or represented, and had had nothing to do with the transshipment. But in the present case, the respondents were present by one of their partners, and had full knowledge of, and participated in, all that was done.

There is nothing in the evidence to indicate that the master of the Mohican in forwarding the cargo was the mere servant or employé of the Yorktown; or that he acted in the mere interest of the Yorktown. On the contrary, the evidence is in entire accord with the ordinary presumption, that he acted as an independent carrier, properly obtained in a port of distress by the master of the Yorktown, to transport the cargo which the Yorktown had become unable to carry; and that he acted under the ordinary provisions of the maritime law, which give him priority for his freight over antecedent claims. The Mohican delivered the cargo upon her own bill of lading only, as I interpret the testimony. The reference to the Yorktown, inserted at New York, was made only for the purposes of customhouse entry, and for the consignee's convenience. For her necessary and beneficial service to all concerned, the Mohican had the right to the payment of her own freight, whatever it might be, without reference to any previous arrangements between the Yorktown and the cargo owners, to which she was in no way privy.

There is no evidence that the master of the Mohican had any knowledge of the prepayment of any part of the freight to the Yorktown; and it is quite obvious that the charter at Callao was not made upon any expected deduction of the respondents' advances from her freight of 12 shillings per ton. Had the master of the Mohican known of these advances, I do not see how it could have concerned him; and if Grace & Co., who negotiated the charter at Callao, had had any purpose of charging those advances against the Mohican's freight, they were equitably bound to acquaint her with

that claim at the time the charter was made. Had any such notice been given, it is certain that the Mohican would have refused any such charter. As no such claim was made then, the respondents are equitably estopped from setting it up now.

I have treated the matter partly on the basis of the bottomry note, because that instrument states the terms of the respondents' advances; and, therefore, the rights of the respondents to repayment or offset on account of the advances are limited by that instrument. The hypothecation is good as against the five shillings per ton agreed by the Mohican to be paid to the master of the Yorktown, because that was freight earned for the benefit of the Yorktown, and not for the Mohican. The Mohican has no right to that. To that extent, the case of *Mathews v. Gibbs*, *supra*, is applicable. That part being covered, in my judgment, by the bottomry instrument, and having become necessary to the respondents' security through the unexpected loss of the Yorktown's remaining part of the cargo, the respondents have the right to retain the 5 shillings out of the 17 shillings per ton on the Mohican's cargo. The rights of the Yorktown growing out of the insurance cannot be settled in this suit, to which her owners are not parties.

The libelant is entitled to be paid at the rate of 12 shillings per ton, and to a decree for so much, less the amount of \$1,100 heretofore paid, with interest and costs.

THE BATTLER.

AMERICAN STEEL BARGE CO. v. THE BATTLER.

(District Court, S. D. New York. June 16, 1894.)

TUG AND TOW—WEATHER ON STARTING—FOG—STRANDING—USAGES OF TIME AND PLACE—NEGLIGENCE.

A tug with a tow started to leave the mouth of the Kennebec river during a temporary lightening up of the prevailing fog. After her start the fog shut down again before the tow had reached the sea, and, the pilot of the tug having been deceived as to his position by misleading signals from an anchored vessel, and the current being changeable, and not to be counted upon, the tow was carried out of its course, and stranded, and this suit was brought to recover the damages. The evidence indicates that by the usages of the time and place the start of the tug was justifiable and reasonably prudent, and as, after starting, the immediate cause of the collision was the misleading signal of the anchored vessel, and the variable current, no fault could be found with her navigation after she had started; and hence, *held*, that the tug was not guilty of negligence.

Libel to recover damages for stranding of barge in tow of tug.

Barlow, Wetmore & Murray, for libelant.

Robinson, Biddle & Ward, for claimants.

BROWN, District Judge. In the afternoon of September 25, 1892, the libelant's barge No. 202, in coming out of the Kennebec river, bound for New York, in tow on a hawser from the steam tug

Battler, ran upon the rocks, during thick fog, at the upper end of Pond island, which lies directly at the mouth of the river. The above libel was filed to recover the damage, alleging that the tug was liable for making an improper start during foggy weather, and for not anchoring when shortly afterwards the fog shut down thick.

I think the weight of evidence is to the effect that at the time when Dix island was passed, Ft. Poppin below was sufficiently in view to warrant the tug in continuing on. Below Dix island, all the witnesses agree that there was no proper anchorage ground. The master of the tug was a competent pilot, and acquainted with the peculiarities of the river. The tug was taken in charge by the Battler at Parker's Flats, only about four miles distant from the open sea. Pond island, where the barge struck, as appears by the chart, is but about a quarter of a mile long, and was the last obstruction in the river, beyond which there was a free and open course seaward. Before reaching Pond island the fog had become so thick that no landmarks could be seen. Shortly before reaching it, the blasts of a fog horn were heard, which indicated a vessel under way. To avoid her, the captain of the tug ported his wheel. On passing her to the right, she was seen to be at anchor. The master immediately starboarded his wheel to reach his former course; but the current upon that day—which is changeable and cannot be counted upon—happened to set upon the head of Pond Island, which, as it turned out, was only about 600 feet from the schooner, so that the barge was unavoidably carried upon the rocks.

I think there is no doubt that the immediate cause of the loss, was the misleading signal from the schooner. Had her signal been that of ringing the bell, as required by law, the master of the tug would have understood that she was at anchor. Her fog horn indicated that she was under way; and she would naturally, therefore, be supposed to be more in mid-channel than if at anchor, and the master would also naturally aim to give her a wider berth, than if her signals had indicated that she was at anchor. No fault is shown in the master in these maneuvers; nor is it any fault that he did not know just how the current would set at that time.

It is urged, however, that knowing these uncertainties in the navigation of the Kennebec, and the liability to meet vessels either under way or at anchor, the tug is responsible for starting upon such a trip in unsafe weather, when these difficulties were known to be more or less likely to be met. This part of the case has been argued very elaborately for the libellant, on the general contention that the tug was not justified in taking any risks, but should have waited for clear weather before starting. It is somewhat against the force of this contention, that though navigators have been beset in innumerable instances with difficulties of the same general nature as arose here, no case is cited that seems parallel with the present, in which the vessel has been held liable. The weather had been foggy during the day, and continued so until about 4 o'clock, when it lightened up so that the sun was seen. Fogs are frequent upon the rivers of that region, and they skirt the coast, while a little out-

side the weather is clear. If the opportunities afforded by the temporary lifting of the fog are not availed of, long detentions and great interruptions of business follow. From these circumstances some modifications in the usages elsewhere followed in navigation naturally arise.

The testimony of the pilots and captains on the river is to the effect that frequently towards sundown there is a partial clearing up of the fog, continuing long enough to enable vessels to make safely the short trip of about four miles from Parker's Flats to the sea. Vessels come down to these flats and wait for the opportunity. This temporary clearing up is so common as to receive a special name, and is known as the "sundown glint." It was upon such a clearing up at about 4 o'clock that the tug started. The principal pilots examined, including some of the libellant's own witnesses, testified that they should have made the start under such circumstances, and would consider it reasonably safe and prudent to do so, though recognizing the possibility that the fog might shut down again before Pond island was passed.

The weight of evidence, on the whole, is clearly to the effect that by the usages of the time and place, and considering all the difficulties of navigation on the one hand, and the liabilities to long detention, if the apparent lightening of the fog for so short a trip was not made use of, on the other hand, the start was one that would be considered justifiable, and reasonably prudent by skillful and prudent pilots accustomed to navigate these waters; and that seems to me to absolve the tug from the charge of negligence.

In the case of *The W. E. Gladwish*, 17 Blatchf. 77-83, Fed. Cas. No. 17,355, Chief Justice Waite, in reference to the obligations of tugs, says:

"The tugs undertook to bring to this work such prudence and such nautical skill as was ordinarily required in such navigation; more was not contracted for, and more was not expected."

In the case of *The Allie*, 24 Fed. 745, 749, the general subject of the obligation of a tug as affected by the usages of the time and place, was considered, and I cannot do better than repeat what was there said:

"The requirements of law are substantially the same, both as to the adequacy of the tug for the work assigned her, and as to proper weather for starting out; and it is the same that is applied to seaworthiness in general, viz. reasonable sufficiency for the particular trip or voyage, according to the judgment of persons versed in the business. The defense of unseaworthiness is not made out by showing that 'a stouter ship might have survived the peril.' *Amies v. Stevens*, 1 Strange, 128. The law does not require a vessel, to be seaworthy, to be capable of withstanding every peril; nor that a tug be capable of rescuing her tow in all weather; nor that she shall start only when there is no possibility of danger; nor that the master, in an emergency, shall infallibly do that which, after the event, others may think would have been best. *The Hornet*, 17 How. 100; *The Star of Hope*, 9 Wall. 230; *The W. E. Gladwish*, 17 Blatchf. 77, 83, Fed. Cas. No. 17,355; *The Mohawk*, 7 Ben. 139, Fed. Cas. No. 9,693. The tug must be reasonably adequate for the work undertaken, managed with reasonable judgment and nautical skill, and she must start only in weather that, in the judgment of nautical men, is reasonably safe for the trip. In whatever form the question comes up, wheth-

er as to seaworthiness, adequacy for the work, or the time of starting, it is a practical question of reasonable prudence and judgment. And as regards seaworthiness in general, or the adequacy of the tug for the work undertaken, there is no other final criterion than the judgment of practical men versed in the business and the customs and usages of the time and place, viewed as representing the judgment and knowledge of the time. To show this, the custom and practice of nautical men is admissible. See *The Titania*, 19 Fed. 101, 105-109, and cases there cited. The exercise of reasonable prudence and judgment, measured by this standard, does not exclude some remaining maritime risks. Against these risks it is the province of insurers to provide; otherwise the shipper is his own insurer."

The question of reasonable judgment and skill as affected by the general custom and practice of the time and place, is similar, whether it regards towage or unseaworthiness, or stowage, or navigation. See *The Wilhelm*, 47 Fed. 89; *The Dan*, 40 Fed. 691; *The Titania*, et supra; *The Frederick E. Ives*, 25 Fed. 447, affirmed on appeal.

Chief Justice Waite also in the case of *The W. E. Gladwish*, 17 Blatchf. 84, Fed. Cas. No. 17,355, in referring to the question whether the master should seek an opportunity to go on when overtaken by bad weather, says:

"This involved the exercise of judgment as to what ought to be done under the circumstances. A mere mistake is not enough to charge the tugs with any loss which followed. To make them liable, the error must be one which a careful and prudent navigator, surrounded by like circumstances, would not have made. * * * I cannot believe that ordinary prudence required an abandonment of the voyage, for the time being, by lying up or seeking a harbor. The tug was commanded by a competent master, and the captain of the barge was an experienced boatman. No objection was made by any one to going on, and it is evident that no person connected with the tow considered it necessary to stop." See, also, *The Clematis*, Brown, Adm. 499, 502, Fed. Cas. No. 2,876; *The Allie*, 24 Fed. 745, 749, and cases there cited.

The above rules seem to me so far applicable to this case as to absolve the tug from the charge of negligence, and the libel is, therefore, dismissed.

THE FLYER.

REDDING v. THE FLYER.

(District Court, D. Washington, N. D. June 18, 1894.)

No. 575.

COLLISION—FOG—STEAMERS PASSING—RATE OF SPEED.

Two steamers, on regular runs in opposite directions, in a fog so dense that the exact position and course of one could not be known to the officers of the other in time to pass safely at full speed, should have passed starboard to starboard, as their courses did not cross, and the master of each knew the route and direction of the other; but the master of one, hearing the other's whistle, assumed that they were coming together on opposite courses, gave the signal to pass port to port, and set his helm hard a-port, thereby swinging his vessel across the other's bow. The other pursued her proper course, and gave the proper signals for passing, but continued her full speed of 18 to 20 miles an hour until the vessels came in sight of

each other, and, before her speed was perceptibly checked, struck the timbers supporting the stern wheel of the first vessel. *Held*, that both were in fault.

This was a libel by Thomas Redding, owner of the steamer Mary F. Perley, against the steamer Flyer, for damages caused by a collision between said vessels.

E. C. Hughes, for libellant.

L. C. Gilman, for claimant.

HANFORD, District Judge. The collision complained of in this case occurred on a foggy morning in October, 1892, about one mile and a half south of Battery Point (locally known as Alki Point). The Mary F. Perley was at the time on her regular run from Tacoma via Vashon's Island to Seattle, and should have been at the time on a direct course from Beal's Point to Battery Point. The Flyer was making her regular run from Seattle to Tacoma, and had rounded Battery Point, and taken her course from that point towards Point Pulley. On these courses the vessels should have passed each other starboard to starboard, as their tracks do not cross each other, the master of each vessel knew the route and schedule time of the other, and each should have known that in case of meeting south of Battery Point they should pass starboard to starboard. The master of the Flyer so understood and acted. But the libellant, who was in command of the Mary F. Perley, after hearing the Flyer's whistle, erroneously assumed that the vessels were coming together on opposite courses, and thereupon gave the signal to pass to port, and set his helm hard a-port, thereby swinging his vessel to a position across the bow of the Flyer. This, in my opinion, was an inexcusable mistake, and a contributing cause to the collision. The Flyer pursued her proper course, and gave the proper signals for passing, but on account of the density of the fog the exact position and course of one could not be known to the officers of the other vessel in time to pass safely, running at full speed. It was the duty of the Flyer, therefore, to proceed cautiously after hearing the whistle of the Mary F. Perley, and stop immediately after her failure to make the proper response to the Flyer's signal. The Flyer's master testified that within one minute and a half after giving his first signal her engines were stopped and reversed, and in this he is corroborated by the testimony of other officers of the Flyer; but upon a decided preponderance of the evidence I find the facts to be that from the time of leaving Seattle until the vessels came in sight of each other the Flyer was running at her full speed of 18 to 20 miles per hour. Her engine-room bell was rung to stop and reverse as quickly as it could be after the first slow bell. Passengers, who knew from the bells that something unusual was about to happen, had scarcely time to move from their seats in time to see the steamers come together. The Flyer's stem struck the timbers supporting the stern wheel of the Mary F. Perley with such great momentum as to cut away entirely the wheel and said supporting timbers, and tear out her eccentrics and one of

her pistons. At the time of striking the Flyer's speed had not been perceptibly checked. The duty of steam vessels to stop when there is known danger of colliding in a fog is imperative, and, if the rule on this subject had been observed by the master of the Flyer, this collision could have been avoided. I find, therefore, that there was fault on the part of both vessels contributing to produce the injury to the libellant's vessel.

The case will proceed in the usual way to ascertain the amount of damages, and, when ascertained, one-half the amount thereof will be decreed in favor of the libellant. The costs will be divided equally.

CITY OF PHILADELPHIA v. GAVAGNIN.

(Circuit Court of Appeals, Third Circuit. July 9, 1894.)

No. 20.

1. COLLISION—TUG AND TOW—VESSEL AT ANCHOR.

A tug which, owing to lack of a proper lookout, takes her tow so near to an anchored vessel that, on the hawser breaking by reason of the tug suddenly changing her course, the tow is unable to avoid the anchored vessel, renders her owner liable to such vessel, it being without fault, for damages from the collision. *The Giovanni v. City of Philadelphia*, 59 Fed. 303, affirmed.

2. SAME—LOOKOUT.

The duty of keeping a lookout is not complied with by the officer in charge of the navigation of a tug with a tow keeping a lookout from the pilot house. *The Giovanni v. City of Philadelphia*, 59 Fed. 303, affirmed.

8. MUNICIPAL CORPORATIONS—LIABILITY FOR TORTS.

A city which, pursuant to its charter powers, engages in the business of towing vessels for profit, is liable for a collision caused by the fault of its tug. *The Giovanni v. City of Philadelphia*, 59 Fed. 303, affirmed.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

This was a libel by Dominico Gavagnin, master of the bark *Giovanni*, against the city of Philadelphia, for damages for a collision alleged to have been caused by negligence of a tug owned by the city. The district court rendered a decree for libellant. The city appealed.

Howard A. Davis (Charles F. Warwick, on the brief), for appellant.

Henry R. Edmunds, for appellee.

Before ACHESON and DALLAS, Circuit Judges, and GREEN, District Judge.

GREEN, District Judge. This is an appeal from the decree of the district court of the United States for the eastern district of Pennsylvania. It appears from the record that the Italian bark *Giovanni* was anchored near the breakwater in the Delaware river on the 7th of February, 1893, in the proper place for the anchorage

of vessels, and outside the usual course of ships passing to and from the sea at that point, and while lying at anchor, without apparent fault on her part, she was run into by the ship Standard and seriously injured. The Standard had left the port of Philadelphia that day in tow of the city ice boat No. 3, owned by the city of Philadelphia. She had been towed safely until she was brought very close to the Giovanni, when, owing to peculiar maneuvers on the part of the city ice boat, the towing hawser parted, and as the Standard was, with the headway then on her, too close to the Giovanni successfully to change her course, the collision necessarily followed.

The night was clear and bright. Lights could be seen afar off. The wind, which was a good sailing breeze, was blowing down the river, and behind the Standard; and the tide had just turned, and was flowing upward. It is not disputed that the Giovanni was anchored upon a proper and safe anchorage ground; that all her lights were set and burning brightly; and in all respects she appears, in this matter, free from the slightest blame. The tugboat charges the fault of the collision upon the ship Standard, but the evidence does not sustain this view of the case. It appears clear that the fault which caused the collision was that of the tug alone. The evidence shows that she ran down the river, in towing the Standard, very close indeed to the Giovanni, on a southerly course. Apparently, from her maneuver, discovering the Giovanni when she was at an exceedingly short distance from her, she suddenly turned squarely to the east,—a maneuver which she was enabled to perform with great celerity, by the peculiar construction of her machinery. At the same time, owing to contradictory orders, the Standard put her wheel first hard a-port, and then immediately hard a-starboard. The result of the tug's change of direction was to draw the towing hawser sharply across the ship's bob stays, and from the unusual strain it parted. As soon as the Standard discovered this accident, she apparently did all she could to avoid the collision, but was unsuccessful, although it appears from the testimony that what she did do probably avoided a more serious accident. As is usual in cases of this character, there is great conflict in the testimony, especially as to the orders given upon the ship, to put her wheel first a-port and then to starboard; but the court below, after a careful consideration of the testimony, came to the conclusion that the ship did everything she could to avoid the collision.

It is quite clear, without discussing the point at any length, that the gross carelessness of the tug in directing her course, and necessarily the course of the Standard, so close to the Giovanni as she did, before sighting her, is the sole cause of the collision of the Standard with the Giovanni. The evidence also discloses the vital fact that the tugboat had no proper lookout. It is true that the mate declares that he was keeping a lookout in the pilot house, but that is not a compliance with the duty imposed upon the tug. The officer in charge of the navigation of the vessel is not a competent lookout, nor is the pilot house the place where the lookout should

be stationed. The lookout should be charged with no other duty than that to which he is assigned, and in that duty he should be actually vigilant and continuously employed, without having his attention distracted by any other service. The very fact that the mate, acting as lookout, failed to see the lights of the Giovanni until just the moment before the sudden veering of the tugboat to the eastward, shows that his performance of the duty imposed upon him, if indeed he was fulfilling it at all, was far from satisfactory, and certainly indicative of gross neglect. Upon this point of the case we have no difficulty whatever in holding the tug guilty.

Nor can the appellants escape liability upon the assumption that they are not responsible for the negligence of the officers of the tug while engaged in performing that which was not one of the duties of the municipality. The contention is that towing vessels is no part of the functions of the city of Philadelphia, and the municipality is not liable for negligence of its officers while engaged in doing that which is not a municipal function or duty. It appears that the city ice boats are primarily maintained for the purpose of keeping the channel open in the Delaware river for the passage of vessels to and from the port of Philadelphia. This is a duty which it is said is not incumbent upon the municipality of Philadelphia, but is done for the benefit of commerce, and the towing of vessels is not carried on as part of the business of the municipality, nor for its private gain. It is difficult to state the general rule embracing the torts for which a private action will lie against a municipal corporation, but the following may be taken as thoroughly settled:

"So far as municipal corporations exercise powers conferred on them for purposes essentially public,—purposes pertaining to the administration of general laws made to enforce the general policy of the state,—they should be deemed agencies of the states, and not subject to be sued for any act or omission occurring while in the exercise of such power, unless by statute the action is given. In reference to such matters they should stand as does sovereignty, whose agents they are, subject to be sued only when the state by statute declares they may be. In so far, however, as they exercise powers not of this character, voluntarily assumed,—powers intended for the private advantage and benefit of the locality and its inhabitants,—there seems to be no sufficient reason why they should be relieved from that liability to suit and measure of actual damage which an individual or private corporation exercising the same powers for purposes essentially private would be liable." 15 Am. & Eng. Enc. Law, tit. "Municipal Corporations," p. 1141.

Applying this rule to the case at bar, it is clear that the city must be held liable. The city ice boat was not engaged in the discharge of a public duty at the time of its negligent conduct, but in the prosecution of a private enterprise for a direct profit to the city of Philadelphia, and under its direction, and in truth in pursuance of its charter; for by the act of assembly of the state of Pennsylvania, approved June 1, 1885 (commonly known as the "Bullitt Bill"), for the government of the city of Philadelphia, it is provided that the operations of the city ice boats shall be under the direction of the department of public works of that city, and one of the city ordinances provides that it shall be lawful for the trustees

of the ice boats to charge and collect such rates of towage for the service of the ice boats under their care as they may deem best. And another ordinance, similar in effect, provides that it shall be lawful for the trustees of the city ice boats to allow vessels to be used in the Delaware river and bay, and authorizes the trustees to make such charges therefor as they may deem adequate. Under such circumstances the city of Philadelphia cannot plead that it is entitled to immunity. When a municipality enters upon private enterprises, transacting private business, it assumes all the responsibility that attaches to individuals under like circumstances. Where a corporation engages in things not public, it acts as any other private individual would act, and under the same responsibilities. The decree of the court below is affirmed.

THE FELIX.

WRIGHT et al. v. THE FELIX.

(District Court, E. D. Pennsylvania. July 20, 1894.)

No. 18 of 1893.

1. SALVAGE COMPENSATION—EXPENSES.

A salvage undertaking is a speculative venture in which there is no reward if nothing is saved to the owner; and hence, if a claimant appears, the salvors are not entitled to the entire proceeds, even if they have necessarily incurred expenses exceeding the same.

2. SAME.

A steel vessel moored alongside a vessel laden with oil was withdrawn from a burning wharf by tugs, but sank immediately afterwards. The tug owners then claimed a right, by virtue of their salvage service, to raise the vessel, which they did at an alleged expense of \$20,000, besides their services. The vessel sold under order of court for only \$10,560. *Held*, that the salvors should receive but two-thirds of the proceeds, although this fell short of their expenses necessarily incurred.

This was a libel by Wright and others against the bark Felix to recover salvage.

Biddle & Ward, for libelants.

Flanders & Pugh, for respondent.

BUTLER, District Judge. On October 30, 1892, the bark Felix, a steel vessel of near 1,000 tons, was at the Atlantic Refining Company's wharf, Point Breeze on the Schuylkill, awaiting a cargo of oil. An explosion occurring near by, the flames which followed set fire to the wharf and bark, and also to the Elena G, another vessel moored outside her, laden with a cargo of refined petroleum. Both vessels were in danger of destruction, and while burning were pulled out from the wharf by the efforts of several tugs which came to their aid. The rigging of the vessels was so entangled that it was difficult to separate them. It was however accomplished, and water

was thrown on the fire until it was under control. When the Felix reached the opposite side of the channel the ballast shifted, and from this cause, and the influence of a high wind, she sank in about 30 feet of water, lying nearly across the channel, where it was narrow. She thus remained, in the way of navigation, until the following Monday, when the libelants proposed to raise her, claiming a right to do so because of what they had previously done on her behalf. The officer in charge assented. There was no contract of employment, or request on behalf of the bark that the libelants should do the work, but simply an assertion of right by the libelants to do it, and an assent that they should, on behalf of the bark. I do not mean to intimate that the result would be different if this were otherwise. The condition of the vessel, the extent of her injuries, and her value at the time, were unknown. Subsequently it was ascertained that her plates were warped, some of them broken, and that she had filled with water and was of comparatively little value. After the expenditure of much time, cost and labor, she was raised. At a sale under an order of the court she produced \$10,560. The libelants claim to have expended over \$20,000 about the work, independently of the time and labor devoted to the service. Whether this claim is just, or too high, need not be determined. I am satisfied the proper and necessary expenditures exceed any award that can be made the libelants. The respondent charges that the libelants were unskillful, occupied much unnecessary time, and rendered the work unnecessarily expensive. I do not think the libelants were unskillful. They had experience in such work; and although the means first employed by them proved ineffectual it could not be known in advance that they would do so. In judging of the wisdom or propriety of what they did the situation must be viewed as it appeared at the time, and not in the light of subsequent events. If unnecessary expenses were incurred or unnecessary time occupied in doing the work, (and I am not satisfied there were,) no loss can result to the respondent therefrom, for the reason before stated, that the largest sum that can be awarded from the proceeds of sale will fall short of even the expenses necessarily incurred.

It is conceded that the libelants are entitled to salvage compensation. The controversy is about the amount. The libelants claim to be reimbursed in full for the expenses incurred, and consequently to be awarded the entire proceeds of sale.

In determining the question thus raised the principles on which the right to salvage compensation rests must be kept in mind. A statement of these principles may be found in any elementary work on the subject. They prevail only in the admiralty. To the common law the doctrine is unknown. Voluntary services rendered to the property of another on land afford no ground for a claim of compensation; while similar services rendered for the preservation of property at sea are entitled to a liberal reward. As said by Mr. Kennedy in his work on Civil Salvage (pages 4, 5):

"The origin of the salvor's right is to be found in the Roman law, which gave to one who preserved or improved the property of another without his

request, and even without his knowledge, a title to compensation from the owner."

In the case of *The Calypso*, 2 Hagg. Adm. 209, Sir Christopher Robinson said:

"It will be found, I think, that both these forms of salvage (civil and military) resolve themselves into the equity of rewarding spontaneous services, rendered in the protection of the lives and property of others. This is a general principle of natural equity; and it was considered as giving a cause of action in the Roman law; and from that source it was adopted, by jurisdictions of this nature (the admiralty) in the different countries of Europe. This is the account which Sir Wm. Wiseman, who was a judge of this court, gave of the origin of salvage. He says 'Upon the equity hereof is that proceeding in the admiralty court clearly justified, whereby, if a ship, being set upon by pirates or by enemies, shall be rescued by another ship seasonably coming to her rescue, it charges the ship that is then redeemed with salvage money to the other; * * * that recompense being but in lieu of all damages thereby sustained, and for future encouragement to others to fight in the defense of those that they see assailed.' Considering all salvage, therefore, to be founded on the equity of remunerating private and individual services, a court of justice should be cautious not to treat it on any other principle."

But what is the rate or measure of compensation? There is no certain measure applicable to all cases. The expenditures, risks and losses incurred, and the time, labor and skill employed, are to be considered, and where the property saved justifies it a liberal allowance is to be made, sufficient not only to reimburse and compensate the salvor, but to encourage such services and undertakings. There is a limit however which the court cannot transcend. The entire property cannot be awarded; otherwise no benefit is conferred by the services on the owner; and as we have seen, such benefit alone confers the right to compensation. If nothing is saved no compensation is earned; if something is saved, but insufficient to compensate the salvor, and leave a material part for the owner, the former must share the loss, with the latter. He assumes the risk of such loss in consideration of the liberal compensation he will receive if successful. The undertaking is a speculative venture, which may result in great profit, or serious loss. Mr. Kennedy says at pages 114 and 115:

"There is no absolute rule or fixed scale of remuneration. The amount of the award, unless it has been ascertained, as it may be, by agreement, is dependent on the discretion of the court, and must from the nature of the case, always be more or less *rusticum judicium*." The amount of salvage award, said Dr. Lushington in *The Cuba*, Lush. 14, is not to be determined by any rules; it is a matter of discretion; and probably in this or any other case no two tribunals would agree. There is no jurisdiction known which is so much at large as the jurisdiction to award salvage compensation. There is none in which so many circumstances are to be considered for the purpose of determining the amount. It may be taken however as a general rule that in no case, where the owner of the saved property appears, will the court award more than a moiety of its value. 'I do not know a case,' said Sir John Nicholl in 1834, '(except for salvage of the king's ships, or where the property is small and unclaimed), where the court has exceeded a moiety.' In 1884, Brett, M. R., in *The City of Chester*, 9 Prob. Div. 186, stated the practice in these terms: 'Even in the case of derelict the admiralty has scarcely ever, under any circumstances, (and in no case of nonderelict has ever) awarded

for salvage more than one-half the property saved.' In *The Erato* (1888) 13 Prob. Div. 163, which was not a case of derelict, Butt, J., awarded salvors £2,000 out of a fund of £3,500. But this was very exceptional."

Carver on Carriage by Sea (section 345) says:

"Where the salving vessel has sustained injury, or her owner has lost earnings, through rendering services of value to the owners of the property saved, and where that property is ample, not only to defray the losses thus sustained by the owner, in addition to a proper sum for the services of the master and crew, but also to leave a substantial surplus, then the amount awarded to the owner of the salving vessel ought to be enough to cover his actual loss, and also whatever additional risk he ran.

"But regard is always paid to the value of the property saved; and an award will not be made of such an amount as to deprive its owners of the benefit of the service, with the view of recouping to the salvors their losses. It is one of the risks they run, that they may not be indemnified for their sacrifices. It is said that the court of admiralty has hardly ever, and then only in the case of a derelict, awarded as salvage more than half the value of the property saved."

See, also, the remarks of Brett, J., in *The City of Chester* (court of appeals, 1884) 9 Prob. Div. 182.

The libelants concede that only a part of the property saved can be awarded for services rendered in saving it, but draw a distinction between compensation for time, labor, skill and other personal services, and compensation for expenditures made in performing the work. I do not however find anything either in reason or the authorities to sustain this distinction. In ascertaining what is a proper allowance in a given case the court examines these two sources of claim separately, not because there is any difference in their respective merits or character, but because it leads to greater certainty. The proper remuneration for expenditures can be ascertained with exactness, while that for the personal services referred to, risk, etc., cannot. It is therefore wise thus to consider them. There is however no other reason for distinguishing them. The one is of no higher equity than the other. No authority is found for the distinction set up. No elementary work recognizes, and no decision found rests upon it. What is said in *Murphy v. Dunham*, 38 Fed. 503, is unimportant. A part is inapplicable here while the remainder is but a passing observation of the judge, which does not enter into the decision; it does not indeed arise out of the case presented, but out of a supposed case which might have been presented. The decisions in derelict cases cited are inapplicable. They rest on an exception, confined to such cases, where no claimant appears. The distinction set up here did not enter into them: the award was for the personal services as well as the expenditures, and rests alone on the fact that the property was very small and that no claimant appeared. The circumstance that these cases establish an acknowledged exception to the general rule, which has been steadily confined to the facts on which they rest, presents of itself a persuasive argument against the libelants' position. The argument is reinforced by the fact that the question has not heretofore been presented. Numerous cases must have arisen which would as well have justified its presentation as this.

Mr. Kennedy at pages 138 and 139, in summing up the result of the decisions respecting compensation, says:

"The effect of these judgments, fairly read together, appears to be that whilst the amount of damage, expense, or loss of profits, ought not, under any circumstances, to be taken as 'fixed figures' or 'moneys numbered,' to be added to the amount of the award for actual services, the fact that such damage, expense or loss has been caused in performing the service is a fact which the court ought never to disregard in ascertaining the amount of the award. But all the circumstances, of which this is only one, must be considered together; and it does not follow, necessarily, that because the salvor proves such damages, expenses or losses, the court should fix the sum awarded high enough to cover them. On the contrary the service may itself be so trivial as to make it unjust, or the property saved may be so small in value as to make it impossible to cast the burden of such an indemnity upon the owner; and if the court sees that this is the case it may properly refuse to receive evidence as to the particulars of damages, expenditures, and loss of earnings or profits, incurred by the salvor. Where however meritorious salvage services have caused the salvors serious pecuniary loss, and where the property saved is ample not only to defray this loss sustained, in addition to an adequate sum for salvage proper, but also to leave a substantial surplus for the owner of the property saved, the salvor should be remunerated with a sum sufficient both to reward him for his risk, labor, skill and conduct, and also to cover damage, expenses, and losses incurred in rendering the services."

Disregarding the distinction which the libelants have set up, what compensation should be allowed in this case? The circumstances are extraordinary. After considering them fully I believe the libelants should have two-thirds of the proceeds of sales less costs. While this sum falls short of a full compensation, it is as much as the value of the property saved will justify the court in awarding. The libelants' loss is the consequence of risk which they voluntarily assumed on undertaking the work. It is a proper source of regret; but not more so than the loss sustained by the respondent.

WILLARD v. SERPELL et al.

(Circuit Court, W. D. Pennsylvania. July 2, 1894.)

No. 11.

TAXATION OF COSTS IN PARTITION—FOLLOWING STATE PRACTICE.

The Pennsylvania statute which provides that in the taxation of costs in all cases of partition there shall be included a reasonable allowance to the plaintiff for counsel fees, as expounded by the supreme court of the state, will be followed by the circuit court of the United States.

Iams & Brock, for complainant.

Shiras & Dickey, for defendants.

ACHESON, Circuit Judge. This is a motion to include in the taxation of costs "a reasonable allowance to the plaintiff" for counsel fees to be paid (out of the appraised valuation) by all the parties in proportion to their several interests, agreeably to the Pennsylvania act of 27th April, 1864, "relative to costs in cases of partition." In Snyder's Appeal, 54 Pa. St. 67, 70, it was declared: "The design of the law was to place the parties upon an equality as to the expenses of effecting partition among them." The court further said: "Owing to minority, coverture, and other causes, the proceeding in partition may be indispensable; and yet, the party, no matter how small his interest, may be compelled to pay attorney's fees for conducting them to a conclusion as beneficial to others as to himself. The law was intended to remedy this injustice." In Grubb's Appeal, 82 Pa. St. 23, 29, 30, it was said: "In proceedings in partition a common benefit is secured to all the parties. The natural and obvious object of the statute was to enforce a contribution from each, proportioned to his share of the common service rendered to them all. Each of the parties would thus pay for the aid he had received." There the court laid down the rule of allowance as this: "The services for the performance of which the statute was meant to provide were searches, formal motions, the preparation of papers and conveyancing; in a word, for such professional duties as would properly enter into a bill of costs of an attorney under the English practice." To the like effect are the views of the court as expressed in *Fidelity Ins., etc., Co.'s Appeal*, 108 Pa. St. 339.¹ The statute, as thus expounded, adopts a principle analogous to that sanctioned by the supreme court of the United States in *Trustees v. Greenough*, 105 U. S. 527, and *Railroad Co. v. Pettus*, 113 U. S. 116, 5 Sup. Ct. 387, where it was held that one jointly interested with others in a common fund, who recovers it for the general benefit, or maintains a suit to save it, and secures its proper application, is entitled in equity to the allowance of costs as between solicitor and client, including reasonable counsel fees. In equity the costs of the commission and of making out the title in partition have always been divided among the parties in proportion to the value of their respective interests. *Adams, Eq.* 389; *Cannon v. Johnson*, L. R. 11 Eq. 90. As the Pennsylvania act establishes a just rule applicable to proceedings

¹ 1 Atl. 233.

for partition in all the courts of the state, I think it should be followed by this court, within the limits of allowance for counsel fees indicated by the decisions above cited. Motion granted, the amount of the allowance to be fixed by the court.

PORTER v. DAVIDSON, Sheriff.

(Circuit Court, W. D. North Carolina. August 4, 1894.)

1. CONFLICTING STATE AND FEDERAL JURISDICTION — CLAIM AND DELIVERY — TAKING PROPERTY FROM SHERIFF'S POSSESSION.

Property in possession of a sheriff under process issued by a state court cannot be taken out of his possession in an action of claim and delivery in the federal court.

2. SAME—DAMAGES.

But the action of claim and delivery in the federal court may be maintained by a third person in so far as it seeks to recover damages against the sheriff for the wrongful taking.

This was an action of claim and delivery by Henry K. Porter against S. W. Davidson, Jr., sheriff of Cherokee county, N. C. Defendant moved to set aside the service of summons, and to dismiss the complaint.

J. W. & R. L. Cooper, for motion.

Gudger Martin, contra.

Before SIMONTON, Circuit Judge, and DICK, District Judge.

PER CURIAM. This is a motion to set aside the service of a summons and to dismiss the complaint upon the ground that the record discloses a want of jurisdiction in this court. The plaintiff is mortgagee of certain chattels in the possession of George Porter & Co., the mortgagors, after condition broken. The defendant, the sheriff of Cherokee county of North Carolina, had seized and held the chattels under warrants of attachment issued out of the courts of North Carolina against the mortgagors, the causes of action being debts alleged to be due by the mortgagors to the attaching creditors respectively. Pending the suits in which the attachments were issued, the present plaintiff mortgagee brought his action of claim and delivery in this court, setting forth the fact that he is the owner of the chattels, and entitled to the possession thereof. Thereupon, pursuing the practice in North Carolina, he executed the proper undertaking, and the marshal of this court took the chattels from the possession of the defendant sheriff, and delivered them to the plaintiff. The defendant has filed his answer, denying that plaintiff is the owner of the chattels, and setting up the fact that he is in possession of said chattels under divers warrants of attachment issuing out of proper courts in North Carolina, said chattels being the property of George Porter & Co., the defendants in the said suits in which the attachments were issued. The question is, can this suit of claim and delivery be maintained against the defendant sheriff under these circumstances? It is well to keep in mind the precise question before us. The plaintiff claims

and has had accorded to him the right to take out of the possession of the state sheriff the chattels held by him under process from the state courts. The question is not as to the personal responsibility in damages to which the sheriff has exposed himself in executing the processes of attachment. In *Taylor v. Carryl*, 20 How. 583, the supreme court, in an opinion of recognized authority, held "that property seized by a sheriff under process of attachment from a state court, and while in the custody of the officer, could not be seized or taken from him by process in admiralty from the district court of the United States." The ratio decidendi was this:

"In the case of conflicting authority under state and federal process, in order to avoid unseemly collision between them, the question as to which authority should for the time prevail does not depend upon the rights of the respective parties to the property seized,—whether the one was paramount to the other,—but upon the question which jurisdiction had first attached by the seizure and custody of the property under its process."

In *Freeman v. Howe*, 24 How. 450, this doctrine was commented on, approved, and applied. In this last-named case the marshal of the United States court had attached certain property under warrants of attachment, and it had been taken out of his custody by the state's officer, under a writ of replevin issued out of the state court. The warrant of attachment had been directed, not against property specifically described, but commanded a levy as in cases of *fi. fa.* upon the property of the defendant. In that state of things the supreme court held:

"When property is taken and held liable under process, mesne or final, of a court of the United States, it is in custody of the law, and within the exclusive jurisdiction of the court from which the process issued for the purposes of the writ. The possession of the officer cannot be disturbed by process from any state court, because to disturb that possession would be to invade the jurisdiction of the court by whose command it is held, and to violate the law which that jurisdiction is appointed to administer. Any person not a party to the suit or judgment, whose property has been wrongfully, but under color of process, taken and withheld, may prosecute by ancillary proceedings in the court wherein the process issued his remedy for restitution of the property or its proceeds."

Vice versa, the jurisdiction of the state courts will be maintained and preserved under like circumstances. The doctrine of this case was stated and approved in *Buck v. Colbath*, 3 Wall. 341, and the general principles reiterated:

"Whenever property has been seized by an officer of the court by virtue of its process, the property is to be considered in the custody of the court, and under its control, for the time being. No other court has the right to interfere with that possession, unless it be some court which may have a direct supervising control over the court whose process has first taken possession, or some superior jurisdiction."

It will be noted that this doctrine is confined to the right of possession of the goods, and prevents only the disturbance of that possession. Says *Covell v. Heyman*, supra:

"All other remedies to which he [the claimant of the property] may be entitled against officers or parties, not involving the withdrawal of the property or its proceeds from the custody of the officer and the jurisdiction of the court, he may pursue in any tribunal, state or federal, having jurisdiction over the parties or the subject-matter." 111 U. S. 179, 4 Sup. Ct. 355.

And the same doctrine is distinctly stated in *Buck v. Colbath*. So, also, in *Lammon v. Feusier*, 111 U. S. 19, 4 Sup. Ct. 286, the court makes the same distinction: "When a marshal, upon a writ of attachment on mesne process, takes property of a person not named in the writ, the property is in his official custody, and under the control of the court whose officer he is and whose writ he is executing; and, according to the decisions of this court, the rightful owner cannot maintain an action of replevin against him, nor recover the property specifically in any way except in the court from which the writ issued;" quoting *Freeman v. Howe*, *supra*, and *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. 27. But "a person other than the defendant named in the writ whose property is wrongfully taken may indeed sue the marshal like any other wrongdoer, in any action of trespass, and recover damages for the unlawful taking, and neither the official character of the marshal nor the writ of attachment affords him any defense to such an action;" quoting *Day v. Gallup*, 2 Wall. 97; *Buck v. Colbath*, *supra*. The whole subject is exhaustively discussed in *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. 355, and the doctrine and distinction above set out fully declared and established.

The rubric of the case summarizes its conclusion. The possession by a marshal of a court of the United States of property by virtue of a levy of an execution issued upon a judgment recovered in a circuit court of the United States is a complete defense to an action in a state court of replevin of the property seized without regard to the rightful ownership. The principle that, whenever property has been seized by an officer of the court by virtue of its process, the property is to be considered as in the custody of the court, and under its control, applies both to the taking under a writ of attachment on mesne process and to a taking under execution.

The learned counsel for the plaintiff in his brief quotes Chief Justice Pearson in *Jones v. Ward*, 77 N. C. 337, and cases confirming him,—*Churchill v. Lee*, 77 N. C. 341; *Duke v. Markham*, 105 N. C. 131, 10 S. E. 1003. But these were cases within the jurisdiction of the court which was in possession of the goods. The claimants pursued their remedy within that jurisdiction,—a right recognized and pointed out in the cases in the supreme court of the United States. He also quotes and relies on *Wood v. Weimer*, 104 U. S. 793; but that case turned upon the question whether replevin would lie anywhere against a sheriff who levied an attachment on goods. The court below held that it would not; but pending the appeal from this decision the supreme court of Michigan in *King v. Hubbell*, 42 Mich. 597, 4 N. W. 440, held that, although goods mortgaged could be taken, under an attachment, from possession of the mortgagor, the officer must surrender them to the mortgagee on demand, after inventory and appraisal completed, unless the attaching creditors dispute the validity of the mortgage. Upon the strength of this decision the supreme court of the United States reversed the decision below. The present point was not raised. Indeed, the doctrine asserted by the supreme court would not have applied. Under the law of Michigan the sheriff who had attached mortgaged prop-

erty was bound to deliver it to the mortgagee demanding it, and not to wait for any order of court, unless the validity of the mortgage was denied. *Wise v. Jefferis*, 2 C. C. A. 432, 51 Fed. 641, seems to be in conflict with the decisions of the supreme court of the United States.

The chattels taken under process of claim and delivery in this case were in the hands of the defendant, a state officer, under process of the state courts, were subject wholly to the jurisdiction of the state courts, and are not amenable to the process of claim and delivery out of this court. The language of the supreme court in *Covell v. Heyman*, 111 U. S., at page 182, 4 Sup. Ct. 355, cannot be quoted too often:

"The forbearance which courts of co-ordinate jurisdiction administered under a single system exercise towards each other, whereby conflicts are avoided by avoiding interference with the process of each other, is a principle of comity with perhaps no higher sanction than the utility which comes from concord. But between the state courts and those of the United States it is something more. It is a principle of right and law, and therefore of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent. Although they exist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and, when one takes into its jurisdiction a specific thing, that res is as much withdrawn from the judicial power of the other as if it had been physically carried into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void."

It is ordered that the chattels taken in this case be returned to the custody of the defendant sheriff of Cherokee county, N. C. But, as has been seen, the cases go only to the possession of the res. A third party may pursue his remedy against the sheriff for damages in any court. The proceedings of the plaintiff in this case by which he took from the possession of the sheriff the chattels levied on was ancillary, not in any way affecting the merits of the original case. That can go on without conflicting with any of the cases quoted above. It is further ordered that so much of this notice as seeks to set aside the service of the summons or to dismiss the complaint is refused.

WILSON et al. v. PERRIN.

(Circuit Court of Appeals, Sixth Circuit. June 5, 1894.)

No. 181.

1. FEDERAL COURTS — STATE LAWS AS RULES OF DECISION — CHATTEL MORTGAGES.

On the question of the validity of a chattel mortgage reserving the mortgagor's exemptions from execution under the laws of the state, the settled local law controls.

2. CHATTEL MORTGAGES — VALIDITY — RESERVATION OF MORTGAGOR'S EXEMPTIONS FROM EXECUTION.

By the law of Michigan, a mortgage of a stock of goods, subject to all exemptions from execution to which the mortgagor is entitled under the laws of the state, is not invalid, even as to a creditor garnishing the mortgagee before a separation of the exempt portion, as the exemption law

furnishes the means of separation and identification, and the mortgagee takes a defeasible title to the entire stock, subject to be defeated by a selection of the exempt goods when made by the mortgagor.

In Error to the Circuit Court of the United States for the Western District of Michigan.

This was an action by Edward B. Wilson and others against George T. Bruen, in which a writ of garnishment was issued against Joel J. Perrin, to whom Bruen had given a mortgage of his goods. Judgment was rendered for plaintiff against defendant Bruen, but on trial of the issue as to Perrin the judge directed the jury to find for him, and judgment for Perrin was entered on the verdict. Plaintiffs brought error.

Fletcher & Wanty, for plaintiffs in error.

E. M. Irish, for defendant in error.

Before TAFT and LURTON, Circuit Judges.

LURTON, Circuit Judge. The question involved upon this writ of error concerns the validity of a certain chattel mortgage executed by George T. Bruen, who was a merchant doing business in the city of Kalamazoo, Mich., to the appellee, Joel J. Perrin. It was made for the purpose of securing an indebtedness of \$14,974.36, which amount was due by Bruen to Perrin. The property mortgaged consisted of the entire stock of dry goods, with the furniture and other fixtures usually found in a dry-goods store, and also two horses, a buggy, a cutter, and certain harness. It was made on the 31st day of August, 1893, and was delivered to Perrin on the 2d day of September following, who on that date took possession of the property described in it, and on the 1st day of the following November he sold the entire property so mortgaged for the sum of \$14,500.

The appellant Edward B. Wilson, upon the assumption that the mortgage was void, and being a creditor of the mortgagor Bruen, began a suit against him in the circuit court of the United States for the western district of Michigan on the 13th day of September, 1893, and, under the practice in Michigan, sued out a writ of garnishment against Perrin, the mortgagee, who was then in possession of the goods. This writ of garnishment was taken out under section 8091 of Howell's Annotated Statutes, and is the same statute considered and construed in *Treusch v. Ottenburg*, 4 C. C. A. 629, 54 Fed. Rep. 867. On October 17, 1893, a judgment was rendered in favor of the plaintiff Wilson against the defendant Bruen for \$14,192.22. The case then came on for trial against the garnishee defendant, Perrin.

The contention of the plaintiff was and is that the mortgage was void for uncertainty. The granting part contained this clause:

"All the goods, chattels, stock, in trade, fixtures, and chattels and merchandise of every name and nature, now in the store occupied by said first party, and known as '125 West Main Street,' in said city of Kalamazoo, being the entire stock of dry goods and similar lines carried by said first party, together with all tables, counters, and two portable furnaces in said store; also, two horses known as 'David' and 'Dick,' and the carriage horses driven by said

first party, one single top buggy, one two-seat surrey, one set double harness, one single harness, one cutter, and all blankets and robes used in connection with said horses and carriages by said first party; also, the safe in said store. The said party of the first part also grants, bargains, sells, transfers, and assigns all the book accounts and bills receivable now on his books kept in connection with the business he has been conducting in said store, and owing to him, due and to become due, unto said second party, and authorizes said second party to collect the same in his own name, and to apply all amounts collected, less the expense of collection, upon the indebtedness already accrued upon the notes which this mortgage is given to secure."

At the conclusion of the instrument there is to be found the following clause:

"The surplus or residue, if any, to belong and be returned to said first party; it being understood that this mortgage is made subject to all exemptions from execution to which said first party may be entitled under the laws of the state of Michigan, and that his exempt interest is not covered by this mortgage."

The judge presiding in the circuit court instructed the jury that the provision reserving the mortgagor's exemptions under the law of Michigan did not invalidate the mortgage, and that they should return a verdict for the defendant.

The contention of the learned counsel for the appellant is that this "was not a mortgage of the entire stock of goods, including the exempt portion, with an added clause that the exempt portion might afterwards be taken out, but it was only a mortgage of that portion which should be left after the exempt portion had been separated." The insistence, therefore, is that inasmuch as the mortgagee was garnished before a separation of the exempt portion had been made, there was no means to determine which portion of the stock of goods was conveyed, and which was not.

Under the exemption laws of Michigan, merchandise to the value of \$250 is exempt from execution in the hands of a merchant. The trial judge was of the opinion that the question thus presented was to be determined by the law of Michigan. If such a mortgage is valid either under the statute law of that state, or by the well-settled law of the state as declared by its highest courts, then we quite agree that the local law is controlling. *Bank v. Bates*, 120 U. S. 556, 7 Sup. Ct. 679; *Means v. Dowd*, 128 U. S. 273, 9 Sup. Ct. 65; *Union Nat. Bank v. Bank of Kansas City*, 136 U. S. 223, 10 Sup. Ct. 1013; *Etheridge v. Sperry*, 139 U. S. 276, 11 Sup. Ct. 565. In the case last cited the opinion was by Mr. Justice Brewer. The case involved the validity of a chattel mortgage made in Iowa. After considering the decisions of the supreme court of that state which bore upon the question involved, the court came to the conclusion that the mortgage was valid under the law of Iowa. In discussing the question as to whether its validity was controlled by the law of the state in which the instrument had been made, the court said:

"The matter is not one of purely general commercial law. While chattel mortgages are instruments of general use, each state has a right to determine for itself under what circumstances they may be executed, the extent of the rights conferred thereby, and the conditions of their validity. They are instruments for the transfer of property, and the rules concerning the transfer of property are primarily, at least, a matter of state regulation. We are aware that there is great diversity in the rulings on this question by the courts

of the several states, but, whatever may be our individual views as to what the law ought to be in respect thereto, there is so much of a local nature entering into chattel mortgages that this court will accept the settled law of each state as decisive in respect to any case arising therein." Pages 276, 277, 139 U. S., and page 565, 11 Sup. Ct.

It becomes, therefore, necessary that we shall ascertain what is the settled local law, as evidenced by the decisions of the highest courts of the state of Michigan.

In the beginning we may as well say that we attach no particular importance to the suggestion that the conveyance is limited to what should be left after the exemptions should be set apart. The conveyance is of the entire stock of merchandise, subject to the mortgagor's right of exemption. This is the plain and obvious meaning. As to the exemptions, it would seem that the mortgagee would take a defeasible title, subject to be defeated upon separation of the statutory amount of exemptions from the stock.

In the case of *Hollister v. Loud*, 2 Mich. 323, an assignment in trust to secure certain creditors was attacked upon the ground that the assignors "reserved from the general mass of the property such of it as was by law exempt from execution." This was held not to affect the deed. The court, as to this, said:

"As to the property which was for the time being withheld, and which was allowed to the assignors by the assignees as being exempt by law, we say, if the property was not exempt, it, at the least, was assigned, and vested in the trustees. The assignees must settle that question with the assignors. The creditors will hold them responsible if the property was not exempt. It was not done secretly. The parties attempted to act under the law."

We see no substantial difference between the legal effect of the language used in the mortgage before us and that sustained in *Hollister v. Loud*.

In *Smith v. Mitchell*, 12 Mich. 180, an assignment was attacked as void because it purported to convey all of the assignor's stock in business, goods, chattels, merchandise, etc., "except, however, our household furniture, and property exempt by law from execution." The court said:

"The assignment is not void on its face, for excepting property exempt from execution without specifying it. A bona fide selection is as practicable here as under a levy."

To say that certain of the property which would pass under the general description is not covered by the conveyance, because of the mortgagor's exemptions, is nothing more than what is meant when out of the conveyance is "excepted" or "reserved" the bargainor's exemptions.

In *Brooks v. Nichols*, 17 Mich. 38, the assignment seems to have been a general one, and to have included all of the assignor's property, real and personal, "saving and excepting such as is exempt from seizure and sale under execution by the laws of the state." Cooley, C. J., in pronouncing the opinion of the court as to the effect of such an exception, said:

"We are of opinion that the circuit judge erred in not rendering judgment for the plaintiff on the special verdict. That verdict established the bona fides of the assignment of McDonald, and the only question that could remain

was whether it was void in law by reason of the omission to select out the exempt property. This question we regard as settled by the decisions of this court in *Hollister v. Loud*, 2 Mich. 323, and *Smith v. Mitchell*, 12 Mich. 180. The supposed difficulty of sustaining an assignment which assumes to transfer property not separated from a larger quantity is not met with in these cases. The assignment is in effect a transfer of the whole property, subject to a right in the assignor to select out a certain portion or certain articles, which the law, on the selection being made, absolutely sets aside for the benefit of himself and his family. The assignment passes for the benefit of creditors the same interest, precisely, which an officer would seize by virtue of execution, and there is no more difficulty in making the selection of exempt property in the one case than in the other. The principle is not new. Transfers of the debtor's property, under bankrupt and insolvent laws, are subject to the like right of selection, and we are not aware that any difficulty has been supposed to exist in the title of the assignee in those cases. He succeeds to the rights of the bankrupt or insolvent; acquiring, however, so far as exempt property is concerned, a defeasible title, which is divested when the selection is made. The trustee in a voluntary assignment stands on the same footing, and is entitled to the like protection. The judgment of the court below should be reversed, and judgment rendered for the plaintiff for six cents damages, and the costs of both courts."

A distinction is suggested to exist as to the effect of such an exception when found in a chattel mortgage, and the cases of *Giddey v. Uhl*, 27 Mich. 94, and *Richardson v. Lumber Co.*, 40 Mich. 203, are cited. We find nothing in either of these cases in the slightest degree justifying such a distinction.

In *Giddey v. Uhl*, cited above, the chattel mortgage in question described the mortgaged property as follows:

"All the following described household furniture and personal property now upon the premises No. 25 George street, in the city of Detroit, owned and occupied by the Whittleseys aforesaid, viz. 1 sofa, 1 lounge, 2 marble-top tables, 2 easy chairs, 3 parlor chairs, 1 black walnut center table, 2 card tables, 1 whatnot, 2 cane chairs, 1 secretary, 1 lounge, carpets, bedding, bed-room furniture, and other personal property in and about said house and premises, except herefrom such personal property as is exempt from execution by the laws of the state of Michigan, to wit, stoves in use, family pictures, library and school books, clothing, provisions, fuel, and sewing machine, also excepting household goods, furniture and utensils therein, of the value of two hundred and fifty dollars."

Christiancy, C. J., as to the effect of the reservation, said:

"It is insisted by the plaintiffs in error that the exception contained in the mortgage, of household goods, furniture, and utensils to the value of two hundred and fifty dollars renders the mortgage entirely uncertain as to the property intended to be mortgaged, and that the mortgaged property cannot, for this reason, be identified; and, if this exception applies to and affects the specially enumerated articles, this may be a very pertinent objection, or might be so if it did not appear that the mortgagors had at the time two hundred and fifty dollars' worth of goods, furniture, and utensils besides the enumerated articles and those exempt from execution. But, construing this mortgage in the light of the facts found, we think it appears with reasonable certainty that this exception was intended to apply to the property mortgaged by the general description only, and not to the articles specifically enumerated. We think the intention was to mortgage the specific articles unconditionally; that the general description which follows the specific enumeration was intended to give so much further security as the property thus generally described would give, after deducting from it what was exempt from execution, and two hundred and fifty dollars' worth of household goods, furniture, and utensils besides. This was the construction adopted by the circuit judge, and we think it clearly correct."

In the case of *Richardson v. Lumber Co.*, above cited, there was a contest between two mortgagees, claiming under instruments of different dates. The mortgagor owned a large quantity of logs in Thunder Bay river. At the time of the execution of the first mortgage, it appears "they had over a million feet of logs marked 'O dot K,' and gave a chattel mortgage on "one hundred thousand feet of white pine saw logs now on the North Branch, so called, of Thunder Bay river." "These logs were further described as having been cut during the winter of 1873-74, but the particular logs mortgaged, or intended to be, were in no way designated, described or separated from the entire mass bearing the same mark." Subsequently, the mortgagors gave another mortgage upon the entire mass of logs, and thus the second mortgagee acquired an interest before any separation or any designation of the logs first intended to be mortgaged had been made. The court held that inasmuch as no separation had been made, and inasmuch as the mortgage furnished no means and made no provision by which the logs mortgaged might be separated from those not mortgaged, the subsequent mortgagee of the entire mass was entitled to preference.

We see nothing in either of these cases that in the least weakens the force and effect of the rule as declared in the earlier cases, which we have heretofore cited.

Under section 7686, How. Ann. St., the mortgagor was entitled to select from his stock in trade goods and merchandise to the value of \$250. The selection is to be made by the debtor entitled to the exemption. *Brooks v. Nichols*, *supra*; *Town v. Elmore*, 38 Mich. 305. Thus, we have the means of separation and identification furnished by the statute under which the reservation is claimed. This obviates all the difficulties pointed out by the court in *Richardson v. Lumber Co.*, *supra*, and which operated to make the mortgage of part of a mass void as incapable of identification. "*Certum est quod certum reddi potest.*"

The effect of the mortgage involved in this case was to convey to the assignor the entire stock of merchandise, subject to the right of the mortgagor to select therefrom goods to the value of \$250; the mortgagee taking a defeasible title to the entire stock, subject to be defeated by a selection of the exempt goods, when such selection should be made by the mortgagor or his agent. We see no difficulty, whatever, under the well-settled law of Michigan, in concluding that such a mortgage, subject to the debtor's right of exemption, affords no more difficulties in a separation of the property mortgaged from that which is exempt than in the case of a levy, or in the case of a bankruptcy, or in the case of a general assignment for the benefit of creditors.

The judgment must therefore be affirmed.

STAPLES v. RYAN.

(Circuit Court, D. Colorado. July 30, 1894.)

No. 3,019.

MECHANICS' LIENS—SALE—VALIDITY.

In an action to enforce a mechanic's lien on defendant's entire property, in which several interveners claimed liens against the same, and one claimed a lien against a portion only, a decree was entered fixing the amount due each claimant, and adjudging that each have a lien therefor against the property described in his complaint, and ordering the entire property to be sold to satisfy the liens. All the parties assented to the decree, and no motion was made to set aside the sale thereunder. *Held*, that the sale was not void on the ground that by such sale the person claiming a lien against only a portion of the property shared in the proceeds from property of which his complaint did not give the court jurisdiction.

On the 1st January, 1885, the Bassick Mining Company held title by United States patent to the Maine lode and mill site, the Triangle lode, the Spring lode, the Frank lode, the Georgia lode and Lookout mill site, the Nemeha lode, and the Lookout lode, situate in Custer county, Colo.

On the 1st of June, 1885, W. D. Schoolfield commenced suit in the district court of Custer county against the Bassick Mining Company and other defendants to enforce a mechanic's lien for work performed upon the lodes in question. In this suit, certain other lien claimants intervened, setting up various claims against the Bassick Mining Company. On June 15, 1885, referees were ordered to take testimony and report on all the lien claims against the company, which resulted in a decree adjudging to certain of the defendants sums according to their proved claims, and ordering the sheriff to sell so much of the property of the company as would pay the several judgments mentioned in the decree. The sheriff advertised all the property of the company for sale at public auction, and it was sold on July 11, 1885, and struck off and sold to Clapp Spooner for \$37,599.85, and a certificate of sale issued to the buyer. On June 2, 1885, Vorreiter commenced suit by attachment against the Bassick Mining Company to recover \$3,152. Upon this suit the plaintiff obtained judgment, which judgment was assigned to George H. White, who on January 16, 1886, caused execution to issue and levy to be made upon the property of the Bassick Mining Company, and on the same day paid to the sheriff the sum of \$37,599.85 and costs, together with interest thereon from July 11, 1885, for the purpose of redeeming, as a judgment creditor, from the sale to Spooner, and then caused the property to be advertised for sale under this execution; but before the time appointed for the sale the Hendrie & Bolthoff Manufacturing Company instituted suit in the same court against the said George H. White and others to restrain and enjoin said sale. A temporary writ of injunction was granted, which injunction was afterwards dissolved, and the suit dismissed. On May 13, 1886, sale was made under the White execution and levy, and the sheriff duly sold the property, and White bought it in for \$60,000, paid the money to the sheriff, and received certificate of purchase from him. On May 14, 1886, James Staples, the plaintiff herein, was the assignee of a judgment duly obtained by Ratcliff Bros. against the Bassick Mining Company, and as a judgment creditor, and with the purpose of redeeming from the White sale, paid to the sheriff the sum of \$60,016.67, being the sum of the White purchase and interest to date, and thereupon caused the property of the company to be again levied upon and advertised for sale under the said execution. Afterwards, and before the time fixed for this last-mentioned sale, the Union Iron-Works Company, claiming to be a judgment creditor of the Bassick Mining Company, instituted suit in the district court of Custer county against George H. White, James Staples, the Bassick Mining Company, and the sheriff, seeking

to restrain the said sale, and for writ of injunction, which was denied, and appeal taken to the supreme court, who granted a temporary injunction pending the appeal; and on May 18, 1887, the supreme court affirmed the judgment of the district court, and dissolved the said injunction. The Bassick Mining Company sued out a writ of error to the judgment rendered on June 19, 1885, in the Schoolfield suit, to the supreme court of Colorado, and on May 18, 1887, that court reversed the decree of the district court, and remanded the cause; and the sale which had been enjoined in the Union Iron-Works suit was proceeded with by the sheriff, who duly advertised, and sold to said Staples, as a redemption creditor, and delivered to him his deed for the property. On May 27, 1885, an attachment suit was commenced by Hendrie & Bolthoff Manufacturing Company against the Bassick Mining Company, and on July 29, 1885, judgment was duly rendered in favor of the defendant, and execution issued to the sheriff, which was afterwards returned by him, showing the sale of some personal property, but not enough to satisfy the judgment, a transcript of which judgment was duly recorded in the county. On May 9, 1886, this Hendrie & Bolthoff judgment was duly assigned to Dennis Ryan and Frank G. Brown, a second execution issued, and returned nulla bona; and on May 26, 1887, a third execution issued, and was duly levied, on 31st May, upon all the property above described as belonging to the Bassick Mining Company. On 3d August, 1887, the property of the Bassick Mining Company was sold under the execution levied upon the 31st May, 1887, and bought in by Dennis Ryan for \$6,700, and this sum was paid to the sheriff, and he issued his certificate of sale on 3d August, 1887, and on 9th September, 1892, his deed, to said Ryan.

Hugh Butler, for plaintiff.

Thomas, Bryant & Lee, for defendant.

HALLETT, District Judge. June 1, 1885, W. D. Schoolfield brought suit in the district court of Custer county, Colo., against the Bassick Mining Company and others, to enforce a mechanic's lien on certain mining claims situate in that county, and owned by the said company. Several other lien claimants appeared in the suit, and asserted liens upon the same property for various amounts. One, Thomas Armstrong by name, appeared and asserted a lien for a considerable sum against one of the lode claims only, described in the bill, and called the "Maine Lode." The cause was referred, to enable the several lien claimants to prove up the amount of their respective claims, and all parties, including the principal respondent, the Bassick Mining Company, appeared before the referee. In due time, June 19, 1885, a decree was entered fixing the amount due to each of the claimants, and declaring that each should have a lien upon the property described in his complaint for the sum adjudged to him. In this way, and by the recital that the parties, respectively, should have a lien upon the property described in their complaints, all except Armstrong secured a lien upon all of the property mentioned in the bill, and Armstrong's lien attached to the Maine lode only. The court further decreed that all of the property should be sold by the sheriff of the county to satisfy these liens, and the property was described at length in the decree. The decree seems to have been entered with the assent of all parties, including the Bassick Mining Company, and this applies to the order of sale as fully as to other parts of the decree. No motion was made in the district court at any time to modify or change the decree in any particular; and in the month of July following a sale was made by the sheriff, pursuant to the decree, for a sum suffi-

cient to satisfy all the claimants, including Armstrong, and they were accordingly paid in full.

Upon this statement of facts, it seems clear that the district court of Custer county, under the Schoolfield bill, acquired full jurisdiction of the property described in it, and of all parties to the suit; and that the decree of June 19th, and the sale subsequently made pursuant to its terms, were entirely within the power of the court. The jurisdiction of the court over the property described in the bill did not stand upon the Armstrong petition. Armstrong was an intervener claiming a lien as against one lode described in the bill, and his position in the case could not affect the original complainant, or the jurisdiction of the court upon the original bill. Whether his claim should be allowed or not, the court had the same authority to proceed against the property for satisfying the complainant's demand and the demands of other claimants against the whole property. It may be conceded that Armstrong was entitled to have the property on which he claimed a lien sold in a manner to satisfy his claim, as well as that of the other claimants in the suit; but he did not ask to have it sold in any particular way, nor did he raise any objection to the sale after it was made. As before stated, all parties assented to the decree, and, no motion having been made to set aside the sale, it is fair to assume that all parties also assented to the sale. If the Bassick Mining Company desired to have the sale made in any particular manner, it should have asked the court for an order in that behalf. And so, also, as to Armstrong and all other parties to the suit. If the sale, when made, was not acceptable to the Bassick Mining Company or to Armstrong, or to any other of the claimants, application should have been made to the district court to set it aside. Since all the property was subject to sale for satisfying the several claims in one way or another, the Bassick Mining Company could only ask that it should be sold in a manner to bring the most money; and it has not been claimed, nor does it appear, that the sale was made at a sacrifice, when considered with reference to the value of the property. Upon this, it is impossible to say that the sale was void; and, but for the emphatic declaration of the supreme court to that effect, the question would hardly be worthy of discussion. *Mining Co. v. Schoolfield*, 10 Colo. 46, 14 Pac. 65. It is believed, however, that the supreme court did not intend to set aside the title acquired by Spooner at the July sale, notwithstanding the statement that it was made without authority. The concluding paragraph of the opinion gives the district court authority to make such order as may be necessary to protect the rights of lien claimants and the purchaser at the sale; and this undoubtedly conferred upon the district court authority to confirm the sale when it should appear that all parties were satisfied, excepting the Bassick Mining Company, and that it had no just ground of complaint. Several sales were made conformably to the statute, at the instance of redeeming creditors, following the July sale to Spooner; and it is believed that the title acquired by Spooner was, by these sales, transmitted to the plaintiff in this suit. Upon a cursory examination of the opinion of

the supreme court, reported in 10 Colo., and 14 Pac., in another case, heard in November, 1887, I was led to believe that the effect of that decision was to avoid all sales made under the Schoolfield decree. Upon a more careful examination of the subject, I am satisfied that the opinion then expressed was wrong. The sale under the Schoolfield decree was perhaps voidable, but it was not void. Concerning the tax title upon which defendant relies, it cannot be necessary to enter into an extensive discussion. The proceedings in assessment and the notice of sale are so far irregular that the title cannot be recognized. I am of the opinion that judgment should go for the plaintiff.

APPLETON et al. v. MARX et al.

(Circuit Court of Appeals, Fifth Circuit. May 8, 1894.)

No. 199.

RES JUDICATA—REVERSAL IN PART ON APPEAL—ACCOUNTING BY ADMINISTRATOR.

A plea setting up, in bar of a suit for an accounting by an administrator, judgments of a county probate court approving his accounts filed in that court cannot be sustained on evidence showing that, on appeals duly prosecuted from said judgments to a district court, judgment was rendered disapproving and disallowing the accounts, and sustaining the objections thereto except as to commissions allowed.

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

The appellants, Minnie M. Appleton, and T. J. Appleton, her husband, citizens of the state of Michigan, claiming to sue in the right of the said Minnie M. Appleton, and as next friends of James M. Strong, an infant, filed a bill in the circuit court of the United States for the eastern district of Texas against Joseph Marx, L. C. De Morse, and others, citizens of Bowie county, in the state of Texas, and Max Munzesheimer, S. Cory, and F. M. Duncan, nonresidents of the state of Texas. The bill charges, in substance, that in November, 1884, James Strong died intestate in the state of Michigan, leaving surviving the said Minnie M. Appleton (then Minnie M. Strong), his wife and widow, and the said James M. Strong, his only child and heir at law, then an infant two years old; that on May 7, 1885, the defendant Joseph Marx was duly appointed temporary administrator of the estate of said James Strong, deceased, by the county court of Bowie county, Tex.; that on the same day the said defendant Joseph Marx gave bond as temporary administrator in the sum of \$50,000, with all the other defendants as sureties on said bond, which bond was duly received, approved, and filed; that on the same day the said Joseph Marx qualified as said temporary administrator, and entered upon the duties thereof; that on the 20th day of June, 1885, the said Joseph Marx filed in the county court of Bowie county an inventory and appraisement of the estate of said James Strong, deceased, in which he showed numerous claims due and owing to said estate, secured by mortgage and other liens, recapitulating the same; that on June 9, 1885, and on January 27, 1886, and January 25, 1887, the said Joseph Marx, as temporary administrator, collected certain claims, amounting to about \$19,500, belonging to the estate of James Strong, deceased. That on October 1, 1884, the said James Strong, then living, placed in the hands of the said Joseph Marx a promissory note against the firm of Frost & Ferguson, in Miller county, Ark., for \$850, which note belonged to said Strong, and was placed in the hands of Marx for collection; that on January 1, 1885, the said Marx collected the said note, with \$50 interest due thereon, which said sum of money was assets in the hands of said Marx when he was appointed as tem-

porary administrator, and should have been included in the inventory and appraisal of the estate of said James Strong, and is now a proper charge against said Joseph Marx as such temporary administrator; that in January, 1885, the said Joseph Marx received from the Kaiser Lumber Company a large sum of money as the proceeds of the sale of lumber, machinery, etc., belonging to the estate of said James Strong, which said money was assets belonging to the estate of said James Strong, and in the hands of said Marx when he was appointed temporary administrator, and should have been included in the inventory and appraisal of the property and estate of said James Strong; that the said James Strong owned and possessed 250,000 feet of lumber, which was of the value of \$2,500, and that the said Joseph Marx, through willful and gross negligence, failed to include said lumber and property in the appraisal of the assets of the said Strong, and through willful and gross negligence failed to take the said lumber into his possession, and failed to keep and preserve the same, but suffered and allowed W. Behan, W. B. Kaiser, and J. M. Kaiser, three of the sureties on his bond as temporary administrator, to take and convert the said lumber to their own use and benefit, whereby the said lumber and property was totally lost to the estate of said Strong, deceased, whereby the said Marx became liable and bound to pay orators the value of said lumber and property, with interest, for permitting and allowing said waste; that at the March term, 1887, of the district court of Bowie county, Tex., the said temporary administration of the estate of said James Strong, deceased, was determined, ended, and closed by the said court by its proper judgment, and that, by the judgment of said court, the said Marx, as such temporary administrator, was ordered and commanded to deliver up and turn over all the property, money, and assets then in his hands belonging to said estate to those entitled to receive the same, which judgment has never been set aside, modified, or appealed from; that there never was any regular administration of the estate of said James Strong, nor any necessity for an administration of said estate, for there were no outstanding debts on said estate at the death of said James Strong; that orators Minnie M. Appleton and James M. Strong were the sole owners, and were entitled to the immediate possession, of all of the property and assets belonging to the estate of said James Strong, deceased, as the surviving wife and only child and heir at law of said James Strong, deceased. That in pursuance of said judgment of the district court, orators did, on the 21st of March, 1887, make a demand on said Joseph Marx, as such temporary administrator, for possession of all the property, claims, money, and assets belonging to the estate of said James Strong, deceased, which demand said Marx failed and refused to comply with; that said Marx, as temporary administrator, converted to his own use and benefit all the property, claims, money, and assets belonging to the estate of James Strong, deceased, as the same had come to his hands and possession, and thereby committed a total waste of the whole of said estate that had been committed to his charge by virtue of the appointment; and that in March, 1887, the time when the said temporary administration was closed, and when said Marx, as temporary administrator, converted to his own use and benefit all the property, claims, etc., the said Minnie M. Appleton was a married woman, the wife of T. J. Appleton, the co-complainant, and the said James M. Strong was and is an infant under 21 years of age. The bill prayed for process, and for judgment and decree against all of the defendants for the full amount of the several sums of money mentioned in the bill, and for the full amount of the property, claims, money, and assets mentioned and specified in the said inventory and appraisal, together with interest on all of said amounts at the rate of 8 per centum per annum from March 21, 1887, and for general relief.

To this bill the defendants demurred for want of equity, and specially excepted that the county probate court of Bowie county, Tex., had sole, exclusive, original jurisdiction of the matters and things complained of in the bill. This demurrer was not properly verified, because not supported by the affidavit of the defendants that it was not interposed for delay. See Equity Rule 31. The demurrer coming on, however, to be heard, the court sustained the same as to the allegations in the complainants' bill as to the

closing of the administration, but overruled it as to the jurisdiction of the court and as to the want of equity in the bill, and complainants were given leave to amend; whereupon the complainants filed an amendment, by which it was alleged that on February 5, 1886, the defendant Marx filed his report as temporary administrator of the estate of James Strong, deceased, in the county court of Bowie county, Tex.; that the complainant Minnie M. Appleton (then Minnie M. Strong) filed objections and exceptions to the said report, the said James M. Strong, then an infant, not being a party to the proceedings in said county court; that on February 20, 1886, the defendant Marx filed a supplemental report as temporary administrator, showing the condition of the said estate, and the amount of cash in his hands as temporary administrator; that the two reports filed by Marx on February 5, 1886, and the report filed on February 20, 1886, and the objections and exceptions of Minnie M. Strong, surviving wife, were heard and a judgment rendered thereon by the county court of Bowie county, Tex., approving and confirming the said report, and overruling the said objections and exceptions, from which judgment the said Minnie M. Strong appealed to the district court of Bowie county in the state of Texas; that on March 1, 1886, the said Minnie M. Strong (now Minnie M. Appleton) filed an appeal bond, as required by law, whereby the said cause was duly appealed to said district court for a trial anew; that on March 19, 1887, the said case was tried by the district court of Bowie county, and a final judgment rendered therein, whereby the said temporary administration of the defendant Joseph Marx of the estate of James Strong, deceased, was determined, ceased, and ended, which judgment has never been appealed from, set aside, or changed; that the district court, in the last-named judgment, reversed, revised, and reformed the said judgment of the county court in favor of Mrs. Minnie M. Strong, and closed the said temporary administration, and ordered said Marx, as the temporary administrator, to surrender up and turn over to the parties entitled thereto all the moneys and assets belonging to the said estate; that on January 21, 1889, the records and papers of the district court of Bowie county were totally destroyed by fire, and that the judgments of the district court, and the judgment of the county court, and nearly all of the original papers in said temporary administration, were destroyed by the said fire; whereupon they prayed as they had prayed in the original bill, but waiving answer under oath.

To the bill as thus amended the said defendants renewed and propounded the demurrer filed to the original bill, and again alleging want of equity, and that the plaintiffs, if they have any action at all, have a complete and adequate remedy at law. This repropounded demurrer was not verified according to equity rule 31. However, the same came on to be heard, and was sustained, with leave to the complainants to further amend by the rule day in March, 1892; and thereupon the complainants again amended, reciting substantially the same facts as recited in the original bill and its first amendment, but therein more specifically and at greater length, with more adjectives, and charging fraud and false accounting against the said Joseph Marx, as the temporary administrator. In this last amendment to the bill the complainants prayed for an accounting against the said Joseph Marx; that the distributive share of the residue of the estate due Minnie M. Appleton be ascertained, and a decree entered allowing the said Minnie M. Appleton her said distributive share of the estate of said James Strong, deceased; that the said residue of said estate be partitioned and divided between Minnie M. Appleton and said James M. Strong equally, share and share alike; that the distributive share due to James M. Strong be ascertained, and a decree entered allowing the same, and for a decree making a final partition, division, and distribution of the entire residue of said estate among the distributees as their respective rights may be shown to the court; and they again prayed for judgment and decree against Marx, as temporary administrator of the estate of James Strong, deceased, as principal, and his codefendants, as sureties, for the full amounts of the several sums of money mentioned and specified in this amended bill and their original, first amended bill, together with interest, costs, etc. As before, the defendants demurred, and on the same grounds, but with a different result; for, at the

September term, 1892, the court overruled the demurrer and exceptions, giving leave, however, for the defendants to answer. Thereupon, in November, 1892, the defendants generally, without particularly naming any of them, filed a plea as follows: "To so much of plaintiffs' bill as demands and prays for an accounting by defendant Joseph Marx, as administrator of the estate of James Strong, deceased, that such accounting has been fully made and acted upon and approved before a competent jurisdiction, to wit, the county [probate] court of Bowie county, Texas, at the February term, A. D. 1886, of said court, in the matter of the administration of the estate of said James Strong, deceased, in said court, then defending, wherein the final account report of the said Joseph Marx, as administrator of said estate, came on regularly to be heard, and the plaintiffs herein then and there appeared and objected and excepted to said final account and report, the plaintiffs alleging, in objection thereto, the same matters set forth in their original and amended bills herein, and upon the trial before said court of said final account and report of said Joseph Marx as administrator as aforesaid was, by the court, approved, and a final judgment approving same duly entered upon the minutes of said county court of Bowie county. Wherefore defendants plead said action and judgment of said court in bar of plaintiffs' bill for an accounting herein. And for further plea in this behalf the defendants say that the defendant Joseph Marx was, at the time of the death of James Strong, a bona fide creditor of said Strong in large amounts, to wit, the sum of nine thousand, six hundred dollars (\$9,600.00), besides interest, in which amount the said Strong was justly indebted to said Marx; that said Marx, as such creditor, on the — day of May, 1885, applied for and obtained letters of administration upon the estate of said Strong in due and proper manner as provided by law, and without wrong or fraud of any kind, and defendants specially deny that any false or fraudulent representations were ever made by him in any manner to obtain said letters of administration, but the same was made in good faith, to protect his rights as creditor; that the plaintiffs herein appeared in the county court of Bowie county, Texas, wherein said administration was pending, and contested said Marx's right to administer said estate, and said contest was duly, regularly, and finally tried by said court, and it was adjudged by said court that said Marx was a bona fide creditor of said Strong, and was entitled to administer on his said estate, and said court did proceed to appoint said Marx administrator; that he duly qualified, and said estate was by him duly, legally, and regularly administered in said court, and the final report and account of said Marx as administrator was duly approved by said court; that all the above proceedings were regular, fair, and in accordance with law, and in a court of competent and exclusive jurisdiction; that said orders and judgments have never been reversed or set aside, but were appealed from by plaintiffs herein, contestants in said proceedings, to the district court of Bowie county; that said appeal was abandoned by plaintiffs, and plaintiff Minnie M. Appleton, for the first time, in the district court of Bowie county, offered and tendered a bond to withdraw said estate from administration, and said district court accepted the same, and entered an order withdrawing said estate from administration, which said action and order of said district court defendants say was without and beyond its jurisdiction, and was void; that said action operated an abandonment of the appeal, and the original orders, action, and judgment of the county court aforesaid were and now are final. Whereupon," etc. This plea was verified by the affidavit of the solicitor for the defendants to the effect that the matters of fact stated in the above plea are true; but there was no certificate of counsel that, in his opinion, said plea was well founded in point of law, nor any affidavit by any defendant that it was not interposed for delay, or that it was true in point of fact.

The evidence pertinent to the plea shows that Joseph Marx was appointed temporary administrator of the estate of James Strong, deceased, by the county court of Bowie county, Tex., on the 7th day of May, 1885; that on the same day he qualified as such temporary administrator by taking the oath and giving bond in the sum of \$50,000; that on the 20th day of June, 1885, said Marx filed a sworn inventory, and on the 5th of February, 1886, filed a report in the county court of Bowie county as temporary administrator,

wherein he admitted the collection of a large sum of money, and alleged an appropriation of much of it in payment of his own indebtedness; and on the same day, February 5th, filed an additional report, showing appropriation of more of the funds collected to the credit of the estate, and that afterwards, on February 20, 1886, filed an additional report, showing amount of funds of said estate on hand at date of same to be \$15,340, and asking an allowance of 5 per cent. commission for receiving said moneys. To the reports filed February 5th, Mrs. Minnie M. Strong, surviving wife of James Strong, filed exceptions, wherein she objected to the credits claimed or suggested by Marx, and afterwards filed objections to the report of February 20th. The objections to the said reports filed February 5th came on to be heard before the county court of Bowie county at a regular term, February 19, 1886, and the said court entered the decree following: "This day came on to be heard the report of J. Marx, temporary administrator of the estate of James Strong, deceased, was examined and approved and administrator ordered to pay court cost out of the funds the estate in his hands, and he further ordered forthwith deliver the estate remaining in his possession to the person legally entitled to the possession of the same. Mrs. Minnie M. Strong, by her attorney, gives notice of appeal in open court to the district court of Bowie county, Texas, and, it appearing to the court that there is a contest pending over the appointment of a permanent administrator, it is ordered that this temporary administrator be continued until the termination of said contest, from which judgment the said Minnie M. Strong has appealed to our district court of Bowie county, Texas." And thereafter the objections to the report of February 20th were heard and overruled. From these judgments of the court, Mrs. Strong prosecuted an appeal to the district court of Bowie county, when the following decree was rendered: "This cause was this day called for trial, whereupon came the parties plaintiff and defendant, by their attorneys, and announced ready for trial. It being made to appear, since the institution of this suit, plaintiff Minnie M. Strong has intermarried with one T. J. Appleton, on motion of plaintiff said T. J. Appleton was made a party plaintiff with his said wife (now Minnie M. Appleton), and suit ordered to proceed in their name as plaintiffs. Thereupon came on to be heard the objections of plaintiffs to the report of defendant filed in the county court of Bowie county, as follows, viz.: Two reports filed on the 5th day of February, 1886, and one report filed on the 20th day of February, 1886. And it appearing to the court that plaintiff's objection to said two first-named reports filed on the 5th day of February, 1886, are well taken, and that the law is for the plaintiffs, it is ordered, adjudged, and decreed that said two reports be disapproved and not allowed, and judgment is hereby rendered for plaintiffs, sustaining their objection to said two reports, and that defendants take nothing thereby. It is further ordered, adjudged, and decreed that the said report marked, 'Filed on the 20th day of February, 1886,' showing amount of funds of said estate on hand at date of same to be fifteen thousand three hundred and forty dollars, and asking an allowance of five per cent. commission for receiving said moneys, be allowed, and approved as to allowance of said commission, and that plaintiffs' objection be overruled. It is therefore considered and adjudged that defendant be allowed as commissions for receiving said moneys the sum of seven hundred and sixty-seven dollars, and that said temporary administration be closed. It is further ordered that a certified copy of this judgment be transmitted to the county court of Bowie county for observance."

The evidence further shows that on the 4th day of May, 1885, Joseph Marx filed his petition in the county court of Bowie county, state of Texas, suggesting the death of James Strong, his domicile in Bowie county, Texas, a large estate, consisting of real and personal property and choses in action, the indebtedness of Strong to petitioner in the sum of about \$10,000, and asking to be granted letters of administration of said estate. To this application Mrs. Minnie M. Strong, surviving wife of James Strong, filed exceptions and objections, among other things denying that said Joseph Marx was a creditor of said estate, because his pretended debt against said estate was fraudulent, illegal, and not a bona fide debt against said estate; declaring there were no other creditors; and tendering a bond in the sum of \$20,000, conditioned

that the obligors would pay the debt of said Joseph Marx upon the establishment thereof by a suit in a court of competent jurisdiction. The application of Joseph Marx for permanent letters of administration came on to be heard before the county court on the 20th day of February, 1886, and thereupon the court decreed: "It is therefore considered, ordered, adjudged, and decreed by the court that the objection of the said Minnie M. Strong to the application of the said Joseph Marx for permanent letters of administration be, and the same are hereby, overruled, and that the applicant, Joseph Marx, be, and he is hereby, appointed administrator of the estate of the said James M. Strong, deceased, and that the clerk of this court be, and he is hereby, directed to issue letters of administration on said estate to Joseph Marx upon his giving bond in the sum of fifty thousand dollars, conditioned payable and approved as the law directs, and William Behan, A. L. Ghio, and A. J. Hoffman be, and they are hereby, appointed appraisers of said estate; to all of which Minnie M. Strong, by her counsel, excepts, and in open court gives notice of appeal to the district court of Bowie county, Texas." The appeal prayed for above was perfected to the district court. When the matter came on to be heard in the district court, the following proceedings were had, as testified to by Mr. Todd, the counsel for Joseph Marx (reference being had to parol testimony because of the alleged destruction of the Bowie county records by fire): "Immediately thereafter came on to be heard the appeal from the judgment of the county court appointing Joseph Marx permanent administrator of the estate, and, when that matter was called up, the counsel for the contestant, Mrs. Appleton, complainant in this suit, arose in his place in court, and stated to the court, in substance, that the contest was based upon the denial of the genuineness of the notes claimed to be held by Marx against Strong, and consequently the denial that he was a creditor entitled him to administration, but that all parties interested had agreed to submit the original notes, with a large number of admittedly genuine signatures of Strong, to an expert, Rhodes Fisher, of Austin, and abide by his decision as to whether the notes were genuine or not; that after some time the said expert, Rhodes Fisher, had rendered a decision, deciding that the notes were genuine, and the contestant's counsel then stated to the court that they did not further insist upon their contest on that ground, but withdrew it. At the same time the counsel offered to the district court to make a bond to secure other claims against the estate which had not been allowed by the court, and asked to withdraw the estate from administration. The court fixed the amount of the bond at \$6,000,—being about double the amount of claims which had been disallowed by the district court at the former order,—and a good and sufficient bond was tendered by Mrs. Appleton as principal, Mr. Sliter, Capt. F. M. Henry, W. H. Tilson, and J. H. Henderson as securities. Thereupon, the contest having been withdrawn, the district court affirmed the appointment of Joseph Marx as permanent administrator, and in the same order accepted the bond in the sum of \$6,000 to secure other claims, and make a final order withdrawing the estate from administration, closing it up, and ordering the administrator, Joseph Marx, to deliver to the persons entitled to the same, upon their demand, all the property in his hands belonging to the estate of James Strong."

On submission of the evidence, the court below entered a decree as follows: "On this day, this cause being called, and it appearing to the court that heretofore, to wit, on May 17, 1893, at Paris, in chambers, upon hearing then and there and upon plaintiffs' original bill and amendments, the defendants' plea, and the plaintiffs' replication, and the issues joined, and the evidence and argument thereon, the plea of the defendants herein was sustained by the court and found to be true, and defendants' general demurrer having been sustained to plaintiffs' bill as to all other allegations and issues not put in issue by said plea, and it was adjudged that said plea meets all the equities alleged in plaintiffs' bill, it was ordered, adjudged, and decreed that said plea of defendants be sustained, and that final judgment be entered at the regular term of this court sustaining said plea, and dismissing the plaintiffs' bill, which order was duly certified and is of record: It is therefore considered, ordered, and adjudged and decreed that said order so made in vacation, as aforesaid, be, and the same is hereby, approved, and in all things

confirmed, and it is now here ordered and adjudged and decreed by the court that the plea of the defendants herein be and is sustained and held to be true, and the plaintiffs' bill herein be and is hereby finally dismissed, without prejudice to any action at law by plaintiffs; and that plaintiffs pay all costs in this behalf incurred and expended, for which execution may issue in favor of the defendants and officers of the court." From this decree plaintiffs appealed to this court.

F. M. Henry, for appellants.

Chas. S. Todd, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge (after stating the facts as above).

Appellants assign as error to be corrected in this court that the court below sustained appellees' plea and dismissed the bill and amended bills, when the court ought to have rendered a decree overruling the plea, and giving the complainants, appellants here, the relief prayed for in the bill and amended bills, and, as they allege, sustained by the evidence. "At the hearing, upon a plea in equity and a general replication, no fact is in issue but the truth of the matter pleaded." *Farley v. Kittson*, 120 U. S. 303, 7 Sup. Ct. 534. "The plaintiff may set down the demurrer or plea to be argued, or he may take issue on the plea. If, upon an issue, the facts stated in the plea be determined for the defendant, they shall avail him as far as in law and equity they ought to avail him." Equity Rule 33. "When a plea in bar meets and satisfies all the claims of the bill, and it is sustained, it will, under equity rule 33, avail the defendant so far as to require a final judgment in his favor." *Horn v. Dry Dock Co.*, 150 U. S. 610, 14 Sup. Ct. 214. "At the hearing upon a plea in equity and a general replication, if the plea be overruled, the defendant must be assigned to answer the bill by the next rule day." Equity Rule 34; *Farley v. Kittson*, supra. "The proper office of a plea is, not like an answer admitting all the allegations of the bill, nor like a demurrer admitting those allegations, to deny the equity of the bill; but it is to present some distinct fact which of itself creates a bar to the suit or to the part to which the plea applies, and thus to avoid the necessity of making the discovery asked for, and the expense of going into the evidence at large. *Mitt. Eq. Pl.* (4th Ed.) 14, 219, 295; *Story, Eq. Pl.* §§ 649, 652." *Farley v. Kittson*, supra. *Farley v. Kittson* is also authority for the proposition that, unless new matter is alleged in the plea, even if the plea be put at issue, it raises no question but questions of law.

The evidence shows that the judgments of the county court of Bowie county, Tex., approving the accounts filed therein by Joseph Marx as temporary administrator of James Strong, deceased, were not only appealed to the district court, but that the appeals were duly prosecuted, and judgment had thereon, in the said district court, by which the two reports filed February 5th, which related to the general accounts of Joseph Marx, administrator, were disapproved and disallowed, and judgment in that behalf given in

favor of plaintiffs, sustaining their objections to said two reports, and that the report of February 20, 1886, which purported to show the amount of funds of said estate on hand at the date of the same to be \$15,340, and asking an allowance of 5 per cent. for receiving said moneys, was allowed and approved only as to allowance of said commission of \$767. As there is no doubt about the jurisdiction of the district court of Bowie county, Tex., in the matters shown to have been appealed thereto from the county court, the plea, so far as it attempts to establish that the complainants are barred of their action because there had been a full and final accounting in the county court of Bowie county, is not supported by the evidence. Whether the district court of Bowie county had original jurisdiction to accept the bond of complainants, and thus end the judicial administration of Strong's estate, we do not feel called on to decide, because it is a question not properly presented for consideration at this time, and because it seems that, whether the administration be closed or still pending in the state court, the complainants' suit may be prosecuted. *Payne v. Hook*, 7 Wall. 431; *Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906. The conclusion which we reach in the matter of the plea is that, so far as it is intended to meet any of the claims of complainants' bill, it is not sustained by the evidence, and ought to have been overruled. The decree of the circuit court appealed from is reversed, and the cause is remanded, with instructions to enter a decree overruling the defendants' plea, and with costs, and assigning the defendants to answer by the following rule day.

PHILLER et al. v. YARDLEY.

(Circuit Court of Appeals, Third Circuit. July 12, 1894.)

No. 12, March Term, 1894.

NATIONAL BANKS—INSOLVENCY—PREFERENCES—CLEARING HOUSE BALANCES.

By special agreement, a national bank, instead of the usual deposit of securities as collateral for payment of its daily balance at the clearing house, each day left with the clearing house manager all checks drawn on it, and other evidences of its indebtedness received from other banks, to be held until the balance due from it for the day was paid. While certain checks and other evidences of its indebtedness were so held, the bank was closed by the comptroller of the currency. Thereupon the clearing house collected the amount of the checks, etc., from the banks from which they had been received, and therefrom paid, besides the bank's balance for the day, duebills given by it for its balance for the preceding day, by their terms payable only through the clearing house the day after issue, and actually in the exchanges held when the bank closed, and applied the remainder towards cancellation of clearing house loan certificates issued to the bank under an agreement between the banks whereby any loss from failure of one to pay such certificates was chargeable upon the others. *Held* that, as the transaction on the part of the bank was not in contemplation of insolvency, nor with a purpose to give a preference, or to prevent application of its assets as prescribed by law, the exchange between the banks was valid, and that it was not avoided, nor were the rights of the clearing house or of the creditor banks impaired, by what subsequently occurred; and therefore the receiver of

the bank, taking its assets subject to all equities and rights against it, had no equity, in a suit against the managing committee of the clearing house alone, to question the appropriation of the money paid by the other banks. 58 Fed. 746, reversed.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

This was a suit by Robert M. Yardley, receiver of the Keystone National Bank, against George Philler and others, being the clearing house committee of the Clearing House Association of the Banks of Philadelphia, to recover certain checks, or the money collected thereon. The circuit court rendered a decree for plaintiff. 58 Fed. 746. Defendants appealed.

A. T. Freedley and John G. Johnson, for appellants.

Silas W. Pettit, for appellee.

Before ACHESON, Circuit Judge, and BUTLER and GREEN, District Judges.

ACHESON, Circuit Judge. Upon a bill brought by Robert M. Yardley, receiver of the Keystone National Bank, against seven individuals, constituting the managing committee of the Philadelphia Clearing House Bank Association, the court below rendered a decree for \$70,005.46, with interest from March 20, 1891, against the defendants, who are here the appellants, upon the ground that, after the known insolvency of the named bank, they applied (as was charged) its funds in their hands or under their control to the payment of its debts to the clearing house association, and to members thereof, with a view of giving them an unlawful preference over other creditors.

The clearing house association of the city of Philadelphia is a voluntary, unincorporated association, composed of the national banks of that city; its main object being to effect at one common meeting place, called the "clearing house," the daily exchanges between the associated banks. Its affairs are under the general supervision of a committee of seven bank presidents, selected by a majority of the associated banks, and serving without compensation. This committee appoints a manager, who has immediate charge of the conduct of the business at the clearing house. All exchanges, however, are made directly between the banks themselves, through clerks representing them respectively. All the checks, drafts, and other evidences of indebtedness to be exchanged are brought to the clearing house in sealed packages, which are never opened there. The gross amount of the alleged contents of each package is indorsed upon the envelope, but not the items. The clerk of each sending bank delivers directly to the clerk of the receiving bank the sealed package of checks and other obligations held by the former against the latter bank. Receipts pass directly between the clerks of the sending and receiving banks. After the exchanges are thus made, the gross totals only are reported to the clearing house manager, who, upon this information, makes up a sheet of differences to be adjusted and settled between

the various banks. Upon this sheet each debtor bank settles the amount due by it to the creditor banks by paying the same to the clearing house manager, who immediately distributes it to and among the creditor banks.

The Keystone National Bank of Philadelphia was a member of the clearing house association. On March 20, 1891, at 8:30 o'clock a. m., the hour fixed for the morning exchange, the messenger of that bank appeared at the clearing house with sealed packages purporting to contain exchanges against other banks, members of the association, amounting to \$70,005.46. These packages he delivered directly to the clerks of the other banks, and received from them receipts therefor. At the same time the messengers of other banks, members of the association, delivered to the clerk of the Keystone National Bank sealed packages of exchanges against it, purporting to amount to the sum of \$117,035.21, and took from him receipts therefor. Thus there was a balance of \$47,029.75 against the Keystone National Bank on that morning's exchange.

After receiving the sealed packages of checks and other exchanges purporting to amount to \$117,035.21, the clerk of the Keystone National Bank left those packages in the custody of the manager of the clearing house until the bank should pay the \$47,029.75 difference, which it was bound to do by 12 o'clock of that day. The reason for the deposit was this: Article 17 of the constitution of the clearing house association required each bank to deposit with the clearing house committee collateral security for the payment of its daily balances. In December, 1890, however, at the instance and for the benefit of the Keystone National Bank, a special arrangement was entered into between it and the clearing house committee whereby all the security held under article 17 to secure its daily balances was transferred to its loan-certificate account with the clearing house, so as to enable it to receive upon that security further advances of loan certificates, and it was agreed that thereafter, at the morning exchange, the clerk of the Keystone National Bank, after receiving the packages of checks and other exchanges from the creditor banks, should leave the packages with the clearing house manager as security that any debtor balance due by it on that settlement should be paid by the bank before 12 o'clock of the same day.

The Keystone National Bank did not pay its debtor balance of \$47,029.75 due on the morning exchange of March 20, 1891, by 12 o'clock that day, and that balance has never been paid or tendered. Shortly after 10 o'clock on the same day, by virtue of an order made by the comptroller of the currency, the Keystone National Bank was closed by William P. Drew, bank examiner, and thereafter Robert M. Yardley was appointed receiver thereof. After 12 o'clock on the same day (March 20, 1891), the clearing house manager, acting under the instructions of the clearing house committee, notified the banks which had presented the packages containing the checks, drafts, and other evidences of indebtedness against the Keystone National Bank for \$117,035.21, that they must make those packages good by paying into the clearing house that

amount of money, and accordingly, in compliance with this demand, these banks forthwith paid to the clearing house manager \$117,035.21 in cash, and took away the packages.

After the morning exchange on that day, the state of accounts between the Keystone National Bank and the clearing house association was this: The debtor balance of the bank on that morning's settlement, as we have seen, was \$47,029.75. Its debtor balances on the exchanges of the preceding day amounted to \$41,197.36, for which it had issued its clearing house duebills,—two thereof, amounting to \$23,390.52, to the clearing house association, and several others, amounting to \$17,806.84, directly to certain banks of the association. These duebills were in the form prescribed by the rules of the association, bore date March 19, 1891, and by their terms were "payable only in the exchanges through the clearing house the day after issue." Then, in addition to its debtor balances on these exchanges, the Keystone National Bank owed \$335,000 on clearing house loan certificates which had been issued to it previously by the clearing house committee, agreeably to the provisions of a written agreement between all the associated banks. To secure the payment of this last-mentioned indebtedness for \$335,000, the bank had deposited with the clearing house committee collateral securities; but the other banks were ultimately responsible for that debt in case of a deficiency in the collaterals, for by the terms of the written agreement referred to any loss caused by the nonpayment of clearing house loan certificates issued by the committee to any member of the association was assessable upon all the other banks in the ratio of capital.

The money, namely, the \$117,035.21, which the other banks, upon the call of the clearing house committee, paid on March 20, 1891, to the clearing house manager, he immediately appropriated, by the direction of the committee, in manner following: To make good the balance due by the Keystone National Bank on that morning's exchanges, \$47,029.75; to the payment of the duebills given by the bank for its debtor balances on the exchanges of the preceding day, \$41,197.36; and the residue, \$28,808.10, he applied towards the cancellation of the clearing house loan certificates which had been issued to that bank. Has the receiver of the bank any just reason to complain of that appropriation, or of the transaction in any respect?

The receiver of an insolvent national bank takes its assets subject to all just claims and defenses that might have been interposed against the corporation itself; and all liens, equities, and rights arising by express agreement, or implied from the nature of the dealings between the parties, or by operation of law, prior to insolvency, and not in contemplation thereof, remain unimpaired. *Scott v. Armstrong*, 146 U. S. 499, 510, 13 Sup. Ct. 148. The morning exchange on March 20th between the Keystone National Bank and its clearing house associates, in itself, was unimpeachable. It took place before the bank examiner acted. The clearing house association had no reason to suspect the impending failure. On the part of the bank itself the transaction was in the regular course of its business, and with a view to continued opera-

tions. It did not act in contemplation of insolvency, nor with a purpose to give one creditor a preference over another, or to prevent the application of its assets in the manner prescribed by law in case of insolvency. The rights of the parties were fixed when the bank was closed. As between the Keystone National Bank and the other banks, the morning exchange had been already consummated. The packages of exchanges on the one side and the other had been delivered and receipted for. The exchange itself was an accomplished fact. What remained to be done was the payment by the Keystone National Bank of its debtor difference of \$47,029.75 to the clearing house manager. To insure this payment by 12 o'clock, the bank, under its arrangement with the clearing house committee, left its sealed packages in the hands of the clearing house manager. The bank, however, defaulted, and what afterwards occurred in the clearing house was in consequence. The situation was unprecedented. The bank had been closed by the government officer. The pledge was not an ordinary one. The sealed packages on temporary deposit with the clearing house manager did not contain assets of the bank, but checks and drafts drawn upon it, and other evidences of its indebtedness. As the packages contained commercial paper, prompt action might be necessary to hold indorsers and drawers. In the emergency, occasioned wholly by the default of the Keystone National Bank, whose supposed equity is the foundation of this bill, the clearing house committee made the call upon the other banks already mentioned. Whether those banks were bound to comply with that demand to its full extent we need not inquire. Under the stress of the situation they saw fit to do so, and paid into the clearing house, of their own moneys, \$117,035.21, and relieved the manager of his custody of the packages. Did this work an annulment of the morning exchange? We cannot so conclude. That deduction would be highly unreasonable. That the banks which paid in this money intended such a result is incredible. The whole transaction negatives the idea of intended rescission. Indeed, the other banks had no right to undo the morning exchange without the concurrence of the Keystone National Bank. Nor was it to their interest to disturb what had taken place. Why should they pay this large sum of money into the clearing house in relief of the debtor bank? Assuredly, this money was not paid for the benefit or use of the Keystone National Bank. The other banks made the payment in promotion of their own interests as members of the association, primarily in order that they might make settlements inter se. This they were at liberty to do without relinquishing any of their rights or equities as against their defaulting associate. The obligation of the Keystone National Bank to pay its debtor balance remained in full force. Without the payment of the \$47,029.75, the bank was not entitled to the return of the deposited packages. Hence those packages were rightfully withheld from the bank. Nothing is better settled than the right of a transferee of a pledge to hold it until the debt for which it was given is paid. *Story, Bailm. § 327; Donald v. Suckling, L. R. 1 Q. B. 585; Talty v. Trust Co., 93 U. S. 321.* This principle is peculiarly

applicable here, for the clearing house manager held the deposited packages for the benefit of the creditor banks. It is our judgment that the morning exchange between the associated banks was valid, and was not avoided, or the rights thereunder of the clearing house association or of the creditor banks impaired, by what subsequently occurred.

It is quite plain that the court below proceeded upon views radically different from those we have expressed. The decree, it will be perceived, entirely overlooks the default of the Keystone National Bank, and puts the receiver in a far better position than the bank would have been in had it fulfilled the terms of its pledge. Had it done that, it would have paid into the clearing house \$47,029.75, whereas, without paying anything, the receiver has a decree requiring the defendants to account to him for the whole \$70,005.46. We are unable to accept that result as just. The principle of the decision of the supreme court in the case of *Scott v. Armstrong*, *supra*, requires that the equities and rights arising from the express agreements or implied from the nature of the dealings between the Keystone National Bank on the one side and the clearing house association or the other members thereof on the other side, prior to the closing of the bank, shall be preserved and enforced.

Was anything done prejudicial to the rights of the Keystone National Bank or its receiver? As already stated, the clearing house duebills, amounting to \$41,197.36, which the bank had given for its balances on the exchanges of the preceding day, were paid out of the fund claimed by the receiver. Can the rightfulness of that appropriation be gainsaid? On the face of each duebill it was stipulated that it was "payable only in the exchanges through the clearing house the day after issue." Those duebills were actually in the morning exchange on March 20, 1891. They were in the packages amounting to \$117,035.21, delivered to the clerk of the Keystone National Bank. They were entitled to payment out of the bank's credit of \$70,005.46 in that morning's exchanges. The application of the \$41,197.36 to those duebills was therefore right, even upon the receiver's hypothesis as to the origin of the fund which the clearing house manager disbursed. The duebills were extinguished. By no possibility can they come against the funds in the hands of the receiver.

Is the receiver in any position to question the application of the \$28,808.10 to the indebtedness of the Keystone National Bank as a member of the clearing house association on its loan-certificate account? That liability arose from the course of dealings between the bank and the clearing house, and under an express agreement between all the members thereof, whereby the other associated banks were chargeable with any loss occasioned by the failure of the Keystone National Bank to pay. The other banks, therefore, had a prevailing equity to have applied to that debt money of their own which they paid into the clearing house under the circumstances as disclosed. How can the receiver object that, as the outcome of the settlement between the other banks, a balance from

funds which they provided was applied to the reduction of the debt due by his bank? Then, again, the receiver, who has no higher rights than his bank, is in a court of equity. Here he is met by the default of the bank in not paying into the clearing house the \$47,029.75 it was bound to pay. He has not deemed it to be for the interest of his trust to pay that money. He does not propose to do so. How, then, can he ask a decree against the defendants for the \$28,808.10? Obviously, to the extent of his bank's default, he is without equity.

For the reasons stated, we hold that the receiver has no good ground upon which to challenge the transactions in the clearing house. We add a single observation: As the right of set-off existed between the banks (*Scott v. Armstrong*, *supra*; *Yardley v. Clothier*, 51 Fed. 506, 2 C. C. A. 349), it is by no means clear that the other creditors of the Keystone National Bank would have fared better if the exchange had not taken place. With claims aggregating \$117,035.21 as against claims for \$70,005.46, it would seem improbable that anything would have been recoverable by the receiver.

Finally, the receiver does not show himself to be entitled here to equitable relief of any nature. The duebills for \$41,197.36 are entirely out of the way. It does not appear that any items in the packages for \$117,035.21 have been proved against the funds in the hands of the receiver, or have been presented to him for payment, or that any suit thereon has been brought or is threatened. If the receiver has the right to insist upon the formal cancellation of \$28,808.10 of those items (which is the utmost he can claim), the present bill is not available to him to secure such decree. No such relief is here sought. The bill is not framed for that purpose. It is not apparent that the receiver needs the aid of a court of equity; but, if he is entitled to equitable relief, it is as against the other banks. Those banks are not parties to this suit.

The decree of the circuit court is reversed, and the case is remanded to that court with directions to dismiss the bill of complaint.

GREEN, District Judge, dissents.

BUTLER, District Judge (concurring). While I believe the foregoing opinion sufficiently vindicates the conclusion reached, I desire, in view of the dissent expressed, to add a few lines. It must be kept in mind that the suit is against certain individuals as the clearing house committee, and not against the banks involved in the exchange. If the latter did anything by which the plaintiff is aggrieved we cannot consider it here. The defendants are only liable for their own acts. These acts are those connected with the exchange of March 20, 1891. What were they? On the morning of that day the Keystone Bank delivered to their manager a package of its own obligations (received from other banks for cancellation) to be held as security for the payment of \$47,000, which it had undertaken to pay by 12 o'clock that day. It did not pay; and as the value of the security depended upon holding the indorsers,

the committee, on being indemnified by the receipt of an equal sum of money from the other banks, handed the obligations over to them. On this state of facts what claim has the receiver on the committee? Until the \$47,000 are paid by the Keystone or the receiver, neither has any right to the obligations; nor can either complain of the disposition made of them. When the money for which they are pledged is paid the receiver will be entitled to them, and the committee must then produce them, or account for their value. The bank did not pay the money, and the receiver will not, because it greatly exceeds the value of the obligations—which consist of promises of the broken bank, comparatively worthless. Their value is just the amount of the dividends they will draw if not redeemed. If the receiver redeems them he, or rather the creditors of the bank, will be benefited to the extent of the dividends thus saved—nothing more.

The fundamental error of the plaintiff consists in the assumption that the exchange of obligations was annulled by the subsequent transaction between the committee and the other banks—respecting which nothing need be added to what is said in the foregoing opinion. But if we concede this assumption the plaintiff will not be helped. The annulment of the exchange, if it bound the Keystone, might and doubtless would entitle the latter to a return of the \$70,000 of obligations, which it had previously held. But it would not render the committee liable for their return. The committee never had nor saw them. But even conceding the committee's responsibility for their return, the assumption that it became liable to pay \$70,000 for failure to return them is clearly erroneous. In such case the measure of damages would be the amount the receiver lost by such failure. This would be the value of the obligations to him and the creditors. Let us see what this is. The banks owing the obligations, held \$117,000 of the Keystone's liabilities, which were a valid set-off. The receiver could not therefore recover a cent. The obligations nevertheless had some value, as they would extinguish \$70,000 of the Keystone's liabilities, thus diminishing the claims against its assets that much; saving to the creditors the dividends which the \$70,000 of obligations would draw if not canceled. This then is the loss from failure to return them. If the assets will pay 30 per cent. (which is very improbable), the dividends on \$70,000 would be \$21,000. Thus we see, even assuming that the exchange was annulled, and that the committee became responsible for the obligations, the receiver is not entitled to \$70,000, as claimed and awarded. As the dividend rate is not ascertained we cannot know what (in this view) the receiver's loss is.

But the plaintiff further assumes that the clearing house received \$70,000 for the Keystone Bank, in its transaction with the other banks, after the Keystone's failure. This assumption is wholly unwarranted. Nothing I think can be plainer than that the other banks did not pay any money to the committee for the Keystone, or its receiver. Why should they? What object could they have in doing so? They owed that bank nothing. On the contrary it owed them. Why therefore should they volunteer to pay the ob-

ligations it had held against them while they held its obligations (which were an available set-off), exceeding the amount in \$47,000? In doing so they would simply throw away \$70,000, (saving the inconsiderable sum that might be recovered back in dividends). It is clear that none of the money paid to the committee was intended for the Keystone, or inured to its benefit. It gave up nothing. Its rights under the exchange remain intact. When it pays its debt the obligations must be returned or their value accounted for. The object of the other banks in paying money to the committee is not clear, and we are not called upon to ascertain it. Why it was paid and what was done with it is unimportant. It was their own, to do with as they pleased. It was probably paid to settle balances among themselves. But whatever the object was, it is clear that it was not to benefit the Keystone Bank, and did not interest it. It is conceded that the object was to benefit themselves, alone.

The erroneousness of the decree may be illustrated by another statement. The Keystone Bank cannot claim to be placed in a better position than it occupied at the date of its failure, or to be benefited by its refusal to keep its contract and the action forced on the other banks thereby. Yet it is indisputable that the decree does place it in an infinitely better position—gives it, in effect, over \$80,000 as a premium for its faithlessness. Let us see if this cannot be demonstrated. If the bank had kept its contract, it would have paid out \$47,000, which would have been lost to the receiver and creditors—by diminishing the assets for distribution that much. It would then receive \$117,000, not of money, but of its own nearly worthless obligations, for cancellation. The receipt of these obligations would have benefited the receiver and creditors just to the extent of the dividend the obligations would draw if not canceled. Now supposing the dividend rate to be 30 per cent. (which is doubtless much too high) the dividends on the \$117,000 of obligations would be \$35,100. To redeem and cancel them costs \$47,000; deducting the \$35,100 from this shows a loss to the receiver and creditors of \$11,900, as the result of carrying out the contract. The receiver acted wisely therefore in not carrying it out; he saved \$11,900. But because he did not carry it out and the committee and the other banks entered into the subsequent transaction on their own account, and for their own exclusive benefit, he is given an additional sum of \$70,000; and is thus made a gainer in \$81,900 by the failure to keep the contract. If the banks had intended to annul the exchange of obligations (which they could not do after the receiver's rights attached), they would of course have returned the obligations received by them from the Keystone, and set off against them the obligations of that bank which they held. To pay it, or for it, \$70,000 in money, as it is alleged they did, would have been an act of folly incompatible with sanity. Of course nothing of the kind was intended or done.

MYERS v. LEAGUE et al.

(Circuit Court of Appeals, Fifth Circuit. May 1, 1894.)

No. 193.

VENDOR AND PURCHASER—TIME OF ESSENCE OF CONTRACT.

A contract for the sale of several tracts of land for a certain price, part in cash and the remainder in notes, the vendors to furnish abstracts of title, provided that the title was to be good or to be made good, or the contract to be determined; sale to be closed, and notes executed, within 45 days from delivery of complete abstracts. The market value of the lands was increasing rapidly, and all the parties were dealing in them as a commercial speculation. Their subsequent correspondence and conduct showed that the vendors regarded the time limited as an essential element, and that this was recognized by the purchaser. After expiration of that time, the purchaser repeatedly applied for an extension, but failed to accept the terms offered by the vendors; and thereafter negotiations proceeded on the understanding on the vendors' part, tacitly assented to by the purchaser, that the contract was at an end. *Held*, that it must be implied that time was of the essence of the contract, and that the parties were estopped from denying that they agreed that the contract was ended.

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

This was a suit by Henry H. Myers against J. C. League and J. R. Coryell, for specific performance of a contract for the sale of land by defendants to complainant. At the hearing the circuit court dismissed the bill, but decreed that defendant League should repay to complainant a certain sum of money paid by complainant as part of the contract price. Complainant appealed.

R. R. Briggs, for appellant.

Farrar, Jonas & Kruttschnitt and A. R. Campbell, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and PAR-LANGE, District Judge.

McCORMICK, Circuit Judge. In 1890 the appellant was a resident citizen of the state of Minnesota. He and his brothers were associated in business in the city of Duluth, under the firm name of Myers Bros. Their attention was drawn to Galveston, Tex., by the projected government work on that harbor. The appellant and one of his brothers visited Galveston in October, and, after studying the situation there, concluded to try and acquire a body of land, made up of different adjoining surveys, and owned by different parties, situated on the main land fronting on Galveston bay and on inlets from it. The appellees' attention had been directed to the same object. League and Coryell had acquired four surveys in the desired locality. Three of these, described as the Grant, Ferguson, and Smith surveys, embraced together 4,214 acres, more or less, and the other, described as the Johnson survey, contained 1,476 acres, all being parts of a body of 8,542 acres, which appellant wished to acquire. All the parties were dealing in these lands as a commercial commodity, having an eye to how the same would be affected by the harbor improvement.

and the anticipated course of speculative enterprise probably incident thereto. Situation with reference to water front, more than quality of soil, controlled. League and Coryell wanted to sell the three first-named tracts as a whole. They placed all the tracts in the hands of Trueheart & Co. to sell for them. All were contracted to be sold the appellant by Trueheart & Co.,—the Johnson survey by a separate contract, on different terms as to time of closing; the other three by a written memorandum in these terms:

"Received Galveston, October 27, 1890, of Henry H. Myers, twenty-five hundred dollars, account of this contract to close sale to him of the following named tracts of land, to wit: 1,476 acres originally granted to James Smith; 1,476 acres originally granted to John Grant; and 1,262 acres originally granted to Hamlet Ferguson, Jr.,—all situated in Galveston county, state of Texas, and sold by acreage called for in the respective patents, be they more or less, and for the total price of \$50,556. Terms of sale: One-third cash (including the amount hereby receipted for), say \$16,852, and the remaining two-thirds, say \$33,704, payable by 18 notes, in one, two, and three years, as follows: One note, \$1,234.66, at one year, and on payment of which buyer may select for release 102 acres; five notes, \$2,000 each, at one year, and on payment of which buyer may select for release 830 acres, or 166 acres for each note; one note, \$1,234.67, at two years, and on payment of which buyer may select for release 102 acres; five notes, \$2,000 each, at two years, and on payment of which buyer may select 830 acres, or 166 acres for each note; one note, \$1,234.67, at three years, and on payment of which buyer may select for release 102 acres; five notes, \$2,000 each, at three years, and on payment of which buyer may select for release 830 acres, or 166 acres for each note,—all said notes bearing interest at the rate of 8 per cent. per annum from this date, and interest payable annually at Galveston, Texas, to the order of J. C. League, and secured by vendor's lien and deed of trust, at expense of buyer. Deed at expense of sellers, as well as abstracts of title to each tract. Sellers to pay all taxes to and including 1889, if any, and pro rata of taxes for 1890 to this day; and buyer to pay balance of pro rata taxes for 1890. Title to be good, or made good, or this payment to be refunded, and this contract determined. Sale to be closed, and notes, etc., executed, in accordance herewith, within forty-five (45) days from delivery of complete abstracts; and, upon payment of last notes, all the remaining land to be released from vendor's lien and deed of trust. Releases at expense of buyer.

"H. M. Trueheart & Co., Agents for League & Coryell.

"J. R. Coryell, for Self and as Agent for J. C. League.

"I hereby accept the foregoing contract of sale, and promise and agree to execute notes and deed of trust, and do all things therein named on me incumbent, in accordance with the terms and conditions thereof.

"Henry H. Myers.

"I hereby ratify and confirm the foregoing copy of contract of this sale, the same having been executed in duplicate, and this ratification being signed by me for delivery to the buyers.

J. C. League."

R. G. Street, an attorney at law in Galveston, was retained as such for Myers Bros. with respect to this matter, and was also empowered to represent them as attorney in fact therein. H. H. Myers and his brother, J. R. Myers, returned to Duluth. Abstracts were delivered to Mr. Street, for which he receipted as follows:

"Galveston, Texas, 2 p. m., Nov. 1st, 1890.

"Rec'd of Messrs. H. M. Trueheart & Co. three abstracts (3) of title by Joseph Franklin, with supplements, respectively, by Island City Abs. Co., brought down to date, viz.: (1) To Hamlet Ferguson, grant of 1,261 acres, in Galveston Co.; (2) to James Smith, $\frac{1}{3}$ of a league, Galveston Co.; (3) to Jno. Grant, $\frac{1}{2}$ of a league, Galveston Co.

"Robt. G. Street, Atty. for Myers Bros."

Three days later, Mr. Street wrote as follows:

"Galveston, Texas, November 3, 1890.

"Messrs. H. M. Trueheart & Co., City—Gentlemen: Please furnish me with all the original title papers to the Grant, Smith & Ferguson surveys. I call your attention particularly to certain evidences of title you are supposed to have, but which are not recorded in this Co.; in the Grant survey, the patent and copy of decree of partition in the estate of N. A. Ware; in the Ferguson survey, copy of order of sale, decree of confirmation, etc., in the estate of Hamlet Ferguson; also certified copy of will and probate, John C. Cutter; in the Smith survey, patent and affidavit showing Mrs. Fulton's heirship.

"Very truly yours,

Robt. G. Street,

"For Myers Bros."

The receipt Mr. Street had given for the abstracts having got mislaid, League and Coryell, being desirous to have the date fixed, applied to Mr. Street, who could not furnish it, but agreed that it was not later than 12th November. The papers Mr. Street had called for were promptly furnished; and, before the expiration of 45 days from the 12th November, Mr. Street returned to League's office the title papers that had been furnished him, without any further suggestion of defect in the abstracts or title. On 18th December, Trueheart & Co. telegraphed appellant at Duluth: "Shall we send you League papers for examination, or will you come down? Answer." Same day, Myers replied: "Send papers here." The papers were dispatched next day by mail. On the 29th, Trueheart wired appellant: "League asks if you are ready to close up. We sent you papers on 19th." Thirtieth December, Myers telegraphed Trueheart: "Trust deeds must be made to grantor. His wife must join in deed." Same day, Trueheart replied by wire: "League papers made as per sale contract. League desires matter closed." On January 1, 1891, League wrote Myers that limit for execution of contract had been passed since December 27th, and that this letter was to notify Myers that League would hold himself free to take such steps for the protection of his interests in the premises as he might deem necessary, but would not take any steps in this matter until after due time for response to this letter to reach League by wire. On January 6th, Myers wired from Duluth: "Letter received. Are waiting reply from Street to letter written him January first. Please wait for letter. Will write you to-day." Same day, Myers wrote: "We ask your kind indulgence for a few days more." Same day, League replied to telegram, by night message: "Your time is up for closing purchase. Trade demands consummation at once. Wire immediate answer." Myers wired on the 8th: "Will you grant thirty days' extension for closing deal?" On the next day, League sent night message: "Will grant thirty days' extension of contract by additional payment on it to me of not less than five thousand dollars by fifteenth instant. Wire immediate acceptance." There was no wire of acceptance. On the 12th, Myers wired: "Do you grant request in our letter to Street, January first, in extension?" On that day League wrote: "I have your mail favor of the first instant; also your dispatch of same date, and two others of subsequent dates. * * * I think it will be kind, frank, and busi-

nesslike to say to you that this communication ends all this on my part. * * * If the posture of your affairs is such as requires an extension until the first of February next, and your application, accompanied by cash, not less than three thousand dollars, as a further deposit of earnest money, and to apply as part of the cash payment, reaches me before I have taken such steps as to put it out of my power to grant the extension, I will do so; but I desire you to understand you have breached the contract." On January 19th, J. R. Myers wired League: "If I go to Galveston, and close deals February 1st, will it be satisfactory? Answer." On January 22d, J. R. Myers wired Trueheart: "Ascertain from League why he does not reply to our telegram January nineteenth about closing February first. Wire answer,"—to which Trueheart replied by wire: "League says has written you fully, and has nothing more to say." Receiving nothing further from Mr. League or from Mr. Trueheart, J. R. Myers went to Galveston. He arrived there February 2d. Previous to this, League had instructed Trueheart to leave everything connected with this matter to League, and, when Myers called at Trueheart's office on the 2d of February, Trueheart telephoned for League, but was unable to get him. Myers called the next morning (3d February), and Trueheart went over with him to see League and Coryell. There is a sharp conflict in the testimony as to what occurred in the interviews between J. R. Myers and League and Coryell, but the conclusive preponderance of the evidence is to the effect that when, in this first interview, Mr. Myers told them, "I have come here for the purpose of closing for those lands we bought in October," he was answered, "We have no time to talk with you to-day." After some insistence on both sides, Myers said, "When can I see you?" and was answered, "We cannot talk with you until day after to-morrow." Mr. Myers waited, and about 10 a. m. on the 5th went again to their office. When the business was broached, Mr. League said promptly and firmly: "We won't talk to you about those lands upon any contract made with you. You breached that contract. It is at an end. If we talk to you about those lands, it must be on another and distinct proposition." Myers said he would like to get the lands. League said: "We have not parted with the lands. We can sell them to you if you wish to buy, but we won't talk to you about it except on the understanding that the October contract is at an end." Myers said he would like to know how he could get the lands, and was told: "We will sell you the lands (including the Johnson tract, about which there was a separate contract) at \$12 per acre. No question about title or examination, but close to-day, on the same terms as to payment specified in October contract." The result of this interview was summarized in a written proposition as follows: "Mem.: (1) Mr. Myers to close the purchase of the four tracts of land. (2) To pay interest on the amount cash due upon 27th December last. (3) To agree to our reserving in our conveyance of the Thomas W. Johnson 60 acres out of the southwest corner of that survey, on account of squatters on it, the

60 acres to be deducted at \$12 per acre; and, if Mr. Myers desires, League's sufficient obligation in writing to convey this 60 acres to said Myers when he shall have recovered it, or such part as he may recover. Suit now pending, with agreement to try this term." Myers did not know about the title to the Johnson tract; said he would see Mr. Street about that, and let them know; that he would come back directly. He went out to go to Street's office, and did not return. The next day, League received a message from Myers, sent from Denison: "Message last night called me home. Street will close with you on all that has good record title. Will return about 1st March." The same day, Street advised League by letter that he was prepared to close for Grant and Ferguson tracts; could not recommend Johnson title; and record title to the Smith tract was unsatisfactory. Thereupon League demanded and received from Street the abstracts of title to the lands that had been furnished Street. February 20th League wrote Street that the only matter for consideration between Myers and him was the matter of the earnest money, as to which he would take legal advice that day, and be ready from that day to pay over the whole or such part as he should of right or legally pay. Street replied February 23d, renewing offer to complete purchase of Grant and Ferguson surveys, saying he was prepared to make cash payment, admitted no forfeiture, waived no right on the part of Mr. Myers, but, with a view to prevent litigation, would be pleased to transmit to Mr. Myers with favorable indorsement any proposition he could recommend. On the 27th, League notified Street that he would pay over to Mr. Myers, or to Street, as his attorney, the whole of the earnest money deposited whenever either called for it. League had on the 11th of February contracted to sell these lands to Kohfeldt, but the contract was not fully executed and deeds filed for record till March 16th. March 3d, Street gave League written notice of Myers' claim for specific performance of his contract for the sale of the Grant, Smith, and Ferguson surveys, saying in the notice: "And herewith tenders, as he has heretofore done, full performance on his part with the stipulations thereof." On March 13th, H. H. Myers, in person, made full tender of the cash payment and notes and deed of trust prepared, executed, and acknowledged as stipulated for in the October contract. The tender was acknowledged and refused. On March 23, 1891, the bill in this case was filed. It is unnecessary to recite its charges or the pleas and answers. At the hearing, the circuit court dismissed the bill, with costs, and decreed that J. C. League should pay the appellant, H. H. Myers, \$2,500 within 30 days from the date of the decree, with 6 per cent. per annum interest thereon from said date until paid; "and, in default thereof, then that the said Henry H. Myers do have his execution for," etc., and for "the costs incident to the issuance of said execution."

It is familiar doctrine that courts of equity will decree specific performance of a contract at the suit of one who has made default, on substantial compliance on his part, where time is not of the

essence of the contract; that time may be made of the essence of the contract by express stipulation of the parties, or such a stipulation may be implied from the nature of the subject, from the conditions of the parties, or from their avowed or known purpose in making it. The result of all the earlier decisions is summarized in *Taylor v. Longworth*, 14 Pet. 172, and the rule as definitely stated as the nature of the subject will permit. *Scarborough v. Arrant*, 25 Tex. 129. With these all subsequent cases agree. The reports abound with illustrations of the application of this rule, in the practice of courts of equity, to the various cases in which such relief has been sought. Was time of the essence of the contract which is the basis of the appellant's suit? A time within which the executory contract is to be executed is definitely stated, but it is not literally written that time is to be considered of the essence of this contract. The subject of the contract is land,—that species of property which, by its fixed situation and qualities, has engrossed the term "real" as its peculiar descriptive. By reason, however, of its fixed situs, its market value is subject to severe fluctuations. Of this we have had recent and widely-felt experience. We have also a clear indication of it in the case we are considering. The lands here involved were bought by League in November, 1889, at from \$1.75 to \$2 an acre. He contracted in October, 1890, to sell them to the appellant at \$12 an acre. The appellant avers that before the 13th of March, 1891, he had sold, or had agreed to sell, these lands at more than \$35 an acre. It was not pertinent to inquire their market value at the time of the hearing of the case in the circuit court, March 14, 1893, or at the hearing of this appeal, April 9, 1894. We are only interested to observe that, however fixed and real as to their material qualities may have been these salt marsh lands, no point of which rose more than a few feet above the level of the sea at ordinary tide, they were subject to such a tide in their market value as to exact that dealers in them, at the time of this rapidly swelling flood, should take and observe sharp notation of its stages, and hold their ventures well in hand to act on the indications of its continuing flood or of its ebb. These parties stipulated that their contract should be closed within 45 days from the delivery of complete abstracts. The appellees League and Coryell delivered what they considered were complete abstracts on the third day after the actual signing of the contract to sell. The attorney at law and in fact of Myers Bros., by a properly written memorandum, acknowledged the delivery of abstracts by Joseph Franklin, with supplements by Island City Abstract Company, brought down to date, on the 1st day of November, 1890. The 45 days was not a limit merely of the time in which money payment should be made. For default in making payment of money, reparation could be made by the addition of customary interest. The relation of this limitation of time is to the contract to purchase and sell. That is what is to be closed. And the time begins to run, not from the day when the title is shown to be good, or is made good, but when complete abstracts are delivered. The title is to

be good, or to be made good. It is not material for us to inquire whether the purchaser could have insisted that this also should be shown or done within the 45 days from the delivery of the abstracts. If so, and the title was not shown to be good, or made good, he could, and he only could, have required that his payment be refunded, and the contract determined. The sellers were bound to deliver complete abstracts within a reasonable time. The buyer was bound to examine these within a reasonable time, and to notify the sellers of any real or apparent defects which he or his legal adviser found in the title as shown by the abstract. All such real or apparent defects as the sellers could supply were to be supplied. That the purchaser might have proper time to reach a sound conclusion as to the title, and the seller have reasonable time to supply such evidence of title as the abstracts from the county records complete to the date did not show, seems to have been the purpose of this limitation of 45 days. The days, therefore, began to run from the delivery of complete abstracts. It is perhaps common knowledge, but, if it is not, the proof in this case sufficiently shows, that a seller who contracts to deliver complete abstracts of title does not contract to make such abstracts himself. The parties alike understand that certain persons or companies, in the particular locality, are engaged in the business of furnishing abstracts of title to lands, as shown by the public records for such title in that locality. These abstracts are not muniments of title. They are only notes (indexes, with remarks) of the respective links in the chain of title that have been recorded as authorized or required by law.

Is it not apparent from the conduct of all the parties that they regarded the time limited as an essential element in this contract? Certainly, even the appellant must have recognized that the appellees League and Coryell so regarded it; and, if the appellant did not so regard it, why did he write Street, January 1st, to obtain extension? Why did he, on January 6th, wire from Duluth: "Letter received. Am waiting reply from Street to letter written him January first. Please wait for letter. Will write you to-day"? Why, on the same day, January 6th, did he write to League explaining delay, and saying: "We ask your kind indulgence for a few days more"? Why, two days later, wire League: "Will you grant thirty days' extension for closing deal"? A careful consideration of the proof leaves no reasonable doubt in our minds that all the parties to this contract considered that time was of its essence. In addition to this, it is certain that before February 5, 1891, Myers Bros. knew that League considered the contract determined by their breach of it. The contract was signed by the appellant, but it was made by and for Myers Bros. The conclusive preponderance of the proof shows that on February 5, 1891, all the parties agreed that the contract had determined. Giving to the testimony of J. R. Myers the most force that the appellant can claim for it, there can be no doubt, when we consider League's previous letters and telegram, and his refusal to communicate further by wire or letter, and his refusal to talk about the matter when approached on it

February 3d, that League did on February 5th, as he and Coryell and Hatch and Campbell all testify, say and repeat with persistence to Mr. Myers, until it was tacitly, at least, assented to by Mr. Myers, that he would not talk to Mr. Myers about the purchase and sale of these lands except on the understanding that the contract was at an end. It is not necessary to recapitulate the proof sufficiently shown in the statement of the case. In our opinion, the nature of the subject of this contract, the condition of the parties when it was made, the well-known purpose of each in making it, and all the subsequent conduct of each in reference to it, raised the necessary implication that time was an essential element in it; and we consider it is conclusively shown by the proof that all the parties are estopped from contending that either one did not agree that the contract was at an end on February 5, 1891. It follows that the appellant is not entitled to the relief he seeks by his bill. It, however, appears that J. C. League has \$2,500 of the appellant's money, which should have been refunded to him at the determination of the contract. The right of the appellant to receive this money was acknowledged by League on the 27th of February, 1891. League has not made such a tender of this money as the appellant should be required to have accepted.

We conclude, therefore, that the circuit court should have decreed that League pay this money to appellant, with 6 per cent. per annum interest thereon from the 12th day of January, 1891, until paid, with all the costs of the suit, within 30 days from the date of the decree, otherwise execution therefor to issue against him, and that in all other respects the bill be dismissed. For the purpose of having the decree corrected as indicated, the decree is reversed, at the cost of the appellee J. C. League, and the case is remanded, with direction to the circuit court to enter the decree in accordance with our order.

Ordered, that the decree appealed from is reversed, and the case is remanded to the circuit court, with direction to enter a decree in favor of complainant against J. C. League for \$2,500, with 6 per cent. per annum interest thereon from February 12, 1891, until paid, and all the costs of suit, with execution if payment is not so made in 30 days, and in all other respects dismissing the bill.

BILLING et al. v. GILMER.

(Circuit Court of Appeals, Fifth Circuit. June 5, 1894.)

No. 188.

RES JUDICATA—DECISION ON MERITS—AFFIRMANCE ON APPEAL.

Complainant brought suit in a state court in 1884 to redeem certain corporate stock, alleging a pledge thereof to defendant in 1871. The answer incorporated several demurrers, among them, that the demand was stale, and was barred by the statute of limitations, and alleged that defendant held the stock adversely after a transfer thereof to him in 1875. A material question in controversy was whether there was a continuing pledge of the stock at the time of such transfer and subse-

quently. On these pleadings, and testimony taken on the issues made by them, a final decree was made without a ruling on the demurrers, dismissing the bill, which was affirmed on appeal by the state supreme court. *Held*, that the decree was a bar to a similar suit thereafter brought in a federal court; and a contention that it was rendered on the demurrers, and was not a decision on the merits, could not be sustained, as the affirmance was necessarily on the merits, demurrers being waived on appeal, under the law of the state, where no ruling thereon was shown by the record.

Appeal from the Circuit Court of the United States for the Middle District of Alabama.

This was an application by James N. Gilmer, appellee, for a rehearing, after a decision reversing the decree appealed from (60 Fed. 332).

Thomas J. Semmes, H. C. Tompkins, and Alex. C. Troy, for appellants.

W. A. Gunter, E. H. Farrar, E. B. Kruttschnitt, and B. F. Jonas, and, on petition for rehearing, also J. D. Rouse and Wm. Grant, for appellee.

Before McCORMICK, Circuit Judge, and LOCKE and TOULMIN, District Judges.

TOULMIN, District Judge. Appellee, James N. Gilmer, in his amended bill filed in the state court avers in substance that the stock in question was transferred to Morris about the 30th of March, 1871, as security for the repayment of the purchase price thereof, which had been paid by Morris, and also as a basis of credit with Morris for money due him and to become due to him from time to time by Gilmer; that part of the purchase money had been paid to Morris, but that a balance was due on account of it; and also that he (Gilmer) was liable to Morris for other small sums of money, and that "said stock in the hands of Morris became and was a basis of a credit for money;" that he did not know what amount of money was due Morris, but that he was willing to pay, and admitted and offered to pay to him, whatever sum of money might be found due to him or to Josiah Morris & Co. for which the stock was held as security. The prayer was for a decree requiring Morris to transfer the stock to Gilmer, and to account for the dividends received since the transfer of the stock to him. Morris' answer to the amended bill denies that the complainant, Gilmer, was ever the owner of the stock, or that there was ever any agreement that it should become his property; that one F. M. Gilmer, the father of the complainant, subscribed for it, and had the certificate issued in the name of the complainant; that he (Morris) agreed with F. M. Gilmer to pay for the stock, and did pay for it, for the benefit of said F. M. Gilmer, who was at the time in an embarrassed pecuniary condition; that the certificate for the stock was not issued until November, 1871, and that immediately thereafter it was transferred to Morris, to be held by him for the repayment of the cost of the stock, and for the payment of a large indebtedness due him by said F. M. Gilmer; that this transaction was with said F. M. Gilmer, and the

complainant had nothing to do with it further than to make the transfer in accordance with the agreement between F. M. Gilmer and Morris. The answer avers that, if it were true that the complainant became or ever was the owner of the stock, as claimed, he, on the 30th day of March, 1875, caused and procured the certificate of stock, which had been issued in his name, to be surrendered to the company, and a new certificate to be issued in Morris' own name, and the stock transferred on the books of the company to his name. Morris denies that the issuance of the new certificate was done with the intent and for the purpose alleged in the bill, and he avers that the complainant had never set up any claim or right to the stock, or made any demand for its reconveyance to him, until the filing of the bill, which was on the 7th day of July, 1884. The answer, in effect, avers that Morris has had the title and possession of said stock, and has held the same adversely to complainant from March 30, 1875, and that in April, 1881, he sold it, as he had a right to do. There are incorporated in the answer several demurrers to the bill; among them, that the demand is stale, and that it is barred by the statute of limitations. On the issues thus made by the bill and answer testimony was taken by the respective parties. The cause was submitted for decree on the pleadings and testimony. The chancellor decreed that the complainant was not entitled to relief, and dismissed the bill without qualification. From this decree the complainant appealed to the supreme court of the state, and the decree of the chancellor was affirmed.

In our former opinion in this case (60 Fed. 332) the writer of the opinion inadvertently made a statement which did not clearly express what we meant to say. We there said that the particular cause of action or controversy in the former suit was ownership of certain stock, and a pledge of it in 1871, and a continuing pledge of it in 1875 and subsequent to that time. What we intended and should have said was that the particular cause of action in the former suit, as shown by the bill, was the ownership of certain stock, and a pledge of it in 1871, but a material question in controversy in that suit was whether there was a continuing pledge of it in 1875, and subsequent to that time. This question arose on the averments in the bill and in the answer, and was, in our opinion, a material one. In the bill it was alleged that "the said stock in the hands of said Morris became and was a basis of credit of money." It seems to us that this allegation was broad enough to cover daily transactions of recognition from the transfer in 1871 to the filing of the bill in 1884. In his answer, Morris denied that the stock was in his hands for any such purpose after the transfer in March, 1875. If Morris, on the 30th day of March, 1875, acquired the title and the possession of the stock, and held the same adversely to the complainant from that time until the filing of the bill, in July, 1884, then the complainant was not entitled to recover. The possession of the stock by Morris was permissive and subordinate in its inception, and, if it so continued, as alleged in the bill and claimed, the complainant was entitled to relief; but if that relation was dissolved by the act of the parties, or by the presumption founded on

the lapse of time, he was not entitled to relief. These issues were presented on the pleadings and testimony in the former suit. The statute of limitations runs only when the possession is adverse. Whether Morris' possession was adverse to the complainant was a question of fact. The transfer of the stock on the books, and the issuance of the certificate to him in March, 1875, was *prima facie* evidence of an absolute right and title in him. If liable to be rebutted or qualified by circumstances showing the purpose of the transfer, and a different holding by him, these circumstances must be shown. These were questions of fact arising on the pleadings and proof, and necessarily issues in the former suit. The same may be said as to the defense of staleness of the demand. Whether staleness of the demand is a defense must be determined by the varying facts of each particular case. Whether the complainant's demand was subject to this defense depended upon the facts and equities of the case. "Each case must necessarily depend upon its own circumstances, having regard not alone to the mere question of time, but also to the circumstances and relative situation of the parties, the nature of the property pledged, whether stationary or fluctuating in value, and other facts effecting the justness or equity of the right asserted." *Gilmer v. Morris*, 80 Ala. 78-83. How could the circumstances of the particular case be ascertained except from the proof? See *Gilmer v. Morris*, *supra*. In our former opinion we said that there was no demurrer to the bill in the state court for want of equity. What we meant to say was, there was no demurrer to the bill for want of equity, on the ground that there was no averment of recognition of a trust relation between the parties subsequent to March 30, 1875. This statement was induced by the argument of appellee's counsel, wherein it was contended that the supreme court of Alabama had decided the case before it on the demurrer to the bill that such recognition was not averred. We suggested that the counsel was mistaken. The supreme court made no such decision. We understood appellee's counsel in their argument before the court to concede that, if the state court did not decide the former suit on the demurrers to the bill, the plea of *res adjudicata* was well made, and appellants were entitled to a reversal in this case. The contention was that the decision of that court was on the demurrers, and that, therefore, said plea could not prevail, and the decree in this case should be affirmed. The demurrers do not appear by the record to have been ruled upon by the chancellor. He made no ruling or decision on them. The supreme court of Alabama affirmed the decree. That court has repeatedly decided that a demurrer will be presumed, on appeal, to have been waived, if the record does not show a ruling thereon. *Corbitt v. Carroll*, 50 Ala. 315; *Daughdrill v. Helms*, 53 Ala. 62; *Harper v. Campbell* (Ala.) 14 South. 650. In the last case cited there was a demurrer interposed to a bill, assigning, among other causes, the statute of frauds. The court said: "The chancellor made no ruling or decision on the demurrer, so far as appears from the record. In such case the presumption on appeal is that the demurrer was waived;" citing *Corbitt v. Carroll* and *Daughdrill v.*

Helms, *supra*. If the demurrers were presumed by the supreme court to have been waived, and that court affirmed the decree of the chancellor, it necessarily follows that it was affirmed on the merits of the case, and not on the decree sustaining the demurrers. The rulings of the chancellor and of the state supreme court were on the testimony, and, governed by that alone, they reached the conclusion that the complainant was not entitled to relief. See opinion of Stone, C. J., in *Gilmer v. Morris*, 80 Ala. 88. After careful consideration of this application and of the elaborate printed argument submitted in support of it, we are satisfied of the correctness of the conclusion reached by us and announced in our former opinion in this case. Rehearing refused.

THOMAS v. COFFIN et al.

(Circuit Court of Appeals, Fifth Circuit. June 12, 1894.)

No. 206.

USURY—EFFECT ON CONTRACT—NEW AGREEMENT NOT USURIOUS.

Parties to a loan, on charges of usury therein by the borrower, agreeing that the contracts on which it had been made should be purged from any usury, struck out every item claimed at the time to be usurious, and a final balance was determined, and a new contract entered into, providing for conveyance to the lenders of the securities for the loan, and a mutual general release was executed. *Held* that, under the law of New York, any usury in the contracts was purged by the mutual agreement of the parties; and if there was any mistake or omission the borrower should not be allowed, in equity, to set it up after permitting large additional expenditures by the lenders on the strength of the new contract, with no offer to refund any portion of the amount honestly due.

Appeal from the Circuit Court of the United States for the Northern District of Georgia.

This was a suit by Coffin, Stanton, and Street, doing business under the name of Coffin & Stanton, against W. B. Thomas, to restrain him from interference with their ownership of certain stock and bonds. The circuit court rendered a decree for complainants. Defendant appealed.

W. B. Thomas, Gregory Smith, and H. T. Smith, for appellant.
Alex. C. King and Jack J. Spalding, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

LOCKE, District Judge. This suit was commenced in the court below by Coffin, Stanton, and Street, citizens of New York, and doing business under the name of Coffin & Stanton, alleging that they were the owners of 3,940 shares out of total capital stock of 4,000 shares of the capital stock of the Blue Ridge & Atlantic Railroad Company, a railroad situated in Georgia, and also owners of 300 first mortgage bonds of said road, and that one W. B. Thomas, a citizen of Georgia, who had been by them appointed manager of said road, had been endeavoring to perpetuate his control of

said road, and had repudiated the contract by which he had sold said shares and bonds to them, and was attempting to convey said shares and bonds to another party, and put a cloud upon the title of such shares and bonds, and praying that he be enjoined from interfering with their ownership thereof.

The history of the case is that the appellant, W. B. Thomas, being the owner of the above-stated shares of stock and bonds of the said railroad company, and the president of it, and desiring to borrow money for the purpose of paying off an existing lien and further improving the property, made application to appellees, Coffin & Stanton, of New York, in March, 1889, for a loan, to be secured by a deposit of the aforesaid shares of stock and bonds, and procured from them a loan of \$30,000, purporting to be procured from the Loan & Investment Company a corporation of West Virginia, incorporated for the purpose of loaning money, and for which Coffin & Stanton were acting as brokers he giving a note therefor in the name of the said railroad company. For this loan he was to pay 6 per cent. interest, and Coffin & Stanton 5 per cent. commission for procuring it. The complainants subsequently advanced him \$12,000 more and when the debt became due extended it for another year, they charging \$15,000 commissions and he giving them in addition twenty-five \$1,000 bonds of the railroad company, and a note for \$75,000 to the Loan & Investment Company. Coffin, complainant, testifies that the commissions were charged and the bonds given at the urgent solicitation of the appellant, Thomas, who was desirous of giving appellees a portion of the profits that he was anticipating making from a sale of the property then in contemplation. The same stock and remaining 275 bonds were left as a security on the loan; and Thomas agreed if at any time more security was required he would furnish it. In December a demand was made for further security, and, after some discussion, he charged that the contracts were invalid, as tainted with usury, but stated, in effect, that he did not desire to take advantage of that defense, and was willing to do what was right. The result, as appears from a careful examination of all the testimony, was that after considerable negotiation it was agreed that the contracts should be purged from any usury, and a final one entered into. In accordance with this understanding, the amount of the indebtedness was reduced from something over \$75,000 to about \$63,000, purging out all that was at the time claimed to be usury and a final balance determined, the 25 bonds restored to the fund and an agreement in two parts, or two agreements, in writing, entered into the 17th of March, 1891, signed by Thomas and Coffin & Stanton. The first of these agreements, after reciting the negotiations which had been had between the parties stated that as it was the intention of the parties to provide by this agreement for the full compromise and adjustment of all manner of claims, disputes, and controversies growing out of these transactions, Thomas bargained, sold, and conveyed to Coffin & Stanton all the right, title, and interest that he held in the railroad company, and its property of any description, and, in

the shares of stock and bonds relating thereto. He furthermore agreed to procure the resignations of the present board of directors, and the election of such persons as Coffin & Stanton might designate, and that Coffin & Stanton should pay Thomas \$3,000 in equal monthly installments of \$250 each, and that there should be good and sufficient deeds and instruments of conveyances executed by him, and releases from the Loan & Investment Company. It was further provided that Stanton should be elected president of the railroad company, and that Thomas should be appointed and designated as manager of the railroad for 12 months at a salary of \$125 a month, to continue for the 12 months whether he should cease to act as manager or not; and that Thomas should have the power and authority to enter into contracts for sale of the shares of stock and the bonds of the road at any time within 12 months for any price not less than the amount of the indebtedness determined then to be due, together with interest and such expenditures as shall have been made upon the road in the meantime, he to have one-half of all that could be procured at such sale above such amount. He also had the power, as the attorney of Coffin & Stanton, to sell the road at public outcry at Atlanta, Ga., for any amount not less than the amount of the indebtedness due at any time within the year. If Coffin & Stanton could effect a sale during the year, they were to do so, but not to sell at a price less than approved by Thomas, and he was to have half of all that was received more than the debt and expenses. The next day—March 18th—they also entered into a further agreement, in which they mutually released and fully acquitted each other “of and from all and every manner of claim and demand of any kind whatsoever growing out of any transaction from the beginning of the world to the present time,” saving inviolate the provisions of the contract of the previous day. The \$3,000 was paid Thomas; also the \$1,500 salary; but before the year had elapsed Thomas procured the commencement of a suit against the road in a court of the state of Georgia, and the appointment of a receiver to take possession of it, repudiated the agreement of March 17, 1891, and informed Coffin & Stanton that he had made an assignment for the benefit of his creditors, and included among the assets the Blue Ridge & Atlantic Railroad, but proposing to them that he would, for a further loan of \$3,000, assign and convey to them in fee simple all his right, title, and interest to the railroad and the shares of stock and bonds. They refused his proposition for a further loan, and filed their bill for the purposes heretofore stated. Upon a hearing the court below found that the contract of March 17, 1891, was valid and binding, and free from any defect, and that Coffin & Stanton acquired thereunder the shares of stock and bonds; that they and Thomas executed mutual release from all manner of liability excepting of that agreement, and that Thomas had not presented a purchaser under that contract, nor tendered nor offered to pay them any sum of money for said stock and bonds; that Thomas had executed a deed of assignment to one A. H. Hodgson, and endeavored to convey thereby said stock and bonds, but that said deed of assignment

never took effect. And it was adjudged that the deed of assignment should be set aside, and decreed to be null and void, and that Thomas be enjoined from interfering with the possession or ownership of said stock and bonds or railroad, and that the contract of March 17, 1891, be decreed valid and binding, and that the receiver in charge, upon the payment of the costs and fees due, surrender the property to the president and directors of the railroad company. From this decree an appeal was taken, and six assignments of error stated, each one being based upon the allegation that the contract of March 17, 1891, was void by reason of usury. The only defense to the suit is the usury which is alleged to have entered into the final contract of settlement by which Thomas conveyed to Coffin & Stanton the stock and bonds of the railroad upon the consideration of the amounts then due, of the further payment of \$3,000 in monthly installments, the salary of \$1,500, and the right and privilege which he was given of finding a purchaser, or selling the road at public auction in Atlanta, within a year, and having one-half of the net proceeds after the payment of the road's indebtedness. To this defense the complainants urge first that Coffin & Stanton were private bankers, doing business in New York, and that the forfeiture of the loan did not attach to them, but, under chapter 409 of the Acts of 1882, the only penalty was the forfeiture of twice the amount of interest collected, upon suit brought within two years; second, that the first transaction was a loan made by one corporation to another corporation, and the commissions charged were allowable, and, if not, the railroad corporation could not avail itself of the plea of usury; and, thirdly, that any usury which might have existed in the business or accumulated loan of \$75,000 or the conveyance of the 25 bonds was purged and eliminated by the mutual action of lender and borrower before or at the time of the final agreement, and it cannot now be urged.

The argument that the complainants were private bankers, and therefore exempt from the penalty of forfeiture of the debt, and only liable to a loss of twice the interest improperly collected, was not touched upon by the appellant, and was only contained in a brief of the appellees in reply to one of appellant. What reply may have been made to it, had an opportunity offered, we do not know; but the position taken therein seems applicable to this case, and conclusive thereof, if there had been no other defense to the charge of usury. The testimony shows that complainants were bankers, and the laws of New York appear to have extended to such individuals the immunity for taking more than the legal rate of interest, which at one time was only enjoyed by incorporated institutions, putting them upon an equality with the national banks in that respect. *People v. Doty*, 80 N. Y. 225; *Perkins v. Smith*, 116 N. Y. 441, 23 N. E. 21; *Bank v. Dearing*, 91 U. S. 29; *Bank v. Johnson*, 104 U. S. 271. But we do not consider it necessary to rely alone upon this position in order to determine the case. The language of the mutual release of the 18th of March, 1891, is sufficient to conclude any complaint or claim which either party had

against the other growing out of any previous transaction. The testimony shows that the charge of usury had been made and fully considered, and that the lender had declared himself ready to strike out any item of usury or usurious demand, and had stricken out all pointed out, or claimed to be such, by the party complaining. It is the recognized rule of law of New York that usurious contracts may be purged of usury by the mutual agreement of the parties, and, where such agreement has been made and accepted, the burden of proof is upon the party subsequently complaining, after mutual agreement and release and a lapse of time, to show fully and conclusively that there was usury intentionally remaining in the alleged indebtedness; and this we do not consider has been done. The first loan negotiated was in behalf of the railroad, its proceeds used to pay an existing lien, and the balance used for the benefit of the property, and the note signed by Thomas as president of the road. We do not find that it was a loan to Thomas, and not to the road, and therefore subject to the defense of usury. The contract and agreement of March 17, 1891, was a contract of conveyance for certain considerations, namely, the relinquishment of certain claims, the payment of \$3,000, and a salary of \$1,500, and a right to sell the property within a year, and receive one-half of the net profits. This certainly was not a usurious contract, and, if reliance can be placed upon the language and recitals of any written instruments, we can but consider that by the agreement witnessed by the certificate of release of May 18th any previous contract or agreement had been fully purged from any usury by a mutual understanding; and if, by any mistake or omission, such was not done, Thomas, in good conscience and equity, should not be permitted to set it up after permitting the expenditure of more than \$20,000 additional upon the strength of such agreement, with no offer to refund any portion of the amount honestly due. The evidence shows that it was the intention and desire to eliminate any and all usury, and, if it was not done, it was an omission both on the part of complainant and the defendant in not pointing out the item now complained of.

We concur with the views and findings of the court below, and the decree appealed from is affirmed.

THOMAS v. CINCINNATI, N. O. & T. P. RY. CO.

(Circuit Court, S. D. Ohio, W. D. April 30, 1894.)

No. 4,598.

RECEIVERS—REDUCTION OF WAGES.

The court, in its discretion, will consider an application by railroad employés to rescind an order of the receiver reducing wages.

This was a motion for leave to file a petition in the suit of Samuel Thomas against the Cincinnati, New Orleans & Texas Pacific Railway Company.

Peck & Shaffer, for petitioner.

Harmon, Colston, Goldsmith & Hoadly, for receiver.

TAFT, Circuit Judge. This is an application by the employés in the service of the receiver of the Cincinnati, New Orleans & Texas Pacific Railroad Company to the court to direct the receiver to rescind an order made by him reducing the wages 10 per cent. from to-morrow, the 1st of May. Objection is made to the filing of the petition by the counsel for receiver, Mr. Colston, on the ground that to receive such petition and consider it will establish a precedent, involving the court in hearings of all sorts concerning the discipline and ordinary administrative matters in the operation of the road. I am therefore asked to refuse to consider such petition, and to hold that the order of the receiver should be received by me as conclusive of the question. In considering this objection, it is well to point out what standing the petitioners have in this court. It is conceded on all sides that the consideration of such a petition is a matter of discretion in the court. The employés have no legal rights which are about to be violated by the order complained of. Under the contract for their employment they were entitled to 30 days' notice of any reduction of wages. That notice was given upon March 27th, and, speaking from a strictly legal standpoint, they are now to be put in the attitude of either accepting or rejecting the proposition by the receiver to employ them at the reduced wages. If they are not content with the wages, they are not compelled to accept them, and may retire from his employment. I repeat that from a strictly legal standpoint they have no standing in this court to call for an adjudication of any rights. But the petitioners, so long as they remain in the receiver's employ, are very important in the operation of the road. The receiver is the agent of the road in operating the road. The petitioners are the employés of the receiver, and therefore are the employés of the court. This is a petition to the court, as their employer, to exercise its discretion not to reduce wages. Their appeal is exactly like that of an appeal by an employé to an employer, except that, while an employer may be moved by considerations of charity, the court is limited in the exercise of its discretion to such action as may be consistent with the preservation of the property and its due administration in the interests of those who own it. How much of a discretion these limits give to the court it is not necessary now to determine. The employés have, doubtless, by reason of arrangements made for living along the road, a motive for remaining in the employ of the road, and it will be a loss to them to withdraw from the employment of the receiver, and seek employment elsewhere, larger than the mere cut in wages. Their complaint is that the cut oppresses them, and is below what skilled labor, considering the market price, is entitled to receive. The receiver, before issuing the order in question, considered it of sufficient importance to consult the court as to its propriety, and the court approved it on his recommendation. The order is certainly an important one in the operation of the road and

in the administration of the trust. It is so important that I do not think a consideration of it can form an injurious precedent for bringing administrative questions of all sorts before the court. There is no doubt that in nearly all matters, the action of the receiver must be conclusive in operating the road, but in a question of this kind I think the court can safely make an exception. Judge Ricks heard such an application in the receivership of the Clover Leaf system, and justified his course by authority. The receiver states that he is entirely willing to have the propriety of the order considered by the court, and that he has so informed the men. In view of these circumstances, therefore, and with the distinct premise that this is a mere appeal to the discretion of the court in operating the property to be exercised within the limits already mentioned, namely, the proper preservation of the property and the rights of its owners, and that it is not a judicial hearing which assumes any legal right on the part of the men to continue in the employment of the road, I will hear an application to modify the order whenever such an application is ready for hearing. Counsel for the employés states that he is not now ready to have heard his petition for rescinding the order, because he was not employed until Friday or Saturday last. The men had 33 days' notice of this order. If they wished to present to the court a petition for its rescission before it should go into effect, they should not have delayed until the eve of the 1st of May, the time when it begins to operate. I must therefore refuse leave to file the petition to rescind the order.

As already stated, the order was made by the receiver after consultation with the court; and, in the absence of a strong showing to the contrary, the court must presume that the order was well made. The order must therefore stand, and go into force to-morrow. But counsel for the men will have the right, upon five days' notice to counsel for the receiver, to present an application to modify the order. When the application is duly made, it will be heard on the evidence then presented. Meantime the motion to file the present petition is overruled, and the order will stand.

BARNES et al. v. KORNEGAY et al.

(Circuit Court, W. D. North Carolina. August 6, 1894.)

1. CONTRACT BETWEEN STATE AND RAILROAD COMPANY—WHAT CONSTITUTES—EXEMPTION OF PROPERTY FROM TAXATION—REPEAL—VALIDITY.

Act Gen. Assem. N. C. Jan. 27, 1849, incorporated the N. C. R. Co., with a capital stock of \$3,000,000. The state of North Carolina subscribed for two-thirds of the shares, and paid for them with 6 per cent. bonds. The other shares were taken by private persons. Act Gen. Assem. N. C. Feb. 14, 1855, amended such charter by increasing the capital stock to \$4,000,000, because the original amount was insufficient to complete the road, and the state subscribed for the additional shares, paying therefor with 6 per cent. bonds. Section 5 provided that all real estate held by said company for right of way, stations, and workshops should be exempt from taxation until the dividends of profits should exceed 6 per cent. per an-

num. *Held*, that the exemption provided by section 5 was a part of the contract between the state and the corporation, and that acts of the general assembly of such state repealing such section, and providing for the listing of such property for taxation, were void, as impairing the obligations of a contract. *Tomlinson v. Jessup*, 15 Wall. 458, applied.

2. SAME—DIRECTORS—AUTHORITY TO LIST PROPERTY FOR TAXATION.

A majority of the board of directors of such corporation cannot list for taxation the property exempted by such act, against the protest of the minority stockholders.

3. SAME—INJUNCTION—BILL BY STOCKHOLDERS—WHEN WILL LIE.

Where a majority of the directors of such corporation, who represent the state, have done everything they can as a board to surrender or destroy such exemption in the face of the protest of the minority, and the governor and the state desire such surrender, the minority stockholders may maintain a bill to enjoin such corporation and the president and individual directors from procuring such property to be taxed, without first going to the board of directors and endeavoring to induce them to prevent such taxation.

Alfred W. Haywood and R. H. Battle, for complainants.

William R. Allen, for defendants.

Before SIMONTON, Circuit Judge, and DICK, District Judge.

SIMONTON, Circuit Judge. This bill is filed by persons, citizens of states other than North Carolina, holding stock in the North Carolina Railroad Company, against the president of said company, the individuals directors therein, and the corporation itself. The prayer of the bill is for an injunction upon this statement of facts: The North Carolina Railroad Company was incorporated by the general assembly of that state on 27th January, 1849. It was a part of a great scheme of internal improvement, and the railroad for the construction of which the company was formed was the connecting link between the eastern and western sections of the state. The original capital was fixed at \$3,000,000, divided into 30,000 shares at \$100 each, and the state of North Carolina subscribed for 20,000 shares, giving therefor state bonds, bearing interest at the rate of 6 per cent. per annum, payable semiannually. The remaining 10,000 shares were taken by private parties. It having been ascertained that the amount of capital stock was insufficient to complete and equip the road, whose terminus was Charlotte, N. C., the general assembly, on 14th February, 1855, amended the original act of incorporation by increasing the capital stock to \$4,000,000,—that is to say, by 10,000 shares of \$100 each; and for these shares the state became the subscriber, paying therefor bonds bearing interest at 6 per cent. per annum, payable semiannually, the shares so taken by the state being preferred stock to the dividends on which net earnings should be first applied. In this act of 1855 was inserted the following section:

"Sec. 5. Be it further enacted that all real estate held by said company for right of way, for station places of whatever kind, and for workshop locations, shall be exempt from taxation until the dividends of profits of said company shall exceed six per centum per annum."

The affairs of this corporation are managed by a board of 12 directors, 8 of whom represent the stock of the state, and 4 of whom

represent the stock of the private stockholders. The state directors are appointed by the governor; the private stockholders elect their own directors. In 1893, upon the recommendation of the governor, a bill was introduced into the general assembly of North Carolina, repealing the fifth section of the act of 1855 (amending the charter of this railroad company). This bill failed to pass, but in lieu thereof the general assembly, at the same session, in the act to raise revenue, inserted a section:

"Sec. 6. Whenever in any law or act of incorporation granted under the general law or by special act, before or since the 4th July, 1868, there is any limitation or exemption of taxation, the same is hereby repealed, and all the property and effects of all such corporations shall be liable to taxation."

At the same session, also, provision was made in the act to provide for the assessment of property and the collection of taxes, for the listing of their property for taxation by all railroads and other corporations doing business in the state of North Carolina with the railroad commissioners. After the passage of these acts the majority of the board of directors of the North Carolina Railroad Company, if not under the instruction, certainly with the approval, of the governor of the state, adopted, against the vote of the representatives of the private stockholders, a resolution instructing the president of the company to report to the board of railroad commissioners of North Carolina the entire property of the North Carolina Railroad Company for taxation, and that that board be empowered forthwith to assess for taxation all the real estate held by the said railroad company for right of way, for station places of whatever kind, and workshop locations, and all other property of the said railroad, in like manner as the property of other railroads in the state is assessed, and to report said assessment to the treasurer of the state and the proper municipal authorities, in order that state and municipal taxes may be levied thereon. This is charged in the bill, and admitted in the answer, with the further admission that it is the purpose of the president to obey this resolution, unless restrained by order of this court. The bill seeks an injunction against this proposed action on the part of the president and the representatives of the state on the board of directors. It claims that this clause of exemption is a part of the contract between the state and the corporation, and that, inasmuch as no power to repeal, alter, or amend the charter was reserved to the state, any act on the part of the state seeking to repeal or modify this exemption would impair the obligation of a contract, and be void. It also claims that this exemption is of great value to the corporation, enhancing the market price of its stock, and that it is not within the power of the board of directors, or even of the majority of the stockholders, to surrender or destroy it. The answer denies that this exemption is a part of the contract between the state and the company; avers that the exemption is not only of no value, but is a detriment; that the dividends of profits of the said company now exceed 6 per centum per annum; and that, inasmuch as all other railroad companies which formerly held similar exemptions have surrendered and waived the same, fair dealing and high public

policy demand that the corporation in which the state herself owns three-fourths of the stock should follow their example.

The last of these considerations this court cannot discuss. Its duty is to ascertain the rights, legal and equitable, of the parties before it. If these rights be ascertained, it is for the parties themselves to say whether they will pursue or waive them. The second consideration presents questions of fact, and can be finally determined only by a reference to a master. We deal with the first consideration. Is this provision of the amended charter, exempting certain of the property of the railroad company from taxation, a part of the contract between the corporation and the state? The learned counsel who represented the defendants at the hearing, in an argument characterized by great ability and acumen, insisted that the private stockholders had no part in this exemption; that there was no consideration moving towards them, for that all the 10,000 shares held by them were provided for under the original charter, and no one but the state took the new shares under the act of 1855. Even if we could entertain this argument, it seems to us that there was a consideration. In the original enterprise the state had entered into copartnership with the private stockholders, they and the state embarking their common capital in the accomplishment of a common purpose. It was found that the capital was insufficient to complete the enterprise and to reap its fruits. There was danger of total loss. The state consented to furnish the additional capital necessary to prevent this loss, provided that such additional capital would be placed in a secure position as preferred stock; and this concession, having been made, exempted the whole of the realty from taxation. But the contract (if it was a contract) was not with the stockholders, but with the entity,—the corporation. And each stockholder, by virtue of his interest in the corporation, had a right to this exemption as a part of the property of the corporation, which could not be given away or destroyed without his concurrence. The fact that the exemption is by an amendment of the charter even of an equipped corporation does not detract from its character as a contract. A fortiori it will not defeat its character as a contract if the completion of the work of the corporation, its final success, its life, depends on the amendment. The precise question arose in *Tomlinson v. Jessup*, 15 Wall. 458. A railroad company had obtained its charter and completed its road under an act of the legislature containing no exemption from taxation. Some years afterwards it obtained an amendment to its charter, and in the amending acts was the exemption. The state adopted a new constitution, and in that constitution it was sought to repeal all such exemptions. The supreme court of the United States, having these facts under consideration, says:

"In these cases, and in others of a similar character, the exemption is upheld as being made upon considerations moving to the state, which gives to the transaction the character of a contract. It is thus brought within the provisions of the federal constitution. In the case of a corporation the exemption, if originally made in the act incorporating it, is supported upon the consideration of the duties and liabilities which the corporation assumes by accepting the charter. When made, as in the present case, by an amend-

ment of the charter, it is supported upon the consideration of the greater efficiency with which the corporation will thus be enabled to discharge the duties originally assumed by the corporation to the public, or of the greater facility with which it will support its liabilities and carry out the purposes of its creation."

The case seems on all fours with that at bar, and no other citation is necessary. This being so, the proposed action of the directors and the president is either the surrender of a clear legal right of the corporation in the contract to an unconstitutional act of the legislature, or it is the waiver and surrender of this right, each of which is beyond the power of the directors. At this stage of the case the restraining order must be continued. It has been urged that this bill will not lie at the instance of the stockholders, because it does not appear that all efforts have been exhausted to obtain action on the part of the corporation. But it cannot be denied that the state, which owns three-fourths of the stock, and which at all stockholders' meetings casts the vote of this stock as a unit, desires the surrender or destruction of this exemption; that the governor, induced by his convictions of public policy and fair dealing, has advised and promoted it; that the directors who represent the state have done everything that the board can do to accomplish it in the face of a protest on the part of the minority, who represent the private stockholders. Shall we require these minority stockholders to go to the board of directors in order to induce them to institute proceedings to overturn their own acts, or to a meeting of stockholders to ask that the action of the directors, who represent the wishes of three-fourths of the stock, be annulled? This case does not come within the ninety-fourth rule of equity, nor is it within the mischief of *Dodge v. Woolsey*, 18 How. 331. See *Fost. Fed. Pr.* p. 27, § 12; *Id.* p. 161, § 27.

Let an order be prepared granting an injunction as prayed in the bill, to be in force until the further order of this court after a hearing on the merits of this case, and referring the cause to the standing master, to take and report all the evidence in the cause.

DICK, District Judge, concurred.

FARMERS' LOAN & TRUST CO. v. CAPE FEAR & Y. VAL. R. CO. et al.
(NORTH STATE IMP. CO. et al., Interveners).

(Circuit Court, E. D. North Carolina. July 25, 1894.)

1. RAILROAD COMPANIES—RECEIVERS—QUALIFICATIONS.

Where one possesses integrity of character, business experience, a capacity for the examination into and comprehension of accounts, and has had large financial experience, and has been concerned in the construction and management of railroads, and knows railroad accounts, he is not disqualified to act as a receiver merely because he is not a railroad expert, acquainted with all the details of the mechanical work of a railroad plant.

2. SAME.

The receiver of a railroad company should not be removed on the ground of alleged unfitness, in removing the treasurer of the company and increasing the expenses of that office, of frequent visits in person on the railroad, and extravagant expenditures, where nothing is shown as to

ability of the person discharged, and where the receiver's answer shows that the expenses of the treasurer's office have not been increased beyond what the pecuniary situation will warrant, where the allegation as to visits were positively denied by the receiver, and where no extravagant expenditure has been shown.

3. SAME.

A person is not disqualified to act as receiver of a North Carolina corporation, owing its conception to the citizens of that state, merely because he is not a citizen of North Carolina.

In the matter of the appointment of a receiver for the Cape Fear & Yadkin Valley Railroad Company, an order was made appointing a receiver, and giving leave to any party interested to intervene, and move to rescind or modify the order, within 60 days from the date thereof. The North State Improvement Company and the People's National Bank of Lynchburgh, Va., intervene and object to the order. Order confirmed.

Watson & Buxton, Charles Price, and F. H. Busbee, for the motion.

Cowan & Cross, H. B. Turner, and I. H. Hudson, for respondent.

SIMONTON, Circuit Judge. One question made in this matter awaits determination. On the 31st March, last, upon this bill filed by trustees of the first mortgage, praying foreclosure, John Gill, Esq., was named as receiver. The order reserved leave to any party interested therein to intervene, and move to rescind or modify the same, within 60 days from the date thereof. The practical effect of this reservation was to make the appointment of the receiver temporary in its nature, until the 60 days had expired, or objection thereto had been heard and considered. Upon the expiration of that period or the hearing of such objection, unless the same proved sufficient, the appointment would become permanent. The interveners have taken advantage of the reservation in the order, and have made a full statement of their objections thereto, which have been patiently heard and have been carefully considered.

At the hearing, the insolvency of the Cape Fear & Yadkin Valley Railroad Company, and the imperative necessity for a receiver, have been frankly admitted. The objections presented are to the person named as receiver. When the application was made in the first instance by the complainants, Mr. Gill was appointed receiver, not on their demand, nor because he was their nominee simply. The necessity for a receivership being apparent, he was selected, because he was preferred by the representatives of the first mortgage bondholders, and because the second mortgage bondholders had shown their confidence in him, he being the president and manager of the Mercantile Trust Company of Baltimore, their trustee. His high character for integrity and business capacity, known to the court, recommended and secured the appointment. At the hearing, certain general objections were urged against continuing him in his position, and certain special objections were urged, growing out of his management as receiver. It is said that he is not a railroad man, his employment being that of a banker and financier. If by this is meant that he is not a railroad expert, acquainted with all the details of

the mechanical work of a railroad plant, this objection, no doubt, is founded on fact. But, to the masterful management of a railroad company, this expert knowledge alone is not sufficient. One must combine with this, great business and administrative ability, a knowledge of finance, intimate acquaintance with the laws of trade, and a diplomatic capacity in negotiations with competing, and contracts with connecting, lines. But this kind of railroad man is very difficult to obtain, and costly when obtained. Besides this, the court, in selecting its receiver of a railroad, does not seek a person to take charge of and administer a road, to the end, after long experiment, of working it out of difficulties, and restoring it to a successful career; certainly not, at least, when such receiver has been appointed in a suit of mortgage creditors, seeking the establishment and realization of their contract rights. All that the court can do, in such a case, is to take charge of the property under an equitable execution, ascertain and fix the legal and equitable rights of all parties interested therein according to their lawful priorities, and, when these are ascertained and fixed, to sell the property, and divide the proceeds among those entitled thereto. During this process of ascertainment and adjustment, it places the property in the hands of a receiver, whose duty it is to preserve it, prevent deterioration, and so manage it that the rights of its real owners shall be prejudiced as little as possible. The person selected for this duty must possess integrity of character, business experience, a knowledge of affairs, a capacity for the examination into and comprehension of accounts, must not be partisan, and must have no pecuniary interest in any one of the classes of creditors whose claims come before the court. Mr. Gill fills these requisites. He is of unblemished reputation. He has had large financial experience, and has credit for great financial ability. He has been concerned in the construction and management of railroads, and knows railroad accounts. When he was appointed, the Mercantile Trust Company, of which he is the president, was trustee of the second mortgage. This place it has resigned, and due provision has been made for the protection of the trust. He was the owner of some first mortgage bonds. These he has parted with. At this hearing, in which his merits are being investigated, he stands an indifferent third person. It is true, he was chairman of a committee of first mortgage bondholders, which promoted this suit. But as it is admitted on all sides that a receivership was inevitable, and necessary for the protection of all the interests involved in this business, surely the promotion of a suit accomplishing this necessity cannot be imputed as a fault. It is said, however, that during the period of his acting as receiver he has shown his unfitness by removing the treasurer of the company and increasing the expenses of that office, by removing the agent at Mt. Airy, by infrequent and hasty visits in person on the road, and by extravagant expenditure. The expressed ground of complaint against these removals is that the gentlemen removed were relatives of large stockholders. Nothing in the affidavits bearing on this point, nor in the argument, is said of the superior ability of these gentlemen for the places they filled. Indeed, nothing at all is said of their ability. The treasurer should have the absolute con-

fidence of the receiver, who is responsible for him. The answer of the receiver to these complaints is satisfactory. The expenses of the treasurer's office have been increased from \$1,800 to \$2,600. From all that has been disclosed in this case, so far, the financial department of this company, and a clear and distinct exhibition of its pecuniary situation, will warrant an expenditure as moderate as this. Necessarily, the allegations of the objectors as to the visits of the receiver are on information and belief. They are met and denied positively and directly by the receiver, who speaks of his own knowledge. No extravagant expenditure has been shown.

Another class of objections has been eloquently and earnestly pressed, and it is this: The Cape Fear & Yadkin Valley Railroad is a corporation of the state of North Carolina, owing its conception and successful construction to the patriotic effort of her own people. Some of them have staked their private fortunes on this adventure. The promotion of their interests and the management of their property should be in the hands of a citizen of North Carolina, who would enjoy the confidence of his own people, and would labor singly for their welfare. But in completing their purpose the promoters of this enterprise were forced to go into a money market, and ask the aid of other capital. In order to secure this, they invested the lenders with certain paramount rights, which every court, which the debtors themselves, are bound to respect. Desirable as it is that every effort should be made to relieve the promoters of this road, its original stockholders, and its unsecured creditors from any loss, this could be secured only by a long administration of the affairs of the corporation, by denying to creditors holding contract liens their clear rights, and by postponing a final settlement to a distant day, speculating upon an uncertain future at the expense of the holders of prior liens. Courts are instituted for the investigation and adjustment of rights. Sentimental considerations, however much they may disturb the judgment of a court, should never control it. No citizen of North Carolina was named or suggested at the hearing by any one whatever. It is a matter of regret that Mr. Gill is not a North Carolinian. Surely, however, all other things being equal, it cannot be said, in this court, that this single fact amounts to a disqualification. The appointment of John Gill, heretofore made, as receiver in this case, is hereby confirmed.

PHINIZY et al. v. AUGUSTA & K. R. CO. et al.

CENTRAL TRUST CO. OF NEW YORK v. PORT ROYAL & W. C. RY. CO.
et al.

(Circuit Court, D. South Carolina. August 16, 1894.)

1. RAILROAD COMPANIES—CONSOLIDATION—RATIFICATION.

An agreement was entered into for a consolidation of several railroad companies, which was in compliance with the statute (Gen. St. S. C. § 1426) providing therefor, and was executed by each board of directors, and submitted to the stockholders of the several companies. The minutes of the action of three of the companies, confirming the agreement, were in evidence, but the minutes of the other company had been lost. The old stock was surrendered, and the new certificates accepted. The

new company took full charge and control of all the component roads without question or exception, and for years exercised such control, and immense advantage resulted to the railroad from such consolidation. *Held* to show that the agreement was accepted and ratified.

2. SAME.

It was not an essential prerequisite to such consolidated companies acting as a corporation that the agreement should have upon it the certificates of the several secretaries of each of the railroad companies that it had been accepted.

3. CORPORATIONS—MORTGAGES—RIGHT OF STOCKHOLDERS TO QUESTION VALIDITY.

Where an organization assumes to act as a corporation, and issues bonds secured by mortgage, and puts the bonds in circulation, persons holding stock in the corporation, as such, cannot defeat the bonds and mortgage by alleging that the corporation was not duly incorporated.

4. RAILROAD COMPANIES—RIGHT OF DIRECTORS TO ISSUE MORTGAGE WITHOUT VOTE OF STOCKHOLDERS.

Gen. St. S. C. §§ 1427, 1428, provide that, on the consummation of the act of consolidation by several railroad companies, the rights, privileges, and franchises of each of the corporations, parties thereto, shall be deemed vested in and transferred to such new corporation without any further act of deed. *Held*, that where each of the corporations, at the date of the consolidation, had outstanding bonds, secured by mortgages, under proper authority, the directors of the new corporation may, without the vote of the stockholders, issue a mortgage on the property of the new corporation in order to take up and substitute bonds of the new corporation for the bonds of the old corporations.

Bill by the Central Trust Company of New York against the Port Royal & Western Carolina Railway Company and others to foreclose a mortgage. The counties of Laurens, Spartanburg, and others file a cross bill denying the validity of the mortgage.

J. R. Lamar, C. C. Featherstone, N. B. Dial, and S. J. Simpson, for complainants in cross bill, Laurens county and others.

H. B. Tompkins, Lawton & Cunningham, and Mitchell & Smith, for defendants in cross bill.

SIMONTON, Circuit Judge. This case now comes up to be heard upon the cross bill of the cities of Anderson and Greenville and of the counties of Laurens, Spartanburg, Anderson, and Greenville, and the answers thereto. It will be impossible to come to a conclusion upon the principles of law governing this case without a full statement of the facts.

There were in the state of South Carolina several small railroads, independent of each other, but connecting at a common point, and, in a sense, auxiliary. One of these was the Augusta & Knoxville Railroad, some 68 miles in length, and completed from Augusta, Ga., to Greenwood, S. C.; another, the Greenwood, Spartanburg & Laurens Railroad, about 66 miles long, having its termini at Spartanburg and Greenwood, and passing through the town of Laurens; and yet another, the Greenville & Laurens Railroad, 36½ miles long, connecting Laurens and Greenville; another, the Savannah Valley Railroad, extending from McCormack, S. C., to Anderson, S. C., some 58½ miles. These five towns (Greenville, Spartanburg, Laurens, Anderson, and Greenwood) are the important trade centers in upper South Carolina; and these roads put them in close con-

nection with the city of Augusta, Ga., and, through Augusta, with the great ocean highways. Of them, the Augusta & Knoxville had the most important function, connecting their common center, Greenwood, with Augusta, and, to adopt a homely expression much used in the hearing of the case, was "the neck of the bottle," to this network of railways. From Augusta there ran the Port Royal & Augusta Railway, connecting Augusta with the harbor of Port Royal, giving immediate access to the ocean. The amalgamation and consolidation of these lines of railroad were fraught with so many desirable results as to seem almost a natural necessity. They go without saying. The Central Railroad & Banking Company of Georgia had an eye to these advantages. The several roads were weak; some of them in an incomplete state; all of them deficient in plant, and more or less moribund. In various ways,—by purchase of stock and of bonds, by construction contracts, originally undertaken, or assigned to it, and otherwise,—this great system obtained a controlling voice in each of these lines of railway, and proceeded to take the steps leading to their consolidation. The people of Greenville, Spartanburg, Laurens, and Anderson had long seen the advantages to be derived by their counties, and the cities and towns in them, from the building of these several roads, and had, by public subscription, shown their faith in them. The county of Spartanburg had issued county bonds to the amount of \$75,000 to pay a subscription of the same amount in stock of the Greenwood, Spartanburg & Laurens Railroad Company; the county of Laurens had issued county bonds to the amount of \$150,000, and had invested \$75,000 of the proceeds in stock of the same railroad company, and a like amount in stock of the Greenville & Laurens Railroad Company; the city of Anderson had issued its bonds for \$50,000, and had used them in subscribing \$50,000 stock in the Savannah Valley Railroad; the city of Greenville had issued \$25,000 in bonds, and had taken a like amount of stock in the Greenville & Laurens Railroad Company; and the county of Greenville issued \$50,000 worth of bonds, and subscribed for the same amount of stock in the same railroad. Each of these counties and municipalities had representatives in the several boards of directors controlling these companies, respectively. Their consolidation having been determined upon by the Central Railroad & Banking Company of Georgia, the controlling stock and bond holder, and the charters of each of the roads authorizing consolidation with other roads, steps were taken for the compliance with the statutory provisions of the state of South Carolina in such case made and provided. Such consolidation is permitted in South Carolina to any railroad company organized under the laws of that state, and having its track, in whole or in part, within this state, whenever the railroads proposed to be consolidated form a continuous line of railroad with each other, or by means of any intervening railroad. Gen. St. S. C. § 1425 (Pub. Laws S. C. § 1536). These conditions were fulfilled in the present instance. The question of consolidation was submitted to each separate railroad company, and the result was the preparation and execution of formal articles of agreement

some time about 27th October, 1886, by and between the directors of the Port Royal & Augusta Railway, the Greenwood, Spartanburg & Laurens Railroad Company, the Greenville & Laurens Railroad Company, the Augusta & Knoxville Railroad Company, and the Savannah Valley Railroad Company, in which it was agreed to consolidate all these railroads into one company, to be called the Port Royal & Western Carolina Railway Company, under the provisions of the act of assembly of the state of South Carolina of 1882, to be found in the Statutes at Large of said state (volume 17, p. 795, §§ 14-20, inclusive, incorporated in the General Statutes as sections 1425, 1433, inclusive; Pub. Laws, §§ 1536, 1542, inclusive). This agreement provided capital of \$2,000,000 preferred stock, \$4,000,000 common stock, in shares of \$100 each; the existing stock in all the railroads but the Augusta & Knoxville to be exchanged, dollar for dollar, in common stock of the new company, and the stock of the Augusta & Knoxville to be converted into a liability of the new corporation, and the holders to be paid the value thereof. This agreement contained, as its last and concluding clause: "Shall any one of the companies named fail to enter into this agreement, the remaining parties hereto shall continue, perfect, and carry out this agreement upon the terms hereinbefore set out." This agreement was signed by the president and each director of each company, and was duly ratified and confirmed by the stockholders of the Greenwood, Spartanburg & Laurens Railroad, the Augusta & Knoxville Railroad Company, and the Savannah Valley Railroad, as their minutes show. The minutes of the Greenville & Laurens Railroad are not to be found; but, from the date of the agreement to the filing of this cross bill, this road has been included in, controlled by, and has been known as a part of, the Port Royal & Western Carolina Railway Company, without protest or objection or exception, so far as the evidence discloses, on the part of any one, and it may well be assumed that its stockholders also assented. The stockholders of the Port Royal & Augusta Railway Company, referred to, refused to confirm the agreement, and that company never has been recognized as a part of the Port Royal & Western Carolina Railway Company. This, as has been seen, did not, under the terms of the agreement, impair it as to the others, who, in its words, had agreed, in an event like this, to continue, perfect, and carry out the agreement. The agreement was duly recorded in the office of the secretary of state, as required by law; all the provisions of the act being complied with, except that the fact "that a majority of all the votes of all the stockholders of each company had been for the adoption of the agreement" had not been certified "upon the agreement by the secretary of the respective companies, under the seal thereof," which certificate is provided for in the act. The Augusta & Knoxville Railroad Company is a corporation of the state of Georgia, as well as of South Carolina. The Georgia act permits consolidation with other companies. At the date of the agreement, each of the railroad companies mentioned in it was under mortgage to secure outstanding bonds:

The Greenwood, Spartanburg & Laurens Railroad, in the sum of..	\$600,000
The Savannah Valley Railroad, in the sum of.....	500,000
The Greenville & Laurens Railroad, in the sum of.....	300,000
The Augusta & Knoxville Railroad, in the sum of.....	630,000

This agreement having been recorded, stock was issued in the new company, and certificates thereof were delivered, share for share, in lieu of the stock held in the several companies; each of the counties and cities, complainants in the cross bill, surrendering the stock held by it in the several companies, and receiving in lieu thereof the shares in the new company. No one of them availed itself of the provisions of section 1432, Gen. St. S. C. (section 1543, Pub. Laws), providing a mode of relief for stockholders of consolidating companies who may be unwilling to convert their stock into the stock of the consolidated company; a proceeding which must be begun within 30 days after the adoption of the agreement of consolidation, not after its record. After the consolidation agreement was made, the Port Royal & Western Carolina Railway executed a mortgage of all its property to the Central Trust Company of New York to secure an issue of coupon bonds, payable to bearer, bearing interest at 6 per cent. per annum, payable by coupons, to the amount of \$2,500,000,—the mortgage now in question. Of these bonds, \$630,000 were to be reserved to retire an equal amount of first mortgage bonds of the Augusta & Knoxville Railroad Company. Of them, an amount of \$1,460,000 was used in retiring and satisfying the outstanding bonds of the other companies in the combination, \$88,400 in taking up and canceling stock of Augusta & Knoxville Railroad Company, and \$321,600 were reserved for the purposes of the Port Royal & Western Carolina Railway Company, in necessary improvements and additions to its property.

The Central Railroad & Banking Company had become the owner of the bonds of all of these roads but the Augusta & Knoxville, and was the principal if not the sole owner of the stock of this last-named railroad. So it became possessed of nearly all of the bonds of the Port Royal & Western Carolina Railway Company which were issued. The trustee still holds the bonds reserved for exchange with the bonds of the Augusta & Knoxville, and a part of the other reserved bonds are still on hand. The Central Railroad & Banking Company of Georgia hypothecated all of its bonds—\$1,460,000—with the Central Trust Company of New York, and a number of other securities, as collateral to a loan effected with the trust company. No interest coupons have been paid on these bonds of the Port Royal & Western Carolina Railway Company, and the Central Trust Company, as trustee holding the mortgage securing them, brought the bill to foreclose the mortgage, to which this cross bill was filed. This trust company holds many of these bonds, as has been stated, as collateral. The bill, however, is filed by it as trustee, and other parties, claiming to be holders, by purchase, of the bonds, have proved them in this suit.

From the date of the first meeting of the Port Royal & Western Carolina Railway Company to the present time, the stock in that

company held by these various municipalities has been represented at its annual meetings; and gentlemen of excellent character and standing, leading citizens of the municipalities, holding few, in some cases no, shares in the company, have served on its board of directors as representatives of the municipalities. There appear many irregularities in the time and mode of selecting them. Yet their service was a matter of notoriety, their right was never disputed, nor were any other persons ever selected, regularly or otherwise, to serve in the places they filled.

The question made by the cross bill is as to the validity of the mortgage which the original bill seeks to foreclose. The cross bill denies that there is, or ever has been, a lawful corporation known as the Port Royal & Western Carolina Railway Company, and that all so-called corporate acts alleged to have been performed by it are void. This averment is made on many grounds. They go to fraudulent conduct in getting up the agreement for consolidation, a want of compliance with the provisions of the acts of assembly in such case made and provided, and to improper and unlawful conduct of the Central Railroad & Banking Company, in possessing itself of the bonds issued by the company. It is also denied that the mortgage is valid, because it was executed under a vote of the directors, and not of the corporation. It is claimed with great earnestness that one essential feature of this consolidation—the inducement controlling the counties and cities—was that the Port Royal & Augusta Railroad Company formed a part of it; that the name of this company was inserted in the agreement and in the title of the new company; and that the failure upon the part of this company to join in the agreement invalidated it, especially as this failure was brought about by the machinations of the Central Railroad & Banking Company, the chief promoter of the enterprise, in order to suppress a competitor. Whatever may have been the hopes, expectations, or motives of the parties to this agreement, its validity must be determined by the considerations expressed in it, and not by those dependent on extraneous parol evidence. This agreement expressly provides for the failure of any one of the companies named in it to enter into the agreement, and binds the remaining companies, notwithstanding such failure, to continue, perfect, and carry out the agreement upon the terms set out. The agreement is the joint agreement of the directors of these several corporations, under the corporate seal of each. It proposes the consolidation of these companies. It prescribes the conditions and terms, and the mode of carrying them into effect. It gives the name of the new corporation, the number and names of the directors and other officers; declares who shall be the first directors and officers, and their places of residence. It gives the number of shares of the capital stock, the amount or par value of each share, the manner of converting the capital stock of each of the companies into that of the new company; that is to say, by the purchase of all of the stock of the Augusta & Knoxville, and by the exchange of the new stock with the old stock, share for share, of the other companies. When it is considered that the Augusta & Knoxville was absolutely necessary to this whole scheme, and

without its aid the measure would have failed,—was in fact the neck of the bottle of the system,—this arrangement was wise and natural. The agreement further states when and how the directors and officers shall be chosen. Comparing the agreement with the words of the act, it complies, almost in *ipsisimis verbis*, with its requirements. Pub. Laws S. C. § 1537 (Gen. St. S. C. § 1426). The agreement, having been executed by each board of directors, was submitted to the stockholders of the several companies. The evidence discloses the minutes of the action of three of them, confirming and approving the agreement. The minutes of the other company have been lost, and cannot be produced. But we have the fact that the old stock was surrendered, and the new certificates accepted; that the new company took full charge and control of all the component railroads, without question or exception, and has for years exercised this control. When we consider these facts, and the immense advantage to the railroads from this consolidation, and the great public benefit derived therefrom; that each railroad was rescued from a moribund condition, and put in condition for traffic; that the railroads from Greenville, Anderson, Spartanburg, Greenwood, and Laurens were secured an outlet to market,—we cannot avoid the conclusion that the agreement was accepted and ratified. The agreement was then recorded, as required by law, in the office of the secretary of state. It did not have upon it the certificates of the several secretaries of each of the railroad companies that it had been accepted. Was this an essential prerequisite before the consolidated company could act as a corporation? It would seem that, at the most, this was only evidence of the fact,—the best and most conclusive evidence,—but that its absence could be supplied aliunde. Here note that under section 1432, Gen. St. (section 1543, Pub. Laws) an objecting stockholder would lose his remedy if he did not apply within 30 days from the date—not from the record—of the agreement. It must be kept in mind that the consolidation of railroads does not create a new corporation, with powers of its own, distinct from, greater or less than, those enjoyed by the consolidating companies separately. It is a method provided by law for the formation of a copartnership between railroad corporations, by which, if the expression may be used, they pool their franchises and property, and are enabled to act in complete harmony under one head, as a unit. This unit possesses the powers of its component parts,—no more and no less. Section 1538, Pub. Laws (Gen. St. S. C. § 1427). And the act authorizing it provides a method of advertising the state that this copartnership has been formed. No further grant of a franchise is necessary, nor is any given. Indeed, it is an accomplished fact, requiring no further act or deed on the part of the state, or any one else. Gen. St. § 1428 (Pub. Laws, § 1539). At all events, the consolidated company assumed to act as a corporation, and issued its coupon bonds, secured by mortgage, and put these bonds in circulation. These bonds and this mortgage are now resisted by parties holding stock in the corporation as such, permitted to intervene in this case in order to do that which the corporation could, but will not, do. “A person who has given a bond to a corporation is not

allowed to defeat the bond by alleging that the corporation was not duly incorporated, nor can a corporation defeat its bonds by alleging a want of lawful incorporation. A person who mortgages land to a supposed corporation cannot defeat a foreclosure of the mortgage by alleging that the mortgagee is not a corporation. Nor can the corporation itself, having given a mortgage, defeat a foreclosure by such a plea." *Cook, Stock, S. & Corporation Law*, § 637, and cases cited; *Wallace v. Loomis*, 97 U. S. 146. Assuming to act as a corporation is claim of a franchise. If invalid, it is an offense to the sovereign, cognizable by it alone. "No one is allowed to assert that the corporation is dissolved, or its franchise is forfeited, or its incorporation illegal, until after that result has been decreed by a court in a proceeding instituted for that purpose." *Cook*, supra. "In general, the courts do not allow parties to suits on contracts to question the due incorporation of a company which it was possible to incorporate, which has attempted to incorporate, and which has acted as a corporation." *Id.*

It is further objected that this new mortgage was not submitted to the corporation for approval, but was the act of its directors. Under the law of South Carolina (Gen. St. S. C. §§ 1427, 1428; Pub. Laws S. C. §§ 1538, 1539), it is provided that upon the consummation of the act of consolidation the rights, privileges, and franchises of each of the corporations, parties to the same, shall be taken and deemed to be vested in and transferred to such new corporation, without any further act and deed. Each of these corporations, at the date of the consolidation, had outstanding bonds secured by mortgages under proper authority. The main purpose of the new mortgage was to take up them, and substitute the bonds of the new company. The bonds and mortgage so substituted were authorized and sustained by the same powers. "The directors alone, without the vote of the stockholders, may authorize a mortgage to be made; and, even though there is a question as to their authority, the validity of the mortgage, as against the corporation, is established by its affirmance of it by the issue of bonds under it." *Wood*, R. R. p. 1951, § 461, quoting *McCurdy's Appeal*, 65 Pa. St. 290; *Hadden v. Railroad Co.*, 7 Fed. 793. "If the act authorizing the mortgage requires a concurrence of the majority of stockholders, it is held that this is a requirement in which the public have no interest." *Thomas v. Railroad Co.*, 104 Ill. 462. The question now under consideration is the validity of this mortgage in the hands of the trustee. Nothing is decided with respect to the claims of other than bona fide holders of the bonds held under it. With regard to the rights of the Central Railroad & Banking Company, they cannot be passed upon at present, because this corporation is in no sense a party hereto. For the same reason, it cannot be decided how far the pledgees of these bonds are affected by the defects in the title of the Central Railroad & Banking Company, nor can a decision be made as to the misuse of any of these bonds. All these questions can come up, and can be decided, when proof is made, or attempted to be made, of bonds in the hands of holders presenting them. Nor is the case ripe for an opinion how far a decision declaring the invalidity of bonds under

this mortgage would affect the rights of holders of bonds covered by separate mortgages on the several roads, who surrender and exchange their bonds for the new bonds. All that is now decided is that the mortgage set up in the original bill by the Central Trust Company of New York, upon the franchises, property, and assets of the Port Royal & Western Carolina Railway Company, is a good mortgage, and that the rights of bona fide holders of the bonds issued thereunder before maturity, and without notice, will be protected, and it is so ordered. The cross bill will be retained for further proceedings in this cause, and will not be dismissed.

GORDON et al. v. NEWMAN.

(Circuit Court of Appeals, Fifth Circuit. June 25, 1894.)

No. 243.

RECEIVERS' CERTIFICATES—PRIORITY OF LIENS—RES JUDICATA—INJUNCTION.

A final decree for foreclosure of railroad mortgages directed that the property be sold, subject to any and all liens prior to the lien of the mortgages and which had not been ascertained and adjudicated, and subject to receiver's certificates theretofore authorized, declaring said certificates a first and prior lien on the property as between them and the mortgages. After the sale, a decree was made on an intervening claim of a mechanic's lien on part of the property, presented before the receiver's certificates were authorized, which allowed such lien as a subsisting first lien on the property, and directed payment of the amount by the purchaser, and, on default, a sale of the property; and this decree was affirmed, on appeal, by the supreme court. *Held*, that its enforcement could not be restrained by holders of receiver's certificates claiming priority over such lien, as they were bound by the decree as privies, and because an injunction for such purpose, in effect, stayed execution of the final decree of the supreme court.

This was a suit by Isidore Newman against Gordon, Strobel & Lareau, for an injunction to restrain enforcement of a decree.

On the 9th of January, 1889, the Central Trust Company of New York filed against the Sheffield & Birmingham Coal, Iron & Railway Company, in the circuit court of the United States for the northern district of Alabama, its bill to foreclose two certain mortgages. On the 12th of January a receiver was appointed, and took possession of the mortgaged property. On the 11th of February, Gordon, Strobel & Lareau filed their intervention, claiming a mechanic's lien upon the three furnaces and one acre of land which were also covered by the mortgages sought to be foreclosed in the suit just referred to. Subsequently, a request was filed by the receiver, asking authority to issue receiver's certificates to the amount of \$150,000 for the purpose of raising money to pay taxes on a portion of the land, and for other objects stated in the prayer. This petition was granted on the 11th of July, 1889. The issue of receiver's certificates was consented to by the trustee under the mortgage, and the interlocutory order authorizing the certificates stated that they were a first lien on the whole property. On the 3d of December, 1889, a final decree of foreclosure was entered on the bill of the Central Trust Company, the decree, among other things, providing as follows: "And it is further ordered, adjudged, and decreed that said sale shall be made subject to any and all liens covering or embracing said property or premises, or any part thereof, which constitute liens upon said property prior to the lien of the mortgages foreclosed in this suit, and which have not been ascertained and adjudicated by this court, and expressly subject to the receiver's certificates heretofore authorized to be issued by said J. G. Chamberlain, receiver, to an amount

not exceeding one hundred and fifty thousand dollars, said receiver's certificates being a first and prior lien upon the said properties, as between them and the two mortgages aforesaid, or either of them; and the amount of said receiver's certificates issued and constituting such lien as set forth in Schedule B, hereto annexed, and made part of this decree." This decree was subsequently modified in the following particular: "That there be stricken from said decree these words, 'and expressly subject to the receiver's certificates heretofore authorized to be issued by said J. G. Chamberlain, receiver, to an amount not exceeding one hundred and fifty thousand dollars,' and that in the place and stead of said words there be inserted these words, 'and expressly subject to the receiver's certificates heretofore authorized to be issued by said J. G. Chamberlain, receiver, to an amount not exceeding one hundred and twenty-five thousand dollars,' and that the twenty-five thousand dollars of said certificates disposed of by Charles D. Woodson—the same being five certificates of five thousand dollars each, and numbered 8, 9, 10, 11, and 12, dated October 10, 1892, and set forth in the Schedule B of said decree—be not included in said amount of one hundred and twenty-five thousand dollars; but that the purchasers of said property at the sale upon said decree take the same subject to the right to resist the payment of said five certificates as disposed of by said Woodson, and that the validity of said five certificates be adjudicated only in this court, and proper case to be made by the parties in interest." On the 3d day of December, 1889, under the original and modified decree, the property was sold. The sale was duly confirmed, and a deed made to the purchasers. On the 24th day of June, 1890, a decree was entered, on the intervention of Gordon, Strobel & Lareau, as follows: "It is further ordered, adjudged, and decreed that the interveners, Gordon, Strobel & Lareau, do have and recover of the claimant, the Sheffield & Birmingham Coal Iron & Railway Company, as recommended in said master's report, the sum of fifty-seven thousand, eight hundred and eight and twelve one-hundredths dollars (\$57,808.12), with interest thereon at six per centum (6%) per annum from the 18th day of December, 1888, until paid, and all costs of this intervention be taxed, and that the mechanic's lien, as given by the laws of the state of Alabama, and claimed as set forth in the intervention on file, be, and the same is hereby, fully recognized and allowed as being a subsisting first lien upon the property specifically described in said intervention and exhibits. And whereas, the said property, which, at the filing of the intervention in this case, was in the possession of the court, has been since sold, conveyed, and delivered under the decree rendered in this cause, but subject to whatever lien or claim which may be allowed in this case, it is further ordered, adjudged, and decreed that the said purchasers of the said property do pay the aforesaid judgment of fifty-seven thousand eight hundred and eight and twelve one-hundredths dollars (\$57,808.12), with interest as aforesaid, and all costs as aforesaid, within twenty days after the filing of this decree, and that in default thereof an order for the resale of said property for the satisfaction of the judgment aforesaid may issue." From this decree, an appeal, operating as a supersedeas, was prosecuted to the supreme court of the United States. In the meanwhile the holders of the receiver's certificates enumerated in the modification of the decree of foreclosure filed their petition of intervention in the foreclosure suit to enforce against the purchasers at the sale the said receiver's certificates. The court below having adjudged in their favor, an appeal was prosecuted to this court, and the judgment below was affirmed. *Alabama Iron & Ry. Co. v. Anniston Loan & Trust Co.*, 6 C. C. A. 243, 57 Fed. 25. After the affirmance of this judgment to enforce the payment of the \$25,000 of certificates, an order for the sale of the property was entered, and on the 22d day of January the property was sold. Thereafter, the judgment rendered in favor of Gordon, Strobel & Lareau was affirmed by the supreme court of the United States, and upon the filing of the mandate of that court a decree was entered recognizing the claim of Gordon, Strobel & Lareau, as above stated, and directing the sale of the property to enforce their lien. Thereupon, Isidore Newman, Sr., averring himself to be the holder of \$110,000 of the receiver's certificates, filed a bill for an injunction, in which he substantially set out (1) that Gordon, Strobel & Lareau had no mechanic's lien upon the property, because their claim for a lien had not been properly re-

corded under the laws of Alabama; (2) that the receiver's certificates held by the complainant ranked the claim of Gordon, Strobel & Lareau, and were therefore entitled to be paid from the proceeds of the property in preference to the lien which had been adjudged in favor of Gordon, Strobel & Lareau; (3) that the whole property, consisting of the furnaces, appurtenances, and seventy thousand acres of coal land, was one concern; that the separate sale of the portion on which lien of Gordon, Strobel & Lareau was asserted would materially injure his (Newman's) rights. An injunction issued, restraining the enforcement of the decree in favor of Gordon, Strobel & Lareau, and from the order so issuing the injunction an appeal was prosecuted to this court.

W. A. Gunter, for appellants.

J. D. Rouse and Wm. Grant, for appellee.

Before WHITE, Circuit Justice, and LOCKE and PARLANGE, District Judges.

WHITE, Circuit Justice, after stating the case, delivered the opinion of the court.

The claim of Gordon, Strobel & Lareau had been presented by way of intervention at the time the receiver's certificates were ordered to be issued. Their lien was recognized by the final decree in the suit, and was affirmed by the supreme court of the United States. To these decrees the holders of the receiver's certificates were necessarily privies. They took the certificates subject to the *lis pendens*, and were therefore bound by the final decree. The attack, therefore, on the lien is without merit, as the complainant in injunction is estopped, by the force of the thing adjudged, from assailing the lien. Like reasoning controls the contention that the receiver's certificates are prior in rank to the mechanic's lien. The final decree for the foreclosure of the mortgage directed that the property be sold "subject to any and all liens covering and embracing the property or premises, or any part thereof, which constituted liens upon the said property prior to the lien of the mortgages foreclosed in this suit, and which have not been ascertained and adjudicated by this court." This language, in unambiguous terms, recognizes the paramount nature of the mechanic's lien. After doing so, the decree adds, "and expressly subject to the receiver's certificates heretofore authorized to be issued; * * * said certificates being a first and prior lien upon the said properties, as between them and the two mortgages aforesaid, or either of them." The words, "as between them and the mortgages," are clearly words of limitation, restricting the priority of the receiver's certificates to rank over the mortgages, and not to rank over the mechanic's lien which had been just previously recognized as being unqualifiedly first in rank. Any other construction would render the words, "as between them and the mortgages," entirely useless and nugatory. This construction of the final decree in the foreclosure suit was adopted in the judgment which disposed of the intervention of Gordon, Strobel & Lareau. That judgment directed that "they be paid the sum of fifty-seven thousand, eight hundred and eight and twelve one-hundredths dollars (\$57,808.12), with interest, and that the mechanic's lien, as given by the laws of the state of Alabama, * * * be, and the

same is hereby, fully recognized and allowed as being a subsisting first lien upon the property." The remedy provided in the decree for the enforcement of the claim emphasizes the priority accorded to the amount secured by the mechanic's lien, since it directs that the sum be paid by the purchaser, and that in default of such payment within 20 days the property be sold. That the holders of receiver's certificates depend for their ultimate rank upon the final decree in the cause where the certificates are issued is beyond question. A text-book thus states the rule:

"The holders of these securities must see to it that in the order distributing the purchase money the proper provision is incorporated for their redemption, because, if once the property is sold, and the court makes a final decree without providing for the payment of the certificates, there is an end of the matter. * * *" Beach, Rec. par. 401, p. 332.

The matter was well considered in *Mercantile Trust Co. v. Kanawha & Ohio Ry. Co.*, 7 C. C. A. 3, 58 Fed. 11. In that case, Circuit Judge Taft, in expressing his own and the opinion of Jackson, Circuit Judge, and Barr, District Judge, said:

"Does the Adams Express Company, as a holder of receiver's certificates, stand in any better position than if it had been present by counsel in court when the final decrees of confirmation, release, and distribution were entered, objecting to the same? It is very clear that it does not. When the Adams Express Company received from Sharp the evidences of indebtedness on which it now relies for its lien, it was informed by what was written thereon that Sharp was a receiver acting under order of the district court of West Virginia, and having custody for the court of the Ohio Central Railroad, of which the court had taken possession in a case then pending before it, and that the lien assured to the express company on the face of the certificates was dependent on an order and adjudication of that court. The doctrine of lis pendens would charge any one who purchased this railroad, or acquired an interest in it, pending the litigation, with notice of the litigation, and would subject the property in his hands to the final action of the court, without his being brought into court as a party. If this be true of one acquiring an interest by deed, conveyance, or mortgage, a fortiori must it be true of one whose interest is acquired, and has its existence, only by virtue of the litigation. The express company was put upon inquiry, then, as to all that had been done in that litigation, and was charged with notice of all the subsequent proceedings therein, as much as if it had been a party to the record. * * * In *Union Trust Co. v. Illinois M. Ry. Co.*, 117 U. S. 434-456, 6 Sup. Ct. 809, the court said: 'The receiver, and those lending money to him on certificates issued on orders made without prior notice to parties interested, take the risk of the final action of the court in regard to the loans. The court always retains control of the matter, its records are accessible to lenders and subsequent holders, and the certificates are not negotiable instruments.'"

Under these principles the holders of the receiver's certificates depended, necessarily, for their ultimate payment, upon the rank given them in the final decree of foreclosure, to which decree they were necessarily privies. By the terms of that final decree the priority of the mechanic's lien was recognized. The claim, therefore, now asserted, is an attempt to take the benefits of the final decree of foreclosure, in so far as it provides for the payment of the certificates, by stipulating that they should be assumed by the purchaser, and yet, at the same time, repudiate that decree in so far as it provides for priority of rank in favor of the holder of the mechanic's lien. The contention, however, goes much fur-

ther than this. The injunction practically amounts to a stay of execution on the final decree of the supreme court of the United States, which not only recognized the sum secured by the lien as first in rank, but also directed that in default of its payment the property should be sold to enforce it within 20 days. To this decree the holders of the certificates were privies, since it was a decree made on an intervention in the record wherein the receiver's certificates were ordered to be issued. It follows, therefore, that as the injunction restrained the enforcement of the decree of the supreme court of the United States, and had the effect of setting at naught its mandate, it was improvidently granted, and should be dissolved. The injunction is therefore dissolved, and the case remanded to the court below for further proceedings in conformity with this opinion.

SHINKLE, WILSON & KREIS CO. et al. v. LOUISVILLE & N. R. CO. et al.

(Circuit Court, S. D. Ohio, W. D. July 30, 1894.)

INJUNCTION—FAILURE TO OBEY ORDERS OF INTERSTATE COMMISSION.

A preliminary injunction to compel a carrier to obey an order of the interstate commerce commission in reference to freight rates on merchandise and manufactures should be denied where the answer denies that the rates defendant charges and which were passed on by the commission were unreasonable or unjust.

Shinkle, Wilson & Kreis Co. and others obtained a preliminary injunction against the Louisville & Nashville Railroad Company, without notice to it, compelling it to obey an order of the interstate commerce commission. Subsequent to the granting of the order defendant filed an answer putting in issue the material facts alleged in the petition. Defendant moves to discharge the order. Order dissolved.

Matthew Kittrell, for complainants.

Ed. Baxter, for defendants.

LURTON, Circuit Judge. The only matter now for consideration is as to the continuance of a restraining order granted without notice to the Louisville & Nashville Railroad Company, upon a petition filed by a number of manufacturers and merchants of Cincinnati, in behalf of themselves and all other shippers in like situation, to obtain such injunctions or other process as will compel the Louisville & Nashville Railroad Company to obey an order made by the interstate commerce commission in reference to freight rates on merchandise and manufactures shipped from Cincinnati to a number of junction points in Tennessee, Georgia, Alabama, and Mississippi. On complaint of the Freight Bureau of the Cincinnati chamber of commerce that certain railroad and steamship companies, associated together under the name of the "Southern Railroad & Steamship Association," were violating certain provisions of the interstate commerce act, entitled "An act to regulate commerce," approved February 4, 1887, and

the amendatory acts of March 2, 1889, and February 10, 1891, it was decided that the schedule of freight tariffs enforced between Cincinnati and certain designated points in the southeast were unreasonable and unjust, and operated to discriminate against Cincinnati, and in favor of New York and other eastern cities having commercial relations with the same territory. The said commission thereupon fixed what it declared to be a maximum rate upon those classes of freights embracing merchandise and manufactures between Cincinnati and Knoxville, in Tennessee, Atlanta and Rome, in Georgia, Birmingham, Anniston, and Selma, in Alabama, and Meridian, in Mississippi, and required that the Louisville & Nashville Railroad Company should desist from charging or collecting for or upon freights from Cincinnati to said other places any higher rates than such as had been determined by it to be just and reasonable. The petition alleged that the railroad company, pending the proceeding before said commission, voluntarily reduced its rates to the points named to a rate below the maximum allowed by the said commission. It charged that said company now proposed to restore the rates held to be unjust and unreasonable, and had given notice of such restoration of rates, to take effect August 1, 1894. The petition seeks a temporary injunction, pending a hearing, and a perpetual injunction, on final hearing, against the imposition of any rate in excess of those fixed by said commission as reasonable.

The petition was presented to the Honorable William H. Taft, U. S. Circuit Judge, who, upon an ex parte hearing, granted a restraining order in accordance with the prayer of the petition. That order was as follows:

"And the court further orders that in the meantime, and until the further order of court, as hereinafter further provided, upon and after the first day of August, 1894, or at any other time, the said defendant the Louisville & Nashville Railroad Company do not proceed to charge or collect for or upon freights from Cincinnati to said other places specified above at any higher rates than as in the words and figures above set forth; and that during the same time it do not proceed to charge or collect for freights from Cincinnati to places contiguous to said other places named above at any higher rates than such as are in keeping with, and relatively proportionate to, specified rates; and that a temporary restraining order be issued and served forthwith upon the said defendant the Louisville & Nashville Railroad Company to said effect. This order, temporarily restraining said defendant, however, is made with the reservation of the right on the part of said defendant to apply by motion for its dissolution, upon two full days' notice to counsel for the plaintiff at Cincinnati, to the Honorable John W. Barr, district judge designated to sit in this district, in court, or in chambers at Louisville, Kentucky, or to the Honorable Horace H. Lurton, circuit judge, in court, or in chambers at Nashville, Tennessee, and upon the condition of the stipulation of counsel for the plaintiffs, now made and ordered to be filed herein, agreeing to the hearing of such motion for dissolution upon the notice aforesaid. This order is made simply on prima facie case made by decision of commission, and is without prejudice to a full consideration of the questions of law and fact on motion to dissolve."

The Louisville & Nashville Railroad Company, subsequent to the granting of the above order, filed an answer putting in issue many of the material facts charged in the petition, and denying, in the most emphatic terms, that the rates of freight from Cincinnati to

the points named, declared by the commission unjust and illegal, and to operate as a discrimination against Cincinnati and in favor of eastern points, are unjust or unreasonable, and that the decision to that effect, upon the facts submitted to the interstate commerce commission, was erroneous and unjustified. It explains that the reduction made in rates was made in an emergency, for the purpose of preventing secret injurious contracts made by railroads and in violation of agreements between it and said other roads, and of the interstate commerce acts; that the reduced rate was in force but a few days when the notice complained of was given, that the rates in force for years would be restored August 1. They deny in the most positive terms that the schedule of rates which they now propose to restore to the same figure at which they were at the time of the hearing before the interstate commerce commission is unjust or illegal. In pursuance of the terms of the restraining order above set out, counsel for the defendant railway have given notice, and have moved to discharge said order. Upon the questions thus presented, full and elaborate arguments have been made by counsel representing both the petitioners and the railway company.

The order made by Judge Taft was granted without notice. The right to a full hearing is so pointedly recognized in the order made that I feel no embarrassment in now passing upon the question as if an original application for a preliminary injunction. Such an injunction never issues as of right, but rests in the sound discretion of the court. In order to obtain it, the plaintiff should show either that his right is very clear, or that the injunction will operate with but little injury to the defendant, if granted, and that, if refused, the injury to himself will be very great. *Fost. Fed. Pr. § 233*, and cases cited; *1 High, Inj. § 7*; *2 High, Inj. §§ 938, 939, 1026*. Where the inconvenience to result is equally divided, or the preponderance is in favor of the defendant, it will be refused. *Flippin v. Knaffle, 2 Coop. Ch. 238*; *Owen v. Brien, Id. 295*. Neither is a plaintiff entitled to a preliminary injunction where his rights depend upon unsettled and disputable questions of law. *Jersey City Gaslight Co. v. Consumers' Gas Co., 40 N. J. Eq. 431, 2 Atl. 922*; *National Docks R. Co. v. Central R. Co., 32 N. J. Eq. 755*; *1 High, Inj. § 13*; *2 High, Inj. § 1026*; *Citizens' Coach Co. v. Camden Horse-Railroad Co., 29 N. J. Eq. 299*. I am of opinion that this is not a proper case for a preliminary injunction.

1. The right of the petitioners is yet to be established. The opinion of the interstate commerce commission has not the effect of a judicial determination. If a carrier refuses to acquiesce in an order made by that commission, it can only be coerced by a proceeding in a United States court. The mode and right of procedure in this court is by petition filed by the commission, or any one interested, setting out the disobedience complained of. Power is then given the court to hear and determine the matter, "in such manner as to do justice in the premises." The act then provides that, on the hearing of the controversy thus submitted,

"the findings of fact in the report of said commission shall be prima facie evidence of the matters therein stated." If it shall then appear, on all the evidence heard and submitted, that the order of the commission was lawful and reasonable, and that it has been violated, it shall be lawful for such court to issue a writ of injunction, or other proper process, to prevent further disobedience of such order. Now, it is well settled that the court is not the mere executioner of the orders of the commission. The suit in this court is an original and independent proceeding. This court is not confined to a mere examination of the matter as heard by the commission. It proceeds to hear the complaint de novo. On that hearing, the findings of fact are evidence operating to make out a prima facie case in favor of the conclusion reached as to the fact of a violation of the interstate commerce act. Kentucky & I. Bridge Co. v. Louisville & N. R. Co., 37 Fed. 613; Interstate Commerce Commission v. Atchison, T. & S. F. R. Co., 50 Fed. 295; Interstate Commerce Commission v. Lehigh Val. R. Co., 49 Fed. 177; Interstate Commerce Commission v. Baltimore & O. R. Co., 43 Fed. 43; Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co., 56 Fed. 926. The answer denies most distinctly that the rates about to be restored, and being the same rates passed upon by the commission, are unjust or unreasonable. It denies that those rates operated to discriminate against the commerce of Cincinnati and in favor of eastern cities. If it be assumed that, upon an application for a preliminary injunction, the report of the commission is to be regarded as making out a prima facie case of illegal rates, that effect, on such an issue, is lost when an issue is made by a sworn answer upon the principal conclusions of the report.

2. The very wide scope of territory affected by this report, and the great importance of the questions of fact and law arising thereon, demand most careful investigation. Many important and unsettled questions of law are involved, and will demand consideration. This should make a court cautious as to the granting of a preliminary injunction, the only relief finally sought being a perpetual injunction. It seems to me that section 16 of the interstate commerce act only contemplates an injunction as the final result of a hearing on pleadings and proof. Certainly, no court has yet granted such preliminary injunction. Many cases such as this have been brought, but no preliminary injunction appears to ever have been issued. In the case of Interstate Commerce Commission v. Lehigh Val. R. Co., 49 Fed. 177, a motion was made for a preliminary injunction, which was fully considered by Acheson, circuit judge, and Butler, district judge, and refused, although the injury to result from its being granted was nothing to that likely to result here.

3. The injury which petitioners will sustain if injunction is now refused, in view of the sworn denials of the answer as to special damages, would consist in being obliged to pay greater rates than defendant is authorized to demand. But the excess paid would be a simple matter of calculation, and it is not alleged that the

defendant is not financially responsible. That there are many others, not parties, equally interested, only comes to this: that the defendant may be harassed with many suits unless, in the event of an adverse decision, it voluntarily restores the excessive charge it will have received. On the other hand, if a preliminary injunction be now granted, it would likely stand until final hearing in the supreme court. In the meantime, the defendant would lose a sum stated in the sworn answer as amounting, on business originating in Cincinnati alone, of upwards of \$100,000 per year. A long adherence to a lower schedule of rates would render it difficult to restore the old rates maintained, with occasional exceptions, for years. In addition, the effect of enforcing the rates from Cincinnati to the designated points would involve a readjustment from cities contiguous to Cincinnati, and having commerce in the same southern territory. The balance of inconvenience seems to be on the side of the defendant. For these reasons, it seems to me that a preliminary injunction ought not to issue, and that the restraining order should be dissolved.

I express no opinion upon any of the questions involving the merits. Any reasonable order tending to the speedy preparation and trial of this matter will be made on application. In the meantime, it is ordered that plaintiff file replication to the answer, and that the cause then stand at issue.

CITY OF NORTH MUSKEGON v. CLARK.

(Circuit Court of Appeals, Sixth Circuit. June 5, 1894.)

No. 176.

1. RES JUDICATA—JUDGMENT ON DEMURRER.

Judgment rendered against a plaintiff on demurrer to his declaration, because it does not aver a fact essential to a recovery, is no bar to a second suit by him on the same cause of action, wherein the declaration, in stating the cause of action, avers the essential fact previously omitted. *Goodrich v. Chicago*, 5 Wall. 556, and *Alley v. Nott*, 4 Sup. Ct. 495, 111 U. S. 472, distinguished.

2. ABATEMENT—FORMER ACTION PENDING—FAILURE TO PLEAD.

Pendency of a former suit for the same cause of action can be availed of as a defense only by plea in abatement.

3. SAME—STATE AND FEDERAL COURTS.

Pendency of the same action in a state court is not a good plea, even in abatement, in a federal court, though it has concurrent territorial jurisdiction with the state court.

In Error to the Circuit Court of the United States for the Western District of Michigan, Southern Division.

This was an action by Bridget Clark against the city of North Muskegon for personal injuries. The jury found for plaintiff, and judgment for plaintiff was entered on the verdict. Defendant brought error.

This writ of error brought into review the judgment of the circuit court for the western district of Michigan. Bridget Clark, the plaintiff below, a citizen of the state of New York, filed her declaration setting forth a plea of trespass on the case against the city of North Muskegon, a municipal cor-

poration existing under the laws of Michigan, which, since the acts complained of, had ceased to be a village, and had become a city. The declaration averred that the corporate authority of the village extended over divers public ways, highways, and streets, and especially over a certain public highway or street known as Maple street, and over the bridges, sidewalks, crosswalks, and culverts on the same; that the said Maple street, for more than 10 years before the committing of the grievance in the declaration thereafter set forth, had been, and was at the time of the filing of the declaration, a public highway and street of the village, and open to public travel; that it was the duty of the village, by reason of Act No. 264 of the Public Acts of the State of Michigan, passed at the regular session of 1887, and approved June 27, 1887, to keep and maintain the sidewalk upon said street in reasonable repair, so that it should be reasonably safe for public travel; that, in violation of this duty, the village, at a point on the street in front of the premises of one Misner, carelessly and negligently permitted the said walk to become greatly out of repair, and the boards or planks to become so loose that it was in a dangerous condition for persons to pass and repass upon it, of all of which the village had had notice for a year preceding the 8th day of October, 1890, upon which day the plaintiff, while proceeding along the sidewalk of said Maple street with due care and caution, was tripped by the loose planks or boards in said sidewalk, was thrown to the ground with force and violence, and the bones of her left ankle and leg were broken. For this injury she asked damages.

The defendant pleaded the general issue, and in its bill of particulars gave notice that it would give in evidence the fact that the plaintiff had sued the defendant, under its then corporate name of the village of Muskegon, in the circuit court of the county of Muskegon, in the state of Michigan, in a certain plea of trespass on the case for committing the same supposed wrongs and injuries (if any such there were) in the plaintiff's declaration mentioned; that thereafter the defendant demurred to the declaration, and, the issue coming on to be tried, the court adjudged that the matters contained in the declaration were not sufficient in law for the plaintiff to have the action against the defendant, and sustained the demurrer; that the court ordered that, upon payment by the plaintiff to defendant of \$10 as attorney's fee, within 20 days thereafter, the plaintiff might have leave to file an amended declaration, to which the defendant should plead, within the rules of practice of the court, but otherwise it was considered by the court that the plaintiff should take nothing by her declaration, and that the defendant should recover, against the plaintiff, its costs, and have execution therefor; that the plaintiff did not file an amended declaration, and did not pay the attorney's fee required, and that the judgment of the circuit court for the county of Muskegon against the plaintiff, and in favor of the defendant, remained in full force and effect, unreversed.

No. 264 of the Public Acts of Michigan for 1887 imposes a liability upon townships, villages, cities, and other municipal corporations for bodily injury sustained by any person by reason of the neglect of such municipal corporation to keep in repair its public highways, streets, bridges, sidewalks, crosswalks, and culverts, when the same are open to public travel, and the municipal corporation has had reasonable time and opportunity, after knowledge that such highway, street, bridge, sidewalk, crosswalk, or culvert is unsafe or unfit for travel, and has not used reasonable diligence thereafter in putting the same in repair. The fourth section limits the application of the law to highways in certain corporations which have been in use 10 years or more.

The declaration in the circuit court of the county of Muskegon set out exactly the same cause of action as the declaration herein, except that it did not allege, what the declaration herein does allege, that Maple street was a street which had been in use for 10 years, and was open to public travel. It appeared from the bill of exceptions that, after the demurrer was sustained, and judgment given for the defendant, a writ of error was sued out, and the case carried for review to the supreme court of the state; that there the judgment of the state circuit court was affirmed, and leave was given to the plaintiff to file an amended declaration, but the plaintiff never did so; that subsequently, and after suit was brought in the court below, a stipulation to discontinue the suit, signed by the attorneys, was filed in the state court.

The supreme court of Michigan, in its decision in this case, reported in 88 Mich. 308, 50 N. W. 254, affirmed the judgment of the state circuit court only because the declaration did not aver either that the sidewalk upon Maple street was open to public travel at the time of the accident, or that the street had been in use as a highway for 10 years. In the case of *Fuller v. City of Jackson*, 92 Mich. 197, 52 N. W. 1075, the supreme court of the state decided that the proviso in the fourth section of the statute of 1887, with respect to 10 years' use of the street, applied only to highways in townships, and not to highways in villages and cities, and to this extent the decision in *Clark v. Village of North Muskegon*, 88 Mich. 308, 50 N. W. 254, was overruled.

The circuit court held that the judgment in the state court was no bar to a recovery in this action, and upon a trial a judgment and verdict for plaintiff was rendered in the sum of \$2,500.

The only assignments of error relate to the ruling of the court with reference to the effect of the action in the state court and the judgment therein.

Boyd & Sullivan, for plaintiff in error.

R. J. Macdonald, for defendant in error.

Before TAFT and LURTON, Circuit Judges.

TAFT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

By the common law of Michigan, municipal corporations are not liable for injuries to a traveler caused by the defective condition of the streets within their borders. *Detroit v. Osborne*, 135 U. S. 492, 10 Sup. Ct. 1012; *Detroit v. Blackeby*, 21 Mich. 84; *Detroit v. Putnam*, 45 Mich. 263, 7 N. W. 815; *Church v. City of Detroit*, 64 Mich. 571, 31 N. W. 447. The right of the plaintiff below to recover for her injuries against the village or city rested wholly upon the act of 1887, and a good declaration ought to have set out the conditions precedent to a recovery mentioned in the statute. The declaration in the state court was bad for not averring that the street or sidewalk upon which the accident occurred was open for public travel. The declaration in the court below contained such an averment. The question presented, therefore, is whether a judgment rendered against a plaintiff on demurrer to his declaration, because it does not aver a fact essential to a recovery, estops the plaintiff from recovering on the same cause of action in a second suit, wherein the declaration, in stating the cause of action, does aver the essential fact previously omitted. We are clearly of the opinion that the first judgment is no bar to a recovery in a second suit.

A demurrer to a declaration is an admission by the defendant that the facts stated in the declaration are true, and a submission to the court of the question whether, on those facts, the plaintiff is entitled to recover. If the demurrer is sustained, the decision of the court is one of law, namely, that, on the facts stated in the declaration, the plaintiff is not entitled to recover, and, if judgment goes upon the demurrer, the only issue which has been finally determined between the parties is this one of law. Such a judgment only estops the plaintiff from raising, in a second suit, the same question of law in the prosecution of the same cause of action. It does not prevent him from prosecuting, a second time, the same cause of action, provided he can and does allege, in his

declaration, additional facts, so that its legal sufficiency to sustain a recovery does not depend on the question of law upon which the demurrer in the first case turned. A leading case establishing this principle is *Gould v. Railroad Co.*, 91 U. S. 526, 533. Upon page 533, Mr. Justice Clifford, delivering the opinion of the court, said:

"From these suggestions and authorities, two propositions may be deduced, each of which has more or less application to certain views of the case before the court: (1) That a judgment rendered upon demurrer to the declaration, or to a material pleading, setting forth the facts, is equally conclusive of the matters confessed by the demurrer as a verdict finding the same facts would be, since the matters in controversy are established in the former case, as well as in the latter, by matter of record; and the rule is that facts thus established can never after be contested between the same parties, or those in privity with them. (2) That if judgment is rendered for the defendant on demurrer to the declaration, or to a material pleading in chief, the plaintiff can never after maintain against the same defendant, or his privies, any similar or concurrent action for the same cause upon the same grounds as were disclosed in the first declaration, for the reason that the judgment upon such a demurrer determines the merits of the cause, and a final judgment deciding the right must put an end to the dispute, else the litigation would be endless. *Rex v. Kingston*, 20 State Tr. 588; *Hitchin v. Campbell*, 2 W. Bl. 831; *Clearwater v. Meredith*, 1 Wall. 43; *Gould*, Pl. § 42; *Ricardo v. Garcias*, 12 Clark & F. 400. Support to those propositions is found everywhere; but it is equally well settled that if the plaintiff fails on demurrer, in his first action, from the omission of an essential allegation in his declaration, which is fully supplied in the second suit, the judgment in the first suit is no bar to the second, although the respective actions are instituted to enforce the same right; for the reason that the merits of the cause, as disclosed in the second declaration, were not heard and decided in the first action. *Aurora City v. West*, 7 Wall. 90; *Gilman v. Rives*, 10 Pet. 298; *Richardson v. Boston*, 24 How. 188."

In *Gilman v. Rives*, 10 Pet. 297, 302, it was held that "a judgment that a declaration is bad in substance can never be pleaded in bar to a good declaration for the same cause of action." See, also, *Terry v. Hammond*, 47 Cal. 32; *Gerrish v. Pratt*, 6 Minn. 61 (Gil. 14); *Wilbur v. Gilmore*, 21 Pick. 250; *Carmony v. Hooper*, 5 Pa. St. 307; *Rodman v. Railway Co.*, 59 Mich. 398, 26 N. W. 651; *Stevens v. Dunbar*, 1 Blackf. 55, 56; *Birch v. Funk*, 2 Metc. (Ky.) 544; *Railway Co. v. Brown*, 23 Fla. 104, 1 South. 512; *Moore v. Dunn*, 41 Ohio St. 62; *Freem. Judgm.* § 267; *Herm. Estop.* § 273.

The case of *Goodrich v. Chicago*, 5 Wall. 566, is much relied upon by counsel for the plaintiff in error, but it is entirely consistent with the cases above cited, and does not aid him. The case was a libel in admiralty against the city of Chicago by the owner of a steam vessel which had been sunk by a collision with certain obstructions in the harbor of the city. The answer of the city set up, in bar of recovery on the libel, a former adjudication in a state court in Illinois, in which the libellant, as complainant in a common-law action against the city, had filed a declaration setting out the same facts as those averred in the libel. In the state court, the city had demurred to the declaration on the ground that, under the statute relied upon, the city owed no duty to the plaintiff. The demurrer was sustained, and judgment was given on demurrer for the city. The supreme court of Illinois affirmed

this judgment. 20 Ill. 445. The supreme court of the United States held that the plea of the former adjudication was a good bar to recovery, because the facts stated in the libel raised exactly the same point of law which had been decided against the libellant when complainant in the state court, and this concluded him upon that point of law, with respect to that cause of action. If the libellant in the admiralty case had set forth, in his libel, additional facts which made the question of its legal sufficiency a different question from that presented to the state court on demurrer to the declaration, the result would necessarily have been different.

The case of *Alley v. Nott*, 111 U. S. 472, 4 Sup. Ct. 495, has no application whatever to the point here under discussion. The question in that case was whether a hearing on a general demurrer to a complaint, under the Code of New York, was a "trial" of the cause, within section 3 of the act of March 3, 1875, providing that plaintiffs and defendants entitled to remove any suit from a state court to the circuit court of the United States could do so by filing a petition for such removal "before or at the term at which said cause could be first tried and before the trial thereof;" and it was held that such a hearing was a trial, because it would finally dispose of the case stated in the complaint on its merits, unless leave to amend or plead over was granted. But there was nothing in that case which called upon the court to decide that a judgment upon such a demurrer would estop the bringing of a second suit on the same cause of action when additional facts were averred, raising a different question of law. The case did not present the question of former adjudication, and is not an authority in respect to it. It only involved a construction of the removal statute of 1875, and the meaning of the word "trial."

There is a second assignment of error made by the plaintiff in error, in that the court below held that the pendency of the suit in the state court was not a bar to the suit in the federal court. The assignment of error cannot be sustained, for two reasons: First, because the pendency of the former suit is to be availed of as a defense by plea in abatement; and, second, because, even as a plea in abatement, the pendency of the same action in the state court is not a good plea in a federal court, though it has concurrent territorial jurisdiction with the state court. *Gordon v. Gilfoil*, 99 U. S. 168.

The judgment of the court below is affirmed, with costs.

PAULY JAIL BLDG. & MANUF'G CO. v. HEMPHILL COUNTY.

(Circuit Court of Appeals, Fifth Circuit. May 15, 1893.)

No. 135.

1. APPEAL—MATTERS BROUGHT UP FOR REVIEW—EXCEPTIONS BY DEFENDANT IN ERROR.

On a writ of error sued out by plaintiff to review a judgment on a verdict for defendant, exceptions taken by defendant to rulings sustaining objections to certain of his pleas cannot be considered.

2. CONTRACTS—PERFORMANCE—CONCLUSIVENESS OF DECISION OF INSPECTOR.

A contract with a county by plaintiff, a nonresident corporation, to build a jail, provided that the county should appoint a commissioner qualified to judge of the work, whose duty it should be to inspect and report upon the work, and to notify plaintiff of any work or materials not in accordance with plans and specifications; his allowing the work to be completed without notice to be considered as an acceptance of it by the county. *Held*, that it was no defense to an action for the contract price that the commissioner appointed was not qualified for the duty, and that nothing but positive proof of mala fides on plaintiff's part could overcome the finality of the commissioner's action.

3. SAME.

The jury in such action were instructed to find for defendant if they should find that the material and work did not substantially comply with the requirements of the contract and specifications. *Held*, that this did not give sufficient weight to the provision for inspection.

In Error to the Circuit Court of the United States for the Northern District of Texas.

This was an action brought by the Pauly Jail Building & Manufacturing Company, of St. Louis, Mo., against the county of Hemphill, state of Texas, upon a contract entered into June 22, 1888, whereby the plaintiff contracted to build for defendant county, at the county seat, the town of Canadian, a jail and cells, according to certain specifications agreed upon, and the defendant county agreed, upon the completion of said jail building, to pay to the plaintiff \$13,000 in 6 per cent. coupon bonds, to be issued by the defendant county. The plaintiff's petition alleged and set up the contract and specifications at length, and that it had completed said jail building in accordance therewith, but that defendant refused to pay plaintiff anything for the jail, or make or deliver its bonds, as it had contracted to do, to plaintiff's damage, as is alleged, of \$15,000. One of the provisions of the contract, as set out in plaintiff's petition, is: "Said party of the second part further agrees to appoint a commissioner, whose duty it shall be to inspect and report upon the work during its construction, said commissioner to be a man qualified to judge of the work; and should any work be done, or should any material be furnished, which, in his opinion, is not in accordance with plans and specifications, it shall be his duty to notify the party of the first part thereof, by letter mailed to its address at its principal office, in St. Louis, Mo., unless said commissioner and the agent or subcontractor of said party of the first part can agree upon the subject in controversy. Should said commissioner allow said work to be completed without notice, it shall be considered the same as an acceptance of the work by the party of the second part. When notice of the time fixed for the completion thereof is given by the said party of the first part, the said commissioners' court shall convene in special session at a time to be fixed by the said party of the first part, examine the said work, and receive the report of said commissioner, and, if completed according to contract, shall accept the same, and make payment therefor as hereinbefore agreed."

The defendant, in answer to plaintiff's petition, among other defenses, charged that "plaintiff and its agents, having full authority in the premises, entered into a combination and conspiracy with one Polly, the county judge for said Hemphill county, and at least two of the commissioners for said county, for the purpose of defrauding said county by building a jail, and palming the same off upon said county at at least three times its cost and value, the profits and gains thereon to be divided between the plaintiff and said county judge and said commissioners;" that "Hemphill county, through her county judge and commissioners, and before the plaintiff had expended anything upon the faith of said pretended contract; protested against said contract, and repudiated the same, and that, if the plaintiff ever built a jail pursuant to or under said contract, the same was built by the plaintiff, at his own risk, over the protest and in defiance of the wishes of the defendant, the plaintiff relying solely upon a void contract, obtained by debauching and corrupting the commissioners' court for said county, to burden the defendant with an illegal debt;" that "the clause in said contract providing that a commissioner

should be appointed by the defendant to represent it in the construction of such jail was fraudulently inserted by the plaintiff, in order to overreach the defendant, and to estop it from complaining of worthless work and material, and not from any honest and legitimate purpose, and to enable the plaintiff to take advantage of its own fraud and wrong, and is against public policy and void." It charged also that, knowing that the plaintiff was proceeding forcibly to build the jail, and that it would rely upon the clause providing for the appointment of a commissioner, the commissioners of defendant county appointed one Robert Moody to act as such commissioner, as was provided by the contract, with the express agreement with the plaintiff that such appointment should not be held as a recognition of the contract. The defendant also charged that the plaintiff did not use bricks of the kind required by the specifications, but soft and worthless ones; that it used a class of stone apparently sound and durable, but which was known by plaintiff and its agents to be unsound, and wholly unfit for the work; and that it did falsely and fraudulently represent to said Moody that said stone was sound and durable. It also claimed that Moody was not an expert in judging of the quality or grade of cement or paint or tin to be used, and in each of these respects the plaintiff, to keep him from objecting to the quality used, did falsely and fraudulently represent to the defendant and to Moody that the quality and grade of each of these articles were the best grade and quality; and that he (said Moody) was so induced not to object to the use of the same, but that the quality and grade of such were worthless, cheap, and inferior to what had been specified in the contract. It is alleged that plaintiff and its agents did fraudulently and secretly use, in the cement work of the floor, grass, weeds and other perishable material, instead of broken stone or brick, as required in the specifications; that plaintiff failed and refused to place galvanized iron window and door caps on the windows and doors, and elbows on the down spouts sufficient to conduct the water away from the building, and willfully, intentionally, and fraudulently failed to comply with the contract in almost every particular.

The plaintiff then filed a supplemental petition, and demurred to the plea of defendant which set up the matters of bribery and interest of its commissioners in the contract, because the same were no defense to plaintiff's said action, and to the plea of revocation of contract, because it was not alleged that the same was done with plaintiff's consent. The plaintiff further excepted to that part of defendant's answer wherein the ignorance, incompetency, and unfitness of the commissioner or supervisor appointed by the defendant was set up, as it did not allege or contend that the said commissioner acted fraudulently or corruptly. The plaintiff further excepted to so much of the first amended original answer as pleaded that the provision of the contract for the appointment of a commissioner or supervisor was inserted in defendant's contract with fraudulent intent for the purpose of deceiving and overreaching the defendant, because that allegation constituted no defense to plaintiff's cause of action, and that the defendant is estopped from pleading its ignorance of said contract. The plaintiff further excepted to all of the said original answer which sought to set up, by way of defense, the failure to perform the work according to the contract, because said amended answer nowhere alleged that due notice of such defects, if any, at the time of their occurrence, was mailed to plaintiff at St. Louis, in accordance with the terms of said contract; and that this defect is not cured or obviated by any allegation as to the ignorance or unskillfulness of said commissioner.

The case coming on to be heard, the court sustained the plaintiff's first and second exceptions, which were to so much of said answer as set up bribery of the commissioners and the revocation of the contract, and that the paragraph of the contract which provided for the appointment of a commissioner was fraudulently inserted, and that alleged the walls to be out of plumb, and that plaintiff and its agents wholly failed and refused to place galvanized iron window and door caps upon the building, to which ruling the defendant excepted; whereupon, the trial being had before a jury, plaintiff introduced in evidence certified copies of the records of the county court of Hemphill county for 22d of June, 1888, authorizing the county judge to sign the contract for building the jail building, and the original contract and specifications; also, the order of the county court appointing Robert Moody as com-

missioner on the part of the county, as provided for by the contract, and the testimony of John Rausch, the superintendent of the plaintiff company engaged in the construction and erection of this jail building, who testified generally as to the building, saying that it was constructed according to the plans and specifications, and in most particulars it was better, showing the particulars wherein the building differed, if any, from the specifications in the contract, and claimed in several respects that the work done and quality of material used was better than called for. Here the plaintiff rested its case. The defendant then read letters showing that Moody, the commissioner or supervisor, appointed by the commissioners' court for said county, had complained to the plaintiff, at its home office at St. Louis, and also to the superintendent in charge, of bricks which were being used at the time, and protesting against their use. The testimony of said Moody was that such protest was regarded once or twice, but some of the brick were put into the building; that part of the outside walls were built of brick that he objected to; that they were of different colors, and soft; that they were put in the walls, but it was represented to him that they were taken out; and that he saw some of them taken out, but he did not see all of them taken out; and that the plaintiff's agents used a lot of poor brick, notwithstanding his protest. Moody also testified that he was no judge of the quality of cement; that he had to depend upon the label on the outside of the barrel and what others told him about it; that the stone that was used looked all right and solid to him; that he knew that it came from a condemned building, but that he supposed the building had been condemned on account of the poor workmanship in it; that Watson, who was doing the work (plaintiff's agent), said they were good rock; that he looked at them, and they looked very good; that, in mixing concrete, it would get out among the weeds, and the man would rake in the grass and weeds with the concrete, and get it mixed up; that he objected, and the man started to rake it out, and Watson said: "Don't take it out; it is just as good as hair or anything." Part of the grass and weeds was taken out, but he had reason to believe it was not all taken out. He further testified that, at the time the cement was used, he had no reason to believe that it was inferior and not good; that Mr. Rausch claimed that it was good or better than the contract called for, but that Louisville cement was used, instead of Rosedale; that Mr. Rausch said it was the same grade of tin that was used that the contract called for, except that it was a little better and one grade heavier. The defendant also introduced testimony tending to prove that the county never accepted the jail; that it was never used but once, and that was with the subcontractor's consent, and upon the provision and understanding that such use of it should in no way be construed into an acceptance of it by the county. It was also shown in evidence that the authorized agent of the Pauly Jail Building & Manufacturing Company, after the completion of the building, made a tender of the keys to defendant's agents, and requested a full investigation of every phase of the jail contract and the work of construction. The defendant also introduced testimony to show that the floors of the building were imperfect; that the roof leaked in several places; and that the walls were not plumb; that some of the stones of the foundation were soft, and cleaved off in places.

During the trial, the plaintiff announced to the court that it abandoned its claim on a quantum meruit, and stood on the contract alone. After the introduction of much testimony regarding the quality of the material furnished and the character of the work performed, which we do not deem it necessary to review for the purpose of this case, the trial judge charged the jury:

"(3) A substantial compliance by plaintiff with its contract, according to the terms of said contract and the specifications attached thereto, is all that was required of plaintiff in erecting said jail house; and if you find, from the evidence, that the character of the material used in erecting said jail and the work in constructing said jail both came up substantially to the requirements of the contract sued on, and that said jail, when finished, was a substantial compliance with said contract and specifications attached thereto, then you will find for plaintiff the contract price of said jail, to wit, \$13,000, with interest thereon at 6 per cent. from February 9, 1891.

"(4) The converse of the above proposition is true. If you find, under the

evidence, that the material used in constructing said jail and the work done in erecting same did not substantially comply with the requirements of said contract and specifications, then you will find a verdict for the defendant.

"(5) Defendant has alleged that said jail was constructed with soft, inferior brick, unsuited for the construction of said jail house; also, that plaintiff used a class of stone that was unsound and perishable for the foundation walls of said jail; also, that plaintiff used a grade of cement inferior to pure English cement, and unsuited to the work to be done on said jail; also, that plaintiff used, in roofing said jail, a grade of tin inferior to that called for in the contract. If the testimony convinces you that the matter of brick, above referred to in this paragraph, plaintiff fell below the contract in the character of the material used, and that such departure (taking the jail as a whole, and considering the purposes for which it was to be used) made the jail, when completed, not a substantial compliance with the contract, then you will find for defendant. On the other hand, if such departure from the contract, if found from the evidence to have occurred, was not material and substantial, and the jail, notwithstanding such departure, was still a substantial compliance with the contract, then you will find for the plaintiff, as instructed in paragraph No. 3, above, unless, under instructions No. 6 of this charge, you find for defendant.

"(6) If you are satisfied from the testimony that plaintiff used a stone for the foundation walls of said jail that was unsound and unfit for that purpose, or used a quality of cement in constructing said jail that was cheap and inferior to that called for in the contract, or used a grade of tin inferior and different to that called for in said contract, and that Robert Moody, commissioner, suffered said material to be used in constructing said jail under the mistaken belief that it was a good quality, and complied with the contract, and that such belief on the part of Moody was induced by the fraudulent and false representations of plaintiff's agents, who were constructing said jail, to the effect that said material was good and complied with the contract, then, if the testimony further convinces you that, in one or more of the three cases referred to in this paragraph, plaintiff fell below the contract in the character of the material used, and that such departure (taking the jail as a whole, and considering the purposes for which it was to be used) made the jail, when completed, not a substantial compliance with the contract, then you will find for defendant. On the other hand, if such departure from the contract (if found from the evidence to have occurred) was not material and substantial, and the jail, notwithstanding such departure, was still a substantial compliance with the contract, then you will find for the plaintiff, as instructed in paragraph No. 3, above, unless, under instruction (5) five of this charge, you find for defendant.

"(7) If you find from the testimony that the commissioner Robert Moody allowed said work of laying the foundation with the stone with which it was laid to be completed, and the roofing of the jail with the tin that covered it to be done, and the cement floors to be laid without objection on his part, and that such action on his part was not induced by fraud or fraudulent representations of the plaintiff or its agents, but grew out of carelessness, ignorance, or inattention of said Moody, then the defendant cannot now complain of the use of said material, unless there was a gross departure from the contract in the use thereof, such as rendered the building substantially unfit for the uses for which it was intended; but if said brick or stone or tin or cement, or the work thereon, when put into said jail, were inferior to that called for by the contract, but not to an extent that prevented said jail from substantially complying with the contract sued on, then you will find for plaintiff the contract price of said jail, to wit, \$15,000, less the value thereof by reason of such defective work or material.

"(8) If there was no willful departure by plaintiff from the terms of the contract, or omission in essential points, but, if he performed the contract in all its essential and material particulars, he will not be held to have forfeited his right to pay by reason of unimportant or technical omissions or defects.

"(9) The charge that the county judge and two of the commissioners were interested in the contract is not before the jury; neither is the charge that they were bribed."

Whereupon the plaintiff moved the court to instruct the jury to disregard all evidence touching the defective material or defective construction, except such defects as the evidence shows may have been communicated to plaintiff at its principal office in St. Louis, Mo., by the commissioner of the defendant, which the court refused to do, and plaintiff excepted to such refusal, and also to the fourth, fifth, sixth, and seventh paragraphs of the court's charge to the jury. The jury returned a verdict for the defendant, and plaintiff filed a bill of exceptions, with seven assignments of error.

George Clarke and D. C. Bolinger, for plaintiff in error.

W. O. Davis and J. L. Harris, for defendant in error.

Before McCORMICK, Circuit Judge, and LOCKE and TOULMIN, District Judges.

LOCKE, District Judge (after stating the facts). The history of this case, as shown by the record, is that one board of county officers, county judge, and commissioners of the defendant, while in office, entered into a contract with the plaintiff for the building of a county jail, for which the county was to issue and deliver to it \$13,000, in coupon county bonds. Subsequently, and before the jail was built, a new board of county officers, being elected, considering, apparently, that the county did not need a jail, endeavored, if possible, to defeat the contract, but the record fails to show what action they took, if any, to rescind it, or to notify the plaintiff of their rescission of it, if any was made.

The first contention of defendant county, and which has been ably urged, is that the plaintiff had no right in law or justice to insist upon building the jail, and thus increase any expense or damage that might be suffered by the county. While such contention would appear to be entitled to consideration, the record of the case is such that it is impossible to determine the facts connected with the rescinding of the contract. Such abrogation was pleaded and excepted to, and the exception sustained; and, although the ruling appears to have been excepted to, yet, the exception being taken by the defendant, in whose favor judgment was given, we have before us no bill of exceptions or assignment of errors in that behalf. Admitting that the position of defendant in that particular point is correct, and that notice of the rescission of the contract was duly given, and plaintiff had its remedy in an action for damages for a breach of the contract, such plea could not fully defeat the plaintiff's action, but might limit the damages. *Tufts v. Lawrence*, 77 Tex. 526, 14 S. W. 165. The same may be said in regard to the ruling of the trial court upon the plea of defendant found in the fourth paragraph of its answer, wherein bribery and a corrupt and illegal conspiracy between the officers of said county and agents of the plaintiff company are alleged. The judgment being in favor of defendant, by whom such exceptions were taken, we do not consider that those questions are so before us that we are permitted to pass upon them.

In the case as presented for our judgment, the plaintiff was a nonresident corporation, acting entirely through its agents and subcontractors, and the provision in the contract which placed it within the power of the defendant county to select its own commis-

sioner to act as inspector during the building, if honestly carried out in accordance with its terms, would necessarily have been of the greatest assistance and protection to both of the contracting parties, and would appear to be a wise and prudent precaution in the completion of such a work, the actual supervision of which must necessarily be delegated to the representatives of each party, and could not be scrutinized by the principals of either. By it every opportunity in reason was given for the defendant to secure good materials and work, and the plaintiff would at the same time be protected from the faults and negligence of its own servants, by being immediately informed of, and enabled to correct them, and also from any complaints that might be subsequently made, too late to determine their truth or falsity. The action of such an arbiter or supervisor, in the absence of any complaint made at the time and in the manner provided by the contract, is *prima facie* evidence of compliance with the contract, and should be conclusive, except upon clear and distinct proof of fraud. *Railroad Co. v. March*, 114 U. S. 549, 5 Sup. Ct. 1035; *Kihlberg v. U. S.*, 97 U. S. 398; *Sweeney v. U. S.*, 109 U. S. 618, 3 Sup. Ct. 344; *Railroad Co. v. Price*, 138 U. S. 185, 11 Sup. Ct. 290; *Ogden v. U. S.*, 60 Fed. 725;¹ *Railway Co. v. Gordon*, 151 U. S. 285, 14 Sup. Ct. 343. In determining such question of fraud, the burden of proof is upon him alleging it. Was such evidence of fraud given in this case as would justify the submission of that question to the jury, or was it sufficient to justify the jury in finding fraud? Fraud is something more than the expression of an opinion which may prove not to be true, with no intent or desire to wrong or mislead. Nothing but an actual intention to deceive—nothing but an actual fraud—would justify a finding impeaching the plaintiff's compliance with the terms of the contract. An intentional perversion of the truth, for the purpose of obtaining some advantage of another, would, we consider, be necessary to remove the presumption of the fairness of action in such a case as this. The contract provided that the commissioner should be a man qualified to judge of the work, and was to be selected by the defendant; and alleging in the answer that no such man was selected, but one not qualified for the duty devolving upon him, should have no weight as a matter of defense, and nothing but positive proof of *mala fides* on the part of the plaintiff or its representatives should be permitted to overcome the finality of the commissioner's action. Unquestionably, in the making of the contract, it was the intention of both the contracting parties that his action should, in the absence of fraud, be final.

With this view of the case, all questions regarding the character and nature of the work, except the brick complained of by him and the fraud of the plaintiff, are eliminated from the case. But these should be carefully considered at each step of the proceedings. In the fourth paragraph of the learned judge's charge, we find the instruction to the jury that, if they found the material and work did not substantially comply with the requirements of the contract and

¹ 9 C. C. A. 251.

specifications, they should find for the defendant. In this, with no language of reference to or connection with any other portions of the charge, we do not consider that sufficient weight was given to that important provision of the contract providing for an inspection, but that the beneficial effects of all such supervision were eliminated from the case. In this we consider an error was committed, to the injury of the plaintiff. Nor do we consider the testimony would have justified the jury in finding such evidence of mala fides of the plaintiff in the representations regarding the brick, stone, cement, and tin as would have entirely defeated its claim, under the sixth article of the charge, which was excepted to.

The judgment of the court below is reversed, and the cause remanded, with instructions to grant a new trial; and it is so ordered.

VINCENT v. LINCOLN COUNTY.

(Circuit Court, D. Nevada. June 18, 1894.)

No. 577.

1. COUNTIES—PRESENTATION AND ALLOWANCE OF CLAIMS—JUDGMENT ON BONDS PAYABLE FROM SPECIAL FUND.

Where the statute authorizing the issuance of bonds provides for their payment by levying a special tax and creating a special fund, the allowance by the county board and audit of a claim on a judgment on such bonds, as payable out of the general fund, is not an allowance in the manner and to the extent to which the holder is entitled, and he is not precluded from maintaining an action on the judgment because another remedy is prescribed by statute to enforce payment of claims allowed and audited.

2. SAME.

Gen. St. Nev. §§ 1950, 1964-1966, requiring presentation of claims and accounts to the county commissioners and county auditor for allowance and approval, apply only to unliquidated claims and accounts, not to bonds and coupons, nor to a judgment upon bonds and coupons; and such presentation is not necessary before an action on such a judgment.

This was an action by C. D. Vincent against Lincoln county on a judgment against the county. The case was submitted to the court on an agreed statement of facts, and a jury was waived.

Freeman & Bates, for plaintiff.

Trenmor Coffin and Geo. S. Sawyer, for defendant.

HAWLEY, District Judge (orally). This is an action brought upon a judgment obtained in this court by the plaintiff against the defendant on the 8th of November, 1888. The judgment and the indebtedness evidenced thereby were founded and based upon certain bonds and coupons issued under and pursuant to an act of the legislature of this state entitled "An act to consolidate and fund the indebtedness of Lincoln county," approved February 17, 1873 (St. Nev. 1873, p. 54). The constitutionality of this act was sustained by the supreme court of Nevada in *Bank v. Quillen*, 11 Nev. 109. The jurisdiction of this court was upheld in *Vincent v. Lincoln County*, 30 Fed. 749; and the judgment rendered by this court was sustained by the supreme court of the United States in *Lincoln Co.*

v. Luning, 133 U. S. 529, 10 Sup. Ct. 868. No part of the judgment, either of the principal or the interest due thereon, has been paid.

This case was tried before the court, a jury having been waived, upon an agreed statement of facts, as follows:

"It is hereby stipulated in this action that on September 1, 1893, the plaintiff filed in the office of the clerk of the board of county commissioners of Lincoln county, Nevada, his verified claim and demand against said county upon the judgment mentioned in the complaint, and that a copy of said judgment was attached to said claim when so filed. That on September 4, 1893, at its regular monthly meeting, the action of said board taken in regard to said claim and entered on the minutes and record of said board was in words and figures following, to wit: 'The demands of Chas. Sutro, C. D. Vincent, and Luning Co. for the payment of the principal, interest, and accrued costs on judgments on the bonds held by them against Lincoln county was taken up and read. Moved and seconded that the above demands be laid over for one month. Carried.' That on the 2d day of October, 1893, at its regular monthly meeting, the action of said board taken in regard to said claim and entered on its record and minutes was in words and figures following, to wit: 'Moved and seconded that the judgment on bonds held by C. D. Vincent against Lincoln county for the sum of \$117,263.34 be allowed and audited. Carried. Ordered that the clerk write Luning and Co., Chas. Sutro, and C. D. Vincent that their demands were allowed and audited and ready for liquidation.' That the foregoing are the only proceedings taken by said board in regard to allowing said claim. That thereafter, on the 6th day of November, 1893, the county auditor of said Lincoln county did, under direction of said board, audit said claim for the sum of \$117,263.34, and made the same payable out of the general fund in the county treasury of said Lincoln county. That on September 1, 1893, and continuously thereafter, to the commencement of this action, the total amount of money in the county treasury of said Lincoln county did not exceed the sum of \$8,807.90, and the total amount of money in the general fund in said treasury did not exceed the sum of \$183.45. That said Lincoln county now is, and for many years last past has been, greatly indebted (in addition to and prior to plaintiff's claim), which indebtedness was, when plaintiff's claim was presented as aforesaid, and still is, represented by unpaid certificates of indebtedness drawn on the general fund, in an amount approximating \$31,443.69. That all certificates of indebtedness drawn on said general fund in said county treasury since the year 1880 are outstanding and unpaid for want of funds to pay the same. That the revenues of said Lincoln county for county purposes for the last five years have not exceeded in any one year the sum of \$22,114.06, all of which has been yearly consumed and expended in the yearly current and necessary expenses of running the county government of Lincoln county, exclusive of said claims and said certificates of indebtedness against said general fund. That the total value of all taxable property in Lincoln county for purposes of county taxation and revenue, according to the last assessment, is \$576,349.10. The total assessed valuation of all taxable property in Lincoln county for the purposes of county taxation and revenue for the past five years has been as follows: For the fiscal year of 1893, \$576,349.10; for the fiscal year of 1892, \$450,863.10; for the fiscal year of 1891, \$415,926.52; for the fiscal year of 1890, \$343,209.12; for the fiscal year of 1889, \$313,426.25."

The complaint in this case was filed October 9, 1893. The contention of defendant is that, as shown by the stipulated facts, the claim of plaintiff was allowed by the board of county commissioners, and audited by the county auditor of Lincoln county, before this action was commenced; that plaintiff is pursuing a wrong remedy; that he must follow the course prescribed by the statutes of this state (Gen. St. Nev. §§ 1949-1951); that he cannot maintain any action in this court upon the judgment unless the board of county commissioners have refused to allow the claim, or some part there-

of (Id. §§ 1964-1966); that if the board, without justification, refuse to allow a claim based upon a judgment regularly obtained against the county, the proper and only remedy is by mandamus to compel the board to allow the claim. In support of this contention, defendant cites and relies upon the following authorities: Alden v. County of Alameda, 43 Cal. 270; Rhoda v. Alameda Co., 52 Cal. 350; McFarland v. McCowen, 98 Cal. 329, 33 Pac. 113; Bank v. Quillen, supra; State v. Board of County Com'rs of Lander Co. (Nev.) 35 Pac. 300.

If it was necessary to present the claim to the board before bringing this action, it is apparent that the board did not allow the same to the full extent that plaintiff was entitled to. When the claim was presented, it included the full amount due upon the principal and interest. Action on the claim was, however, laid over for one month; and, when the claim was allowed, it did not include the accruing interest for that month. This was doubtless a mere inadvertence upon the part of the board, as it allowed the claim just as it was presented. But, independent of that fact, it affirmatively appears that the board did not allow the claim in the manner and to the extent that plaintiff was entitled to, because the allowance was qualified by directing the payment of the claim out of the general fund of the county. This was a limitation of the rights and remedies to which plaintiff is entitled under and by virtue of the statute authorizing the issuance of the bonds and interest-bearing coupons, and providing for their payment by the levying of a special tax, and creating a special fund, etc. St. Nev. 1873, p. 54. The judgment originally obtained in this case, and upon which this action is brought, is conclusive that the bonds and coupons upon which the judgment was rendered were binding obligations, which entitled plaintiff to payment of the same out of the funds created by law for that purpose, or out of any fund that could be lawfully created for the payment of the same. And it is not within the power of the board to limit this right so as to deprive plaintiff of the remedy to which he is entitled under the law Ralls Co. Ct. v. U. S., 105 U. S. 733, and note; Lincoln Co. Ct. v. U. S., Id. 739, note.

But there is another view of this case which furnishes a conclusive answer to the contention of defendant, and renders it unnecessary to review the authorities cited in its behalf. The questions presented are virtually settled by the decision of the supreme court of the United States in Lincoln Co. v. Luning, where the court, in answering a similar contention, said:

"It is further objected that the complaint was defective in not showing that the bonds and coupons had been presented to the county commissioners and county auditor for allowance and approval, as provided by sections 1950 and 1964-1966 of the General Statutes of the state. Those sections, referring to claims and accounts, have application only to unliquidated claims and accounts, and do not apply to bonds and coupons. This question was presented in the case of County of Greene v. Daniel, 102 U. S. 187, 194, in which the court observed, speaking of bonds and coupons, that 'the claim was, to all intents and purposes, audited by the court when the bonds were issued. The validity and amount of the liability were then definitely fixed, and warrants on the treasury given, payable at a future day.'"

I am of opinion that this principle is as applicable to an action on the judgment as to the action upon the bonds and coupons, which resulted in obtaining the judgment. It was not therefore necessary for the plaintiff to present his claim to the board, or await its action thereon, in order to maintain this action.

The clerk will enter judgment in favor of plaintiff, as prayed for in his complaint.

SUTRO v. LINCOLN COUNTY.

LUNING CO. v. SAME.

(Circuit Court, D. Nevada. June 18, 1894.)

Nos. 578 and 582.

These were two actions—one by Charles Sutro, the other by the Luning Company—against Lincoln county, each on a judgment against the county. Each case was submitted to the court on an agreed statement of facts, and a jury was waived.

Freeman & Bates, for plaintiff Sutro.

J. P. Langhorne, for plaintiff Luning Co.

Trenmor Coffin and Geo. S. Sawyer, for defendant.

HAWLEY, District Judge. The principles announced in *Vincent v. Lincoln Co.*, 62 Fed. 705, are decisive of the questions raised in these cases. Upon the authority of that case, judgment is hereby directed to be entered in favor of the plaintiffs herein, as prayed for in the respective complaints.

HENDERSON et al. v. SMITH.

(Circuit Court of Appeals, Fifth Circuit. May 8, 1894.)

No. 211.

TESTAMENTARY POWERS—EXECUTION—DEED OF TRUST.

A married woman's will gave all her property to her husband, "during his natural life, to be by him managed and disposed of in whatever way may to him seem just and right;" and directed that all remaining at his death undisposed of by him should be divided among their children. Land which had belonged to their community estate was conveyed by him, after he had married again, his second wife joining, by a deed of trust to secure payment of money advanced to him, making no reference to the will, but particularly describing the land with habendum to the trustee, his successor or substitute, forever, and covenant of warranty. *Held*, that the trust deed was a sufficient execution of the power declared in the will, and passed the entire title, and not alone the husband's estate in the land.

In Error to the Circuit Court of the United States for the Western District of Texas.

This was an action of trespass to try title to land, brought by Francis Smith against James W. Henderson and others. On trial by the court without a jury, judgment was rendered for plaintiff. Defendants brought error.

Sam Streetman and T. S. Henderson, for plaintiffs in error.

H. P. Drought, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

McCORMICK, Circuit Judge. This is an action of trespass to try title, the form of real action in Texas. The land had belonged to the community estate of James W. Henderson and his wife, Mary E. Henderson. She died testate in 1880. Her will was duly probated. It provided:

"(2) After relieving all our property of every incumbrance which may be upon it at my death, I will and bequeath to my beloved husband, J. W. Henderson, all my effects, of any nature and description, both real, personal, or mixed, during his natural life, to be by him managed and disposed of in whatever way may to him seem just and right, having full faith and confidence that he will guard well the interest of our darling children in all his dealings. (3) At the death of my said husband, I desire that all effects then remaining undisposed of by my said husband shall be divided equally among our children, share and share alike, taking into account any advances that may have been made them during the life of my said husband."

Mary E. Henderson left surviving her eight children, the fruit of her marriage with James W. Henderson. He married a second wife. In 1890, he, joined by his second wife, conveyed the land in controversy to a trustee, to secure the payment of a large sum of money advanced Henderson by the firm of which the defendant in error was a partner. The deed of trust makes no reference to the will of Mary E. Henderson. It particularly describes the land, it provides for a substitute trustee, and in its habendum clause uses this language: "To have and to hold the above-described premises and appurtenances, rents, profits, and income, improvements and machinery unto the said party of the second part, and his successor or substitute, forever." It contains a covenant that the grantor will warrant and forever defend the title to the same unto the said party of the second part, and his successor, against the lawful claims of all persons. Default was made in the payment of the money, and the substitute trustee, in accordance with the terms of the trust deed, conveyed the land to the defendant in error. He brought this action against James W. Henderson and the descendants of Mary E. Henderson. The pleadings are formal. The contention of the plaintiff below, the defendant in error, is that the absolute fee-simple title to the lands passed by this conveyance through the trustee. The contention of the plaintiffs in error is that Mary E. Henderson vested in her husband only a life estate in her half of their community property; that, having in his own right a one-half interest in the land, and under the will a life estate in the other half, his deed must be construed to pass only these interests of his in the land, as it makes no reference to the power, and can have substantial effect without reference to it. The parties waived a jury, and the trial judge gave judgment for the defendant in error. The following are assigned as errors:

"(1) The trial court erred in its first conclusion of law in finding that the will of Mary E. Henderson, deceased, passed the fee-simple title to the property in controversy to her husband, the defendant J. W. Henderson, because same conveyed only a life estate to said James W. Henderson during his

natural life, and he took no greater estate under said will. (2) The trial court erred in its second conclusion of law in holding that the deed of trust executed by said defendant J. W. Henderson, to H. P. Drought, trustee, passed all of the title to the property in said James W. Henderson, including both his community interest and his deceased wife's community interest, as embraced in said will, because said deed of trust could and did only convey the legal estate which said James W. Henderson had in said land, which estate only consisted of his half of said community property, and his life estate in his deceased wife's half of said community property, devised to him in her will, and did not convey absolutely in fee simple his said deceased wife's half of said community property."

If we rightly understand the plaintiffs in error, they do not contend that Mary E. Henderson's will did not give her husband power to alienate all of her half of their community property. Their contention is that, owning an interest in the property sufficient to give effect to his deed, and making in his deed no reference to the will, the deed must be construed to pass only his own estate in the land. It is manifest that, unless both of the assignments of error above recited are well taken, the judgment of the circuit court must be affirmed. If the will passed the fee-simple title to the property in controversy to J. W. Henderson, it is immaterial to inquire further. If, on the other hand, his deed must be held sufficient to show a disposition under the conceded power, it is wholly immaterial what estate the surviving husband took, under the will, in the testatrix's half of their community property. Touching this question of the execution of a given power, it is to be observed that:

"The power may be executed without reciting it, provided the act shows that the donee had in view the subject of the power. * * * The general rule of construction, both as to deeds and wills, is, if there be an interest and a power existing together in the same person, over the same subject-matter, and an act be done without a particular reference to the power, it will be applied to the interest, and not to the power. * * * In construing the instrument in cases where the party has a power, and also an interest, the intention is the great object of inquiry. And the instrument is construed to be either an appointment or a release; that is, either an appointment of a use in execution of a power, or a conveyance of the interest, as will best effect the predominant intention of the party. It may, indeed, operate as an appointment, and also as a conveyance, if it be so intended, though the usual practice is to keep these two purposes clearly distinct." 4 Kent, Comm. 333-335.

In *Hough v. Hill*, 47 Tex. 148, James S. Steele had executed two powers of attorney to convey land. The first, dated October 4, 1838, named Alexander H. Livermore as the donee, and the second, dated February 25, 1839, named Amos H. Livermore as the donee of the power. In construing the deed offered in evidence, the supreme court of Texas say:

"Notwithstanding the fact that the deed to Bailey purports to have been made by virtue of the first power of attorney, and is silent as to any other power, we think that if A. H. Livermore, who, as attorney in fact for James S. Steele, executed that deed, was in reality, by virtue of the second power of attorney, empowered to do so, the deed would be valid."

In *Weir v. Smith*, 62 Tex. 1, the power relied on was declared by will, and the execution of the power, as claimed by the parties, was by the will of the donee. The latter will did not refer

to the first will, but the property named in certain clauses of the will of the donee was shown to have belonged to the first testator, and there was nothing to raise a presumption that the testatrix in the second will had or claimed any other interest in the property than as donee of the power. Those clauses were upheld as an execution of the power. It was held that, in certain other clauses of her will, she disposed of lands and personal property, to which she asserted title in herself, in a manner inconsistent with any intention, through these last clauses, to execute the power given her by the will of her husband. The court say:

"If she had named, in these clauses, property embraced in the will of her husband, then the question would arise whether her disposing of the property as her own would rebut the presumption of her intention to execute the power given by her husband. No such case, however, is presented."

In the case just cited, the court quotes from 4 Kent, Comm. 335, and say the rule as there stated is well sustained, citing authorities. While Mary E. Henderson survived, her husband had exclusive control of their community property, and could dispose of it in whatever way to him might seem just and right. She had understood this, and had full confidence in him. Her children were his children. There were a goodly number of them. It was evidently in the interest of the family, as such, and of these children, that she undertook by her will to provide for the continuation of this control and power of disposition in the event of her death. It appears that at the date of the execution of her will their property was incumbered. It may have been incumbered at the time of her death. However this may be, she declared:

"I will and bequeath to my beloved husband, J. W. Henderson, all my effects, of any nature and description, both real, personal, or mixed, during his natural life, to be by him managed and disposed of in whatever way may to him seem just and right, having full faith and confidence that he will guard well the interest of our darling children in all his dealings."

There is nothing in this record to show that he has not continued to deserve that confidence. He procured advances of money amounting to a large sum. To secure the payment of this money, he executed the deed of trust through which such title as he conveyed passed to the defendant in error. The land is carefully described. It, and all its appurtenances, rents, profits, income, improvements, and machinery are conveyed to his grantee, with covenant to warrant and forever defend the title to the same unto the grantee against the lawful claims of all persons. To meet certain provisions in the Texas law relating to estates of deceased persons, in the event of his death, his wife joins in executing this deed. The transaction is in no manner different from what it would have been had his first wife been still living. She would have joined in the trust deed, and only for the same purpose,—to meet the contingency of his death occurring before the trust was fully executed. Can it be doubted that it was the intention of James W. Henderson, in making this trust deed, to pass thereby all the estate in the land described which he, in any right, or under any power, was authorized to convey? Could such inten-

tion be more conclusively shown than it therein appears? We conclude that his conveyance to the defendant in error, through the trustee, must be held to be an execution of the power declared in the will of Mary E. Henderson, and the judgment of the circuit court is therefore affirmed.

CASKEY et al. v. CHENOWETH.

(Circuit Court of Appeals, Fifth Circuit. May 1, 1894.)

No. 150.

1. APPEARANCE—WAIVER OF OBJECTION TO SERVICE OF PROCESS.

Defendants in an action in a state court, in which an attachment was levied on their property, being nonresidents of the state, removed the cause to the United States circuit court, and again to the circuit court at another place. Thereafter they filed an answer, raising all the merits, but asserting that they reserved their rights as nonresidents, and also filed a motion to quash the attachment, asserting that they appeared for the purpose of the motion only, whereupon the attachment was quashed. *Held*, that they could not afterwards question the sufficiency of the service on them of the citation in the suit.

2. VENDOR AND PURCHASER—REPUDIATION OF CONTRACT BY PURCHASER—DEFECTS IN VENDOR'S TITLE.

In an action for breach of a contract by which plaintiff agreed, in payment for merchandise bought of defendants, to pay \$1,000 and convey certain lands, it appeared that he could not give title to the lands, but there was evidence that defendants had repudiated the contract before actual default on plaintiff's part, and also evidence to the contrary. *Held*, that it was error, without submitting to the jury the question as to default on defendants' part, to direct a verdict for plaintiff for the \$1,000 which he had paid.

In Error to Circuit Court of the United States for the Northern District of Texas, at Dallas.

This was an action by J. W. Chenoweth against John Caskey and W. J. Wilkes for damages for breach of contract, brought in a court of the state of Texas, and removed therefrom by defendants. At the trial in the circuit court, the judge directed the jury to find for plaintiff. Judgment for plaintiff was entered on the verdict. Defendants brought error.

On September 24, 1891, the plaintiffs in error, John Caskey and W. J. Wilkes, composing the firm of Caskey & Wilkes, then engaged in mercantile business in Ft. Worth, Tex., contracted in writing with defendant in error, J. W. Chenoweth, to sell him their stock of merchandise at invoice prices, with 5 per cent. added, and Chenoweth agreed to pay for same as follows: \$1,000 cash when stock was tendered for invoice; "also, to convey, by good and sufficient warranty deed, sections 13, 15, 23, 53, and the north 229 acres of section 55, all in block 16, Texas & Pacific reservation lands in Taylor county, Texas." The contract also provided: "Said Chenoweth also represents that he has good title to said land, and that the same is clear and free from any lien or incumbrance whatever, except a lien of \$3,746.20, and that at least 60 per cent. of said land is substantially free from breaks and gravel; and said Chenoweth agrees to furnish complete abstracts of title to said land, bringing title down to time of conveyance herein agreed to be made." It was provided in contract that Caskey & Wilkes should take the land hereinbefore described, as a payment upon the stock of goods, at the sum of \$8,094, and subject to the lien of \$3,746.20. It was further provided that the invoice should be commenced September 28, 1891. Detailed pro-

vision was also made as to the execution of notes for the balance of the amount for which stock should invoice, but this is not deemed material here. Chenoweth not being ready on the 28th, invoice was not commenced until October 1st, at which time he paid the \$1,000 cash provided in the contract. The invoice was completed October 9th, and the amount was found to be \$22,116.65. Both parties assisted in the invoice, and both were at considerable expense therein, which fully appears in the evidence. At the close of the invoice, Chenoweth handed Caskey & Wilkes five abstracts of title, one for each of the tracts named in the contract. They were certified, of date September 21, 1891, as being complete abstracts of the records of Taylor county, Tex., affecting the title to said lands. These abstracts (except for missing deeds, patents, and other matters hereinafter specified) brought the title down to the Interstate Railway & Construction Company, subject to a vendor's lien on each tract in favor of the Franco-Texan Land Company. At the same time, Chenoweth handed to Caskey & Wilkes five instruments, not recorded, and not shown in the abstract, releasing the liens of the Franco-Texan Land Company; also, five warranty deeds from the Interstate Railway & Construction Company to Chenoweth, dated in June, 1891, but not recorded, and not shown in the abstracts. It appears from Chenoweth's evidence that these deeds were delivered to him in June, 1891. The abstracts were in the usual form, but contained no abstract of the patents to these lands, the patents not having been recorded. One of the instruments shown in each of said abstracts was a deed of trust from the Texas & Pacific Railway Company to the Fidelity Insurance, Trust & Safe-Deposit Company, dated prior to the date of the patents. In this deed of trust it appears that said railway company had, for one dollar and other considerations (not named in the abstract), conveyed to the Fidelity, etc., Company all lands said railway company had or should acquire from the state of Texas for building the Rio Grande division of said road; the abstracts stating "that the conditions and stipulations of said trust deed cover twelve pages, and are too voluminous to set out." The abstracts also showed that there were two deeds missing to complete the chain of title, even down to the Interstate, etc., Company. One of the lacking deeds was from the Fidelity, etc., Company to Duncan Sherman & Grain, and this Chenoweth handed to defendants next day. This deed, though not appearing in the "complete abstracts," showed that it had been recorded prior to September 21, 1891, the date abstracts were certified. The other lacking deed, which had not been recorded, and did not appear in the abstracts, was from Duncan Sherman & Grain to the Franco-Texan Land Company. This latter deed, Chenoweth informed defendants, was in possession of Robertson & Coke, attorneys at Dallas, to be used as evidence in a suit in the federal court, but Chenoweth furnished no proof or statement showing that said suit did not affect the title to said lands. Chenoweth procured this deed on October 13th. On October 14th, Chenoweth made another tender to defendants, tendering them the following: (1) The five abstracts already described; (2) the five patents from the state to the Fidelity, etc., Company for the lands in contract, "as assignee for the Texas & Pacific Railway Company;" (3) the five releases of liens by the Franco-Texan Land Company; (4) the five deeds from the Interstate Railway & Construction Company to Chenoweth; (5) the deed from Duncan Sherman & Grain to the Franco-Texan Land Company; (6) the deed from the Fidelity Insurance, etc., Co. to Duncan Sherman & Grain; (7) warranty deed from Chenoweth to lands in contract; (8) notes according to contract, and money enough to pay for recording instruments not recorded. Caskey and Wilkes declined to accept the tender, and did not pay back to Chenoweth the \$1,000 cash he had paid on the contract. About 200 acres of the land was not in Taylor but in Jones county, and Chenoweth furnished no abstract from Jones county records. It appears from the evidence of Wilkes that defendants requested Chenoweth to procure from Robertson & Coke a certificate concerning the unrecorded deed held by them for use as evidence in a lawsuit, showing that titles to lands in contract were not affected by said suit, but this Chenoweth failed to do.

In December, 1891, Chenoweth brought suit on the contract in the district court of Wise county, Tex., alleging performance on his part and breach by defendants, and claiming \$6,158 damages, and caused a large amount of

defendants' property to be levied on under writ of attachment. The attachment was based upon the fact that defendants were nonresidents of the state of Texas. On February 1, 1892, Caskey & Wilkes filed a petition in the district court of Wise county, and therein, asserting that they specially appear for the purposes set forth in the petition, alleged as follows: "That the controversy in said suit is between citizens of different states, and that the petitioners, being all the defendants in above-entitled suits, were at the time of the commencement of said suit, and still are, citizens of the state of Missouri, and nonresidents of the state of Texas, and the plaintiff in the suit was at the time of the commencement of said suit, and still is, a citizen of the state of Texas; and, tendering bond and security, prayed for an order of removal of the said cause into the circuit court of the United States for the northern district, at Dallas." On the same day the state court, on the petition, and on an agreement between the parties, in writing, that the cause might be transferred, ordered the same to be transferred to the United States court at Dallas. It seems, upon this order of removal, the transcript of the record was filed in the circuit court for the northern district of Texas, at Graham, Graham being the place where the next term of the circuit court for the northern district of Texas was to be held. On the 15th day of March, 1892, the following entry was made at Graham: "This cause coming on to be heard on motion to transfer to Dallas, it is ordered that the same be and is hereby transferred to Dallas by agreement filed." On the 17th of May, Caskey & Wilkes filed in the circuit court for the northern district of Texas, at Dallas, defendants' original answer, in which, after preamble as follows: "Now come the defendants, reserving their rights as nonresidents of this state, and not submitting themselves to the jurisdiction of the court, but appearing only for the purpose hereinafter set out,"—they specially and generally demurred and excepted to the sufficiency of the plaintiff's original petition, and on such demurrers prayed the judgment of the court. On the same day, Caskey & Wilkes filed a motion to quash the attachment on various grounds assigned, and therein again asserted an appearance for the purpose of the motion only, and denying the jurisdiction of the court over their persons. On January 16, 1893, the cause came on to be heard before the circuit court on motion to quash the attachment, and the same on argument was granted, and thereupon it was ordered that the attachment be quashed and set aside, and held for naught. On the 17th day of January, 1893, again came the defendants, by counsel, "for the purpose alone of resisting the jurisdiction of the court herein, and no other, and say that this court cannot exercise jurisdiction over these defendants in this cause, for that both of these defendants reside now, and did reside, in the state of Missouri, at the time of the institution of this suit, and that no citation in this case was ever served upon them, except in the state of Missouri, and by a private person therein, who delivered to these defendants, in said state, certified copies of plaintiff's petition; that writs of attachment were sued out in this state, and levied upon property of these defendants; that these defendants appeared specially, as appears by motion to quash, filed May 17, 1892; and that said motion to quash said attachment has this day been sustained, and said attachment proceedings quashed and held for naught; wherefore, they pray the judgment of the court whether they ought further to answer therein." At the time of filing this motion the counsel for Caskey & Wilkes, reciting the special appearances thereinbefore made in the case, asked leave to withdraw their answer, and for leave to file plea to the jurisdiction, whereupon the court refused to grant defendants leave to withdraw their answer, to which the defendants excepted. Defendants below then filed their first amended original answer, alleging nonperformance on the part of plaintiff, and claiming damages therefor.

On the trial of the case, after the conclusion of the evidence, the court charged the jury as follows: "In this case the jury are instructed that the plaintiff has failed to show title in himself in October, 1891, to the lands he was to put in trade with defendants. You will therefore find for plaintiff one thousand dollars, the amount he paid defendants, with 6 per cent. interest per annum from the date it was paid," the same being the only instruction given by the court to the jury; and the defendants, then and there, before the jury retired, duly excepted to the giving of that part of said

charge which read as follows: "You will therefore find for plaintiff one thousand dollars, the amount he paid defendants, with 6 per cent. interest per annum from the date it was paid,"—and defendants then and there stated the grounds of their said exceptions to be as follows: "(1) Plaintiff's failure to prove title was in itself a breach of the contract, such as to prevent him from any recovery on the case made by his petition. (2) Because, under the undisputed evidence, plaintiff had failed to comply with the contract sued on; hence, defendants were entitled to have their claim for damages submitted to the jury. (3) Because the abstracts of title were not complete,—they not showing the condition of Jones county records as to lands in Jones county; not fully showing the deed of trust to the Fidelity Company; not being brought down to date; not showing any of the seventeen instruments referred to in plaintiff's testimony. (4) Because of the grave doubt left upon the title in the matter of the deed in the hands of Robertson & Coke, without any explanation whatever. (5) Because plaintiff was not ready to comply at the close of the invoice, and it was not shown that he could not, by the use of diligence, have been ready at that time. (6) Because contract contemplated performance at the close of the invoice, and plaintiff, by his own acts, had thus construed it, and had used no diligence; and having failed, and shown no legal excuse, he must be held to have broken the contract. (7) Because the court should have instructed the jury as to what constituted compliance by the respective parties, and left the question of compliance and damages to the jury. (8) Because, even though defendants may have declared the contract off on October 12th, and though it should be held that they had not waited a reasonable time, yet as plaintiff afterwards demanded compliance, and himself attempted to comply, such declaration was no waiver on the part of defendants, and gave plaintiff no rights as against defendants; and, the plaintiff having failed to fully comply on the 14th of October, he committed a breach of the contract, which entitled defendants to have their claim for damages submitted on the evidence introduced." In the bill showing these facts the court said: "In this case it was the opinion of the court that the defendants had repudiated the contract, and kept the \$1,000, when the plaintiff was trying to carry it out, and that too after he had substantially furnished abstracts of his title. But the plaintiff failed on trial to show title to himself, at the date of the contract, to the lands he was to convey, from the sovereignty of the soil; hence the above instruction. With this explanation the above exception is approved and allowed, this March 23, 1893." And it further appears that the following instruction was asked by the defendants: "If the jury believe from the evidence, under the instructions given, that the plaintiff failed to comply with the contract on his part, and if you further believe from the evidence that the defendants were ready, able, and willing to comply with the contract at any one time when plaintiff should comply with the contract on his part, then your verdict must be for the defendants,"—which instruction was refused by the court, to which refusal the defendants then and there duly excepted.

J. R. Robinson, for plaintiffs in error.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge (after stating the facts). The first matter for consideration is the jurisdiction of the circuit court over the plaintiffs in error. If the cause had remained in the state court, then, under the provisions of articles 1242-1245, Rev. St. Tex., as construed by the supreme court of that state, the appearance of the plaintiffs in error specially for the purpose of moving to quash the service upon them, or to quash the attachment issued in the case, would have been properly taken as a general appearance, fully conferring jurisdiction upon the court. See *York v. Texas*, 137 U. S. 15, 11 Sup. Ct. 9; *Kauffman v. Wootters*, 138 U. S. 285, 11 Sup. Ct. 298. Irrespective of this, there is excellent

authority for holding that the plaintiffs in error waived any objections to the service of the summons by appearing in the state court, and filing a petition for the removal of the cause to the United States court, and this notwithstanding the appearance was said to be specially for the purposes of removal. *Sayles v. Insurance Co.*, 2 Curt. 212, Fed. Cas. No. 12,421 (opinion by Mr. Justice Curtis); *West v. Aurora City*, 6 Wall. 139; *Bushnell v. Kennedy*, 9 Wall. 387; *Construction Co. v. Simon*, 53 Fed. 1 (opinion by Mr. Justice Jackson). In the instant case, not only did the plaintiffs in error appear in the state court, and there file a petition for the removal of the cause, but the record shows that after the removal there was an appearance in the circuit court at Graham, which (so far as the record shows) was unqualified, for the purpose of having the cause removed to the circuit court at Dallas for trial, and that in the circuit court at Dallas the plaintiffs in error appeared, and filed an answer raising all the merits of the cause at the same time that they specially appeared, and moved to quash the attachment issued in the case. It is true, the answer asserts that the plaintiffs in error reserved their rights as nonresidents of the state, and submitted themselves to the jurisdiction of the court only for the purposes of the answer. It is difficult to see how the plaintiffs in error, by appearance in the circuit court, could have more fully submitted themselves and their cause to the jurisdiction of the court. Submitting themselves to the jurisdiction of the court for the purposes of the answer was about all that any defendant could do in that behalf. We understand the general rule to be that any appearance of a defendant in court, when sued, for any other purpose than to object to the sufficiency of the service upon him, and move to quash therefor, is to be taken and held as a general appearance in the case. Certainly, when a defendant who has not been strictly served according to law comes into court in such case to obtain relief, or the benefit of a privilege outside of the sufficiency of the service, he ought not to be heard thereafter to say that the court has no jurisdiction over the case because he has not been properly notified. In this case it appears that the plaintiffs in error first procured the removal of the cause from the state court to the circuit court at Graham, then a removal from the circuit court at Graham to the circuit court at Dallas, then filed an answer, and thereafter procured the attachment in the case to be dissolved, and yet, after all these proceedings, object that the original service of citation upon them was insufficient in law to bring them into court.

On the merits of the case, the plaintiffs in error complain of the instructions of the court, in directing the jury, as a matter of law, that the plaintiff below was entitled to a verdict for \$1,000, the amount he had paid the defendants below, with 6 per cent. interest per annum from the date it was paid, and in refusing to instruct the jury as follows:

"If the jury believe from the evidence, under the instructions given, that the plaintiff failed to comply with the contract on his part, and if you further

believe from the evidence that the defendants were ready, able, and willing to comply with the contract at any one time when plaintiff should comply with the contract on his part, then your verdict must be for the defendants."

It appears that the trial judge was of the opinion—undoubtedly, from his view of the evidence in the case—

"That the defendants had repudiated the contract, and kept the \$1,000, when the plaintiff was trying to carry it out; and that too after he had substantially furnished abstracts of his title. But the plaintiff failed on trial to show title in himself, at the date of the contract, to the lands he was to convey, from the sovereignty of the soil."

As we understand this, it means that the plaintiff in the court below could not give title to the lands he had agreed to convey, and yet, while he was trying to carry out the contract, the defendants repudiated the same, and therefore the plaintiff below could recover back the amount he had paid under the contract, and the defendants below could recover no damages for the failure of the plaintiff to perform. It is clear that the plaintiff below was not entitled to recover damages from the defendants below for non-compliance with the contract of sale, since he had failed to comply with the contract on his part.

In this state of the case, whether the plaintiff below was entitled to recover back the moneys paid by him under the contract, and whether the defendants were entitled to recover damages for breach of the contract, depended upon the conduct of the parties, as shown by the evidence in the case. The bill of exceptions recites that substantially all the evidence offered and introduced by either party is therein recited. While there is considerable evidence in the bill tending to show that the defendants below repudiated the contract, and practically rescinded it, prior to the actual default of the plaintiff below, yet there is also considerable evidence tending to show the contrary. From this state of the evidence, as we view it, the question of default on the part of the defendants below should have been submitted to the jury, with instructions that if they found the defendants in default, or that they had repudiated or rescinded the contract prior to the actual default of the plaintiff below, then he might recover back the amount paid under the contract (see Sedg. Dam. § 658; Suth. Dam. § 585); if, on the other hand, they should find from the evidence that the defendants below were not in default, then they would be entitled to recover such damages as directly flowed from the breach of the contract, and were proved by the evidence in the case. We are of the opinion that the assignments of error in relation to the instructions of the court are well taken. The judgment of the circuit court is reversed, and the case remanded, with instructions to grant a new trial.

AETNA LIFE INS. CO. v. PLEASANT TP.

(Circuit Court of Appeals, Sixth Circuit. June 5, 1894.)

No. 164.

RAILROAD COMPANIES—MUNICIPAL AID—CONSTITUTIONAL RESTRICTIONS.

Laws Ohio 1880, p. 157, which authorizes any township having a population of 3,683 to issue bonds in the sum of \$40,000 to construct a line of railway, seven miles in length, between termini to be determined by the township trustees, in view of the limited amount to be appropriated, and the failure to prescribe location or termini, on its face contemplates, not a constructed and equipped railroad, but a mingling of public aid with private capital, and therefore violates Const. Ohio, art. 8, § 6, which forbids the general assembly to authorize a township to raise money for, or loan its credit to or in aid of, any joint-stock company, corporation, or association. 11 Sup. Ct. 215, 138 U. S. 67, followed. 53 Fed. 214, affirmed.

In Error to the Circuit Court of the United States for the Northern District of Ohio, Western Division.

This was an action by the Aetna Life Insurance Company against Pleasant township on bonds issued by defendant. The circuit court overruled a demurrer to defendant's answer, and rendered judgment thereon for plaintiff, but the judgment was reversed on appeal to the supreme court, and the case remanded. 11 Sup. Ct. 215, 138 U. S. 67. Plaintiff then filed a reply to the answer, and the issues thereon were tried by the court,—a jury having been waived,—and judgment was rendered for defendant. Plaintiff brought error.

Jas. H. Sedgwick and O. J. Bailey, for plaintiff in error.

Doyle, Scott & Lewis, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge. This was an action brought by the Aetna Life Insurance Company to recover upon bonds issued by Pleasant township, in Van Wert county, Ohio. The defense was that the bonds had been issued by the township under an act of the legislature which was in conflict with the constitution of Ohio. The act, passed April 9, 1880 (Laws Ohio, p. 157), authorized any township having a population of 3,683, upon a vote of the people, to issue bonds in the sum of \$40,000 to construct a line of railway, seven miles in length, between termini to be determined by a resolution of the township trustees. The answer, for a second defense, averred that this was one of a series of acts passed to authorize the construction of a railroad through a line of townships from Ohio into Michigan; that the acts were passed to enable the townships to contribute the amounts named in each act, respectively, to the construction of a railroad, to be owned and operated as a private enterprise by a private corporation; that the act was therefore in violation of article 8, § 6, of the constitution of Ohio, providing that "the general assembly shall never authorize any county, city, town or township by vote of its citizens, or otherwise, to become a stockholder in any joint stock company, corporation, or association what-

ever; or to raise money for, or loan its credit to, or in aid of, any such company, corporation, or association."

A demurrer was filed to the answer of defendant, which demurrer the circuit court overruled; and, the defendant refusing to plead further, judgment was rendered for the plaintiff. The circuit court held that before the bonds were issued the supreme court of Ohio had, in *Walker v. Cincinnati*, 21 Ohio St. 14, upheld the validity of an act which could not be distinguished from the enabling act under which the bonds at bar were issued, and therefore that, in spite of subsequent decisions of the same court, made after the issuance of the bonds, declaring the enabling act invalid, the federal court must hold the bonds to be valid obligations of the township issuing them, under the principle announced in the case of *Douglass v. Pike Co.*, 101 U. S. 677.

This judgment was carried by writ of error to the supreme court of the United States. The opinion of that court is reported under the name of *Pleasant Tp. v. Aetna Life Ins. Co.*, 138 U. S. 67, 11 Sup. Ct. 215. The court held, in accordance with decisions of the supreme court of Ohio in the cases of *Wyscaver v. Atkinson*, 37 Ohio St. 80, and *Counterman v. Dublin Tp.*, 38 Ohio St. 515 (rendered since the issue of the bonds here in suit), that the act was in conflict with the constitution of Ohio, and that such a conclusion was not inconsistent with the decision in *Walker v. City of Cincinnati*, 21 Ohio St. 14. The judgment was accordingly reversed, and the case was remanded to the circuit court, with instructions to overrule the demurrer to the answer. This was done, and a reply was filed, taking issue with the averments of the answer as to the circumstances under which the act was passed. The case was submitted to the court on the evidence, a jury being waived. Special findings of fact were made by the trial judge, sustaining the averments of the answer, and a judgment was rendered for the defendant. This judgment is now before us for review.

The contention for plaintiff in error is that as it was a bona fide purchaser, for value, of these bonds, it was not charged with notice of anything but the text of the statute itself, and was not bound to inquire into the motives or intent of the legislature, as inferred from other acts passed at the same time, and from facts extraneous to the act under which the bonds were issued, the existence or significance of which it could not know; that, on the face of the act, it raised exactly the same question of constitutionality which was considered in the case of *Walker v. Cincinnati*, 21 Ohio St. 14. The effort of counsel for plaintiff in error is to explain away the decision of the supreme court of the United States in this case by insisting that the hearing before that court was on the averments of the answer with respect to the surrounding circumstances under which the bonds had been issued, and that no question was then before the court as to the right to use such evidence, in attacking the constitutionality of the law, against a bona fide purchaser of the bonds, for value, without notice.

We do not find it necessary to consider the objection that bona fide holders of bonds are not charged with a knowledge of surround-

ing circumstances which render the enabling act invalid, because, while the supreme court did refer to such circumstances in the discussion of the act's validity, still the court held that, even if all the surrounding circumstances were ignored, the act was invalid, and was plainly distinguishable from the Walker Case. Mr. Justice Brewer, in delivering the opinion of the court, after referring to a decision of the supreme court of Ohio holding a similar act invalid (*Wyscaver v. Atkinson*, 37 Ohio St. 94, 95), finally said:

"The conclusion of that court was, we think, imperative, from the facts as developed. Beyond that, if we ignore all surrounding circumstances, the fact is that the amount of the aid to be voted was insufficient for the construction and equipment of a road of even short length; and, turning to the mere letter of the statute, we notice this significant fact: While the act of 1869 [i. e. the act under consideration in the Walker Case], by its language, contemplated and required a railroad, and thus a highway, from Cincinnati outward into territory subservient to its business interests, the act in question before us locates neither the road nor its termini. If the letter of the statute alone be regarded, power is given by this statute to construct a railroad in Alaska. Neither location nor termini are prescribed, and the general power is given to construct a railroad not exceeding seven miles in length. Can an act containing such indefinite provisions, with an appropriation of township aid so limited as to foreclose the idea of a constructed and equipped railroad, and whose thought of mingling public aid with private capital is so evidenced, be one which can be sustained, in the face of the inhibition of the constitution of the state of Ohio. We think not."

In this view, no case for recovery was stated in the petition, and therefore, without regard to the findings of fact on the evidence adduced, judgment ought to have been given for the defendant. The judgment of the court below is accordingly affirmed, with costs.

VAIL v. RICHARDS.

(Circuit Court of Appeals, Fifth Circuit. June 5, 1894.)

No. 232.

TAX TITLES—POSSESSION OF PURCHASER—EJECTMENT BY FORMER OWNER.

Laws Fla., c. 4115, § 65, passed June 2, 1893, relating to recovery of possession of land sold for taxes, provides that, when a purchaser of such real estate prior to the passage of the act "has not entered into and taken actual possession of the same, he shall, within one year from the passage of this act, bring suit for the recovery of actual possession of the real estate described in such tax title, and in default thereof such tax title shall become void and of no effect." Such a purchaser, who, before the passage of the act, had obtained his tax deed, no one being in possession of the land, entered and took possession of it on October 1, 1893, and thereafter remained in possession. On October 30, 1893, the former owner brought ejectment against him for the land. *Held*, that the action could not be maintained.

Error to the Circuit Court of the United States for the Northern District of Florida.

This was an action of ejectment by William E. Vail against George W. Richards. The parties agreed to waive a trial by jury, and submitted the case on an agreed statement of facts. The circuit court rendered judgment for defendant. Plaintiff brought error.

The waiver and agreed statement of facts were as follows:

The parties to the above-entitled action hereby agree to waive a trial by jury herein, and to submit this case to any judge or judges of said court for finding, verdict, and judgment upon the following agreed statement of facts, which are hereby admitted to be true:

(1) William E. Vail, the plaintiff, is a citizen and resident of the state of New York, and was such at the beginning of this action.

(2) George W. Richards, the defendant, is a citizen and resident of the state of Pennsylvania, and was such at the beginning of this action.

(3) The lands in controversy are correctly described in the plaintiff's declaration.

(4) The lands in controversy are worth more than six thousand dollars (\$6,000.00), and the sum, amount, or value in controversy in this action exceeds, exclusive of interest and costs, said amount of \$6,000.

(5) The lands in controversy were owned by Frank J. Hinson on January 1, 1888, he then holding the same by a good and valid title in fee simple. The plaintiff herein holds a deed to said lands from a master in chancery, passed upon a valid proceeding of foreclosure of a valid mortgage, executed by the said Hinson to the plaintiff, but the defendant herein was not a party either to the said mortgage or to the said foreclosure proceeding.

(6) On August 4, 1889, the said lands were sold by the tax collector of Lake county, Florida, for the unpaid taxes thereon for the year 1888, and said lands were bought at said tax sale by one R. H. Ramsey, to whom there issued a certain tax certificate, in which it was certified that the said Ramsey had bought the said lands at such tax sale, the said certificate being number 33. This certificate was on October 16, 1890, assigned by said Ramsey to the defendant, Richards. On June 1, 1891, said Richards presented said certificate to the clerk of the circuit court of Lake county, Florida, that being the county and state in which said lands were situated, and said clerk issued a tax deed to said Richards conveying said lands to him. All the proceedings relative to the assessment of the said lands for taxes, the advertising of same for sale, because of nonpayment of taxes, and the sale of said lands at tax sale aforesaid for taxes, and the issuance of said certificate of purchase at the said tax sale to the said Ramsey, and the assignment of such certificate by said Ramsey to said Richards, and the issuing and delivery of the said tax deed, were proper and legal and regular, and in due form as required by law. The said taxes on the said lands had not been paid at or before the said tax sale took place, and the said lands were never redeemed from said sale. The said tax deed was by said Richards duly filed for record and properly and regularly recorded on the 12th day of June, 1891, at page 389 of Book No. 1 of Tax Deeds, in the office of the clerk of the circuit court of the said county of Lake, state of Florida.

(7) On October 1, 1893, the defendant, by his agents, went to the lands in controversy, and, finding no one in possession of said lands, or any part thereof, he entered upon the said lands peaceably, openly, and quietly, and then and there took actual, open, notorious, and adverse possession thereof, and remained in such possession up to the time of the commencement of this action, and is at the present time still in possession of the said lands.

(8) Chapter 3681 of the Laws of Florida is entitled "An act for the assessment and collection of revenue," and took effect August 4, 1887; and chapter 4115 of the Laws of Florida is also entitled "An act for the assessment and collection of revenue," and took effect August 1, 1893, having been passed June 2, 1893.

(9) It is further agreed that, at the trial or hearing of this cause, each and every part of the constitution of the United States and of the constitution of the state of Florida (adopted and ratified by the people of Florida in the year 1885), and all the laws and parts of laws of the state of Florida relative to the assessment and collection of taxes, the sale of lands for unpaid taxes, and all the proceedings leading up to, or in any way connected with, tax sales or tax titles within the state of Florida, so far as same may be applicable or relevant, are to be considered by the court, and, if necessary or advisable, may be offered in evidence at the trial.

If, upon the foregoing facts, it shall be found that the plaintiff is entitled to maintain this action, a judgment shall be entered in favor of the plaintiff

for the recovery of the possession of the lands described in the plaintiff's declaration, and also damages in the sum of two thousand five hundred dollars (\$2,500); but, if the court shall be of opinion that the plaintiff is not entitled to recover, judgment shall be entered for the defendant against the plaintiff on the merits, and for the costs of the action.

No right of appeal or other rights are to be waived by either of the parties, except as herein expressly stipulated.

Laws Fla. c. 4115, mentioned in the foregoing agreed statement, contained the following provision:

Sec. 65. When the purchaser of land at a tax sale goes into actual possession of such land, no suit for the recovery of the possession thereof shall be brought by the former owner or claimant, his heirs or assigns, or his or their legal representatives for the recovery of the possession of such land, unless such suit be commenced within four years after the purchaser of such tax sale goes into possession of the land so bought; and the purchaser at such tax sale, when said real estate is in the adverse actual possession of any person or persons, shall not be entitled to recover possession of such real estate bought at such tax sale, unless suit for such recovery shall be brought within one year from the date of acquiring a right to such tax title; and where any purchaser of any real estate situated in this state, prior to the passage of this act, has not entered into and taken actual possession of the same, he shall, within one year from the passage of this act, bring suit for the recovery of actual possession of the real estate described in such tax title, and in default thereof such tax title shall become void and of no effect.

J. B. Gaines, for plaintiff in error.

Upon the record in this case, including the agreed statement of facts, but two questions are presented for determination by the court:

First. The constitutionality of that part of section 65, c. 4115, Laws Fla. (Acts of 1893), which reads as follows: "And where any purchaser of real estate, situated in this state, prior to the passage of this act, has not entered into and taken possession of the same, he shall, within one year from the passage of this act, bring suit for the recovery of actual possession of the real estate described in such tax title, and in default thereof such tax title shall become void and of no effect."

Second. Has the holder of such tax deed any remedy for the enforcement of his right, other than by suit, within one year from the passage of the act in question?

The plaintiff in error contends that the provisions of the act in question referred to are constitutional, and that the defendant in error had no right under the law to possession of the lands in question except upon judgment in his behalf upon suit filed within one year from the passage of the act.

Arthur Oolin (Walter C. Anderson and Clark Varnum, of counsel), for defendant in error.

Upon the agreed statement of facts in this case, under the law of Florida defendant in error was, on June 1, 1891, and ever since has been, the absolute owner of the lands in controversy, under and by virtue of the certain tax deed above referred to, and entitled to the possession thereof, and constructively presumed to be in possession thereof, unless by a subsequently enacted law (hereinafter quoted) such ownership and possession and right of possession have all been taken away from him by legislative enactment. The law referred to is a part of section 65, c. 4115, Laws Fla., and was passed June 2, 1893, and, so far as is applicable to this case, is as follows: "And where any purchaser of any real estate situated in this state, prior to the passage of this act, has not entered into the actual possession of the same, he shall, within one year from the passage of this act, bring suit for the recovery of actual possession of the real estate described in such tax title, and in default thereof such tax title shall become void and of no effect. * * *"

It is alone upon this provision that the plaintiff in error bases his right to the possession of the property in controversy, claiming that the defendant

in error must sue for possession within one year from August 1, 1893, or lose all; and claiming, further, that this statute prevents the defendant in error from taking possession after August 1, 1893, except by and through such suit, and that if the defendant in error took possession after August 1, 1893,—the time when such law took effect,—such taking of possession was so unlawful as that ejectment would lie against him. Notwithstanding the fact that the land was, prior to the 1st day of October, 1893, vacant and unoccupied, and the further fact that under the prior laws of Florida, to wit, sections 1287–1289, Rev. St. Fla., existing and in full force at the time of the execution of said tax deed, said lands were then, and for over two years had been, constructively in the possession of the defendant in error, who held title through and from the state of Florida, the plaintiff in error now claims that this new law of June 2, 1893, so changed the rights of the parties as to make unlawful the entry of the defendant in error upon the real estate, and the taking of actual possession thereof, after August 1, 1893. The defendant in error contends that this statute is unconstitutional, and therefore void and of no force or effect, for the following reasons:

First. It impairs the obligation of contracts.

Second. It deprives persons of property without due process of law.

Third. It lessens the time within which a civil action may be commenced on a cause of action existing at the time of its passage.

Fourth. Chapter 4115 of the Laws of 1893 of the state of Florida embraces more than one subject.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PER CURIAM. Without considering the question as to whether the statute of the state of Florida brought in question be constitutional or not with respect to the rights involved in this case, but considering that, on the agreed facts as submitted to the circuit court, the plaintiff in the court below (plaintiff in error here) has no case entitling him to relief, it is ordered that the judgment of the circuit court be, and the same is hereby, affirmed.

WILSON v. HIGBEE.

(Circuit Court, D. Nevada. July 2, 1894.)

No. 566.

1. DECEIT—PAROL EVIDENCE.

In an action for deceit in the sale of land, oral evidence of what occurred before and when the deed was signed is admissible to show the situation and intention of the parties, in order to explain an ambiguity in the deed.

2. WATER RIGHTS—RESERVATION IN DEED.

A deed reserving to the grantor so much of the premises as may be needful to his full enjoyment of the waters of a certain creek, and all water rights and flowing water on or about the premises with right of free access, and of building and maintaining reservoirs, ditches, flumes, etc., on said premises, for mining purposes, reserves the water for mining purposes only, and without express words conveys it as appurtenant to the land for agricultural purposes.

3. DECEIT—NEGLIGENCE OF PARTY INJURED.

A vendee is not deprived of his remedy for deceit because he might have learned the falsity of the vendor's statements from the public records.

4. SAME—MISREPRESENTATIONS INDUCING PURCHASE.

A vendor by quitclaim deed is liable for his misrepresentations inducing the purchase.

Action for damages for deceit by Wilson against Higbee. Judgment for plaintiff.

James F. Dennis and Trenmor Coffin, for plaintiff.

J. L. Wines, for defendant.

HAWLEY, District Judge (orally). This is an action at law to recover damages for false representations, deceit, and fraud in the sale of land. It was commenced in the state court, and from thence removed, by the petition of defendant, on the ground of diverse citizenship of the parties, and was tried in this court without a jury.

The testimony shows that on the 26th of September, 1887, the defendant made, executed, and delivered to plaintiff a quitclaim deed of 92.12 acres of land, with the appurtenances. This deed, among other things, contained the following proviso, viz.:

"Provided always, nevertheless, and it is distinctly understood and agreed between the parties hereto, anything herein contained to the contrary notwithstanding, that said party of the first part expressly reserves from the operation of this conveyance, and retains and keeps unto himself and his heirs and assigns, forever, so much and all of said premises hereinbefore described as may be now or hereafter necessary to the free, full, and perfect enjoyment of and use by said party of the first part, his heirs and assigns, of, in, or to the waters of said Duck creek and its tributaries, and of all water, water rights, and privileges heretofore had or enjoyed by the said party of the first part and his grantors of, in, and about the said premises, or any part thereof, and all water that now flows or hereafter may flow upon, through, over, or across, upon the surface or otherwise, or in any manner, in and about said premises, together with the right of free access therefrom and thereto, as well to any portion as to the whole thereof, with the right to construct and maintain reservoirs, ditches, flumes, sewers, drains, or channels, and any and all thereof, upon, in, and about said premises, for mining purposes."

At the time of the execution and delivery of the deed, defendant represented to the plaintiff that he was the owner of the water of Duck creek, which, in its natural course, flowed over, upon, and through the land, and assured plaintiff that he could and would have this water for agricultural purposes, whereas the truth was that defendant did not then own the water, because he had conveyed the same to one John Leick long prior thereto, to wit, on the 21st day of April, 1887, and the deed conveying the water right was of record. Plaintiff could have ascertained these facts if he had taken the precaution to have the records examined, but he relied upon defendant's representations being true, and would not have purchased the property if he had known the facts concerning the prior sale of the water.

It was argued on behalf of defendant that the deed does not convey, or purport to convey, any water or water rights whatever, but, on the contrary, expressly contains an exception showing that the water was not intended to be conveyed.

Objection was made to the introduction of oral evidence as to what occurred prior to and at the time of the execution of the deed, as to the understanding of the parties in relation thereto. This testimony was admissible, not for the purpose of changing the terms of the deed, as claimed by defendant, but for the pur-

pose of explaining the situation, understanding, and intention of the respective parties. The intention of the parties, when it can be ascertained, is to govern in the construction of deeds, as well as other written contracts; and, if the language used in the deed is susceptible of more than one interpretation, it is the rule that courts will look at the situation of the parties, the object they had in view, and the surrounding circumstances existing at the time the contract was executed, as well as the subject-matter of the same; and, to this extent, extraneous evidence is admissible to aid in the construction of the instrument. *French v. Carhart*, 1 N. Y. 96; *Bridger v. Pierson*, 45 N. Y. 601; *Pike v. Munroe*, 36 Me. 309; 2 Devl. Deeds, § 990.

The land conveyed by the deed was arid, and of no value for agricultural purposes without the use of water to irrigate the same during the dry season. It was purchased by the plaintiff for agricultural purposes,—for a home for himself and family. The water of Duck creek, if not otherwise appropriated or conveyed, naturally belonged to, and was appurtenant to, the land, and would be conveyed with it, unless expressly excepted or reserved therefrom by apt and appropriate words in the deed. The defendant owned certain mines and a mill site in the cañon above this land, which, for successful operation, required the use of the water for mining and milling purposes. The water of the creek could be used by the defendant for such purposes without detriment to its use by the plaintiff for agricultural purposes. The deed was type-written, and, when read over by plaintiff, the words “for mining purposes” were inserted at his request. Plaintiff testified that, “at the very hour and very moment that he [defendant] put his name to the instrument, he guaranteed me the use of the water for agricultural purposes,” and that there was no question whatever between them, at the time, but what the water should belong to him when the deed was executed. “I was to have the use of the water for agricultural purposes, and he was to have it for mining purposes only. * * * He told me, on every occasion, that he never sold any water to Leick. * * * Q. Did he say so when you took the deed of the property from him? A. Yes, sir. Q. Did he say so at the particular time that he delivered the deed to you? A. Yes, at that very moment.” This testimony is not denied. It shows clearly, and beyond all question, that it was plaintiff’s understanding, at least, that the deed conveyed the water to him for agricultural purposes, and that defendant reserved the right to use the same for mining purposes. But, independent of the testimony, I am of opinion that the language of the proviso in the deed is not susceptible of any other or different construction. It is true that there is no reference to the water in any other part of the deed. It was not absolutely essential that the water of the creek, if it flowed over or through the land in its natural course, should have been specifically mentioned, although it is usual and proper, and the best way, to mention the water right, in conveyances of this kind. But it was not necessary, as is claimed by defendant, that plaintiff should have first brought an action to have the deed

reformed, if it was the intention of the parties that the water, as well as the land, should be conveyed, because, as before stated, the water, if it belonged to the land, would pass as an appurtenant thereto. 2 Devl. Deeds, § 863; *Farmer v. Water Co.*, 56 Cal. 11. It is true that the words "exception" and "reservation" are occasionally used indiscriminately; and it not infrequently happens, in a deed, that what purports to be a reservation has the force of an exception, or vice versa. 2 Devl. Deeds, § 980. Instances of construction to be given in particular cases are mentioned in 2 Devl. Deeds, § 989, and in the numerous authorities there cited. But I am of opinion that none of those cases, or of the other authorities cited and relied upon by defendant, viz. *French v. Carhart*, 1 N. Y. 96; *Bridger v. Pierson*, 45 N. Y. 601; *Munn v. Worrall*, 53 N. Y. 44; *Marvin v. Mining Co.*, 55 N. Y. 538,—are in opposition to the conclusion reached, that the proviso in the deed in question was a reservation, pure and simple, of the defendant's right to use the water for mining purposes only.

2. Does the rule of caveat emptor apply to this case? The weight of authority is to the effect that a vendee has the right to rely upon the representations of the vendor as to material matters connected with the land; and especially is this so in all cases, like the present one, where the facts in relation to such matters are within the knowledge of the vendor, and unknown to the vendee. In such cases the vendee may rely upon such representations, although other means or opportunities might be afforded to him to ascertain the truth. He is not bound, under the law, to go to the expense or trouble of verifying the truth or falsity of the statements made by the vendor, and the vendor is estopped from asserting that the vendee might readily have ascertained the truth if he had examined the records of the county where the land was situated. The liability of the vendor arises from his own fraud and falsehood, and is not in any manner affected by the question of diligence upon the part of the vendee. The defendant had the right, if so disposed, to remain silent as to whether the water had been previously disposed of or conveyed to other parties, and if he had done so he would have been safe; but when he led the plaintiff astray by falsely representing the facts, and thereby induced him to make a purchase which he would not otherwise have made, it does not lie in defendant's mouth to say that plaintiff had no right to rely upon his representations. "The seller may let the buyer cheat himself *ad libitum*, but must not actively assist him in cheating himself." *Banta v. Savage*, 12 Nev. 151; *Fishback v. Miller*, 15 Nev. 428; *Henderson v. Henshall*, 4 C. C. A. 357, 54 Fed. 320, 329; and authorities there cited; *Hil. Vend.* 354; *Matlock v. Todd*, 19 Ind. 131; *Kiefer v. Rogers*, 19 Minn. 32 (Gil. 14); *Walsh v. Hall*, 66 N. C. 233; *Hale v. Philbrick*, 42 Iowa, 81; *Bailey v. Smock*, 61 Mo. 213; *Upshaw v. Debow*, 7 Bush, 443; *David v. Park*, 103 Mass. 501; *Gammill v. Johnson*, 47 Ark. 335, 1 S. W. 610; *Graham v. Thompson*, 55 Ark. 296, 18 S. W. 58; *Dodge v. Pope*, 93 Ind. 481; *Young v. Hopkins*, 6 T. B. Mon. 19; *Linn v. Green*, 17 Fed. 407.

3. The right of plaintiff to recover is not defeated by the fact that the conveyance was only a quitclaim deed. It is immaterial what covenants were in the deed. It is the fact that the plaintiff was induced by the false representations of the defendant to pay his money for the property that gives to plaintiff a cause of action, independent of the covenants in the deed. "It would be a reproach to the law to hold that a vendor who, by fraudulent representations, has induced a vendee to accept a quitclaim deed for land, can wholly escape liability for his fraud. The law ought to exact truth and honesty from vendors by quitclaim deeds as well as from those who give warranties of title. Of course, if the grantor in a quitclaim deed makes no false representations, he is not liable if the grantee acquires nothing by the deed. But in that case he is honest,—at least, does not deceive the vendee by misrepresentations. But when he induces the grantee, by falsehood, to accept a quitclaim deed, there is no rule of law or equity which will relieve him of liability for his fraud." *Ballou v. Lucas*, 59 Iowa, 24, 12 N. W. 745; *Atwood v. Chapman*, 68 Me. 38; *Wardell v. Fosdick*, 13 Johns. 325.

4. Plaintiff is entitled to recover damages, which, under the testimony, I assess in the sum of \$3,000. Let judgment be entered accordingly.

NORMAN v. WABASH R. CO.

(Circuit Court of Appeals, Sixth Circuit. May 28, 1894.)

No. 163.

MASTER AND SERVANT—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

In an action against a railway company for personal injuries to an employé, his evidence showed that, when he was at work in defendant's sheds, and was kneeling to look for marks on a bale of cotton, moved from the wall on a truck, its weight depressed the ends of loose boards in the floor, causing a bale standing at their other ends to fall on and injure him; that the floor had been in bad repair for several years; but he denied that he knew of the defects in the floor, and, on his testimony, his ignorance of its condition was possible and reasonable. *Held*, that he had the right to submit to the jury the issue whether he was negligent or not.

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

This was an action by Frank Norman against the Wabash Railroad Company for personal injuries. At the trial the judge directed the jury to find for defendant, and judgment for defendant was entered on the verdict. Plaintiff brought error.

Frank Norman, the plaintiff in error and the plaintiff below, was employed by the Wabash Railroad Company, the defendant, in its freight sheds in Detroit. The freight sheds were divided into two parts by railway tracks. The north part was called the "city side" and the south part was called the "dock side." Norman's duties consisted of examining the tags or marks upon each package of merchandise and calling out the same to the checker, who made a record of them. This was done at the time when the packages were moved. The floor of the north side of the shed had been in bad condition for several years, the boards were loose and the floor, under pressure, sagged in the middle. The stringers under the boards were defective, and the foundations of

the floor were generally out of repair. The evidence for the plaintiff tended to show that Norman worked all the time on the dock or south side of the freight sheds, and that he was sent over to the city or north side at rare intervals only; that he did not know that the floor of the north side was in bad condition; that at 9 o'clock at night he went over to that side with a foreman and a truck to move bales of cotton which were standing against the wall; that, after having removed all but two of the bales, he and the truckman approached one of the two remaining bales, and pulled it down on to the truck; that Norman could not find the tag or mark on the upper part of the bale, and, in the dimly lighted building, stooped to find it below; that the foreman called to the truckman to pull the bale toward the middle of the shed in order that Norman might get more light; that the truckman did pull the bale several feet away from the bale which remained standing; that Norman kneeled to examine the lower part of the bale on the truck, when the remaining bale toppled and fell upon Norman's foot, inflicting a severe injury. The evidence tended to show that the weight of the loaded truck and the truckman on one end of the loose floor boards had depressed them, and thus lifted the bale at the other end of the boards, toppling it over. It was in evidence that the freight agent of the company and the division superintendent had visited the freight house, and had examined the condition of the floor. The foreman, called by the defendant, testified that the bale which ultimately fell upon Norman's foot had fallen before, and had been replaced by Norman, and that he then deliberately placed himself so near the bale that when it fell again it necessarily injured him. He also stated that Norman was sent into the north side of the freight sheds for an hour or two every day, and that he must have been there several hundred times. There was no evidence to show what the duties of the freight agent or of the division superintendent were, or that they were charged with the repair and preservation of the freight house. The circuit court, at the conclusion of the evidence, on a motion by the defendant, instructed the jury to return a verdict for defendant on the ground that the plaintiff was guilty of contributory negligence, because he had as full opportunity as the defendant to know the dangerous condition of the floor, and yet continued to work upon it without complaint.

E. S. Grece, for plaintiff.

Alfred Russell, for defendant.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The law governing the reciprocal duties of employer and employé with reference to the safe condition of the place where the employé is to work, or of the machinery and tools with which he is to do his work, is well settled. It is the duty of the employer to exercise ordinary care to provide and maintain a reasonably safe place in which the employé is to perform his services, so that the employé shall not be exposed to unnecessary and unreasonable risks. The employé has the right to presume, when directed to work in a particular place, that reasonable care has been exercised by his employer to see that the place is free from danger, and, in reliance upon such presumption, may discharge his duties in such place, unless there are obvious dangers which would lead a reasonably prudent employé either to refuse to work in the place, or to make complaint of the same to his master. If, however, the danger is not actually known to the employé, or would not become known to an employé of reasonable prudence performing the duties imposed on him, he cannot be charged with contributory negligence in the

happening of an injury to him by reason of the condition of the place in which he works.

The law on the subject has been most clearly and comprehensively stated by Judge Sanborn, speaking for the circuit court of appeals for the eighth circuit in the case of *Railway Co. v. Jarvi*, 10 U. S. App. 439, 3 C. C. A. 433, 53 Fed. 65. In that case the plaintiff was a miner, who was injured by the fall of a large stone from the roof of the mine, and the question was whether the plaintiff had been reckless in not discovering or knowing the dangerous condition of the roof from which the stone fell. The learned judge, speaking of the obligation upon the servant, says:

"He cannot recklessly expose himself to known danger, or to a danger which an ordinarily prudent and intelligent man would, in his situation, have apprehended, and then recover of the master for an injury which his own recklessness has caused. * * * But the degrees of care in the use of a place in which work is to be done, or in the use of other instrumentalities for its performance, required of the master and servant in a particular case may be, and generally are, widely different. Each is required to exercise that degree of care in the performance of his duty which a reasonably prudent person would use under like circumstances; but the circumstances in which the master is placed are generally so widely different from those surrounding the servant, and the primary duty of using care to furnish a reasonably safe place for others is so much higher than the duty of the servant to use reasonable care to protect himself in a case where the primary duty of providing a safe place or safe machinery rests on the master, that a reasonably prudent person would ordinarily use a higher degree of care to keep the place of work reasonably safe, if placed in the position of the master who furnished it than if placed in that of the servant who occupies it."

See, also, *Kane v. Railway Co.*, 128 U. S. 91-94, 9 Sup. Ct. 16; *Railroad Co. v. McDade*, 135 U. S. 554, 10 Sup. Ct. 1044; *Railroad Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590.

Coming to apply these principles to the evidence disclosed by this record, the first important fact is that the floor of the north side of the shed had been in bad repair for several years. The company must be presumed to have had knowledge of this, through its proper officers. The plaintiff denied that he knew of the defects in the floor, and testified that he had been so few times in the north side of the shed as to make his ignorance of its condition possible and reasonable. The fact that the foreman swears that Norman was every day in the north side of the sheds and had been there several hundred times, merely produces a conflict between the foreman and Norman, which it was for the jury to decide.

The case made by the evidence for the plaintiff therefore was this: He received an injury when working in the sheds of the defendant as its employé. His injury was caused by the defective condition of the floor. The defendant company knew of this defective condition. Norman did not know of it. If he did not know it, he had no reason to expect that the moving of the truck upon the floor would cause the remaining bale to fall, and therefore, to kneel where he did kneel was not a voluntary or negligent exposure of himself to obvious injury. Manifestly, plaintiff had the right to submit to the jury the issue whether he was negligent or not.

The judgment of the circuit court is reversed, with directions to order a new trial.

TEXAS & P. RY. CO. v. SCOVILLE.

(Circuit Court of Appeals, Fifth Circuit. May 22, 1894.)

No. 208.

MASTER AND SERVANT—LIABILITY TO THIRD PERSONS—WANTON AND MALICIOUS ACTS OF SERVANT.

The wanton and malicious use of the steam whistle of a locomotive, by servants of a railroad company who are in charge of the locomotive, while it is in motion on a regular or authorized run, is an act within the scope of their employment, so far as to charge the company with liability for injuries caused thereby. Locke, District Judge, dissenting.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

This was an action by P. A. Scoville against the Texas & Pacific Railway Company for damages for personal injuries. The circuit court overruled a demurrer to the petition, and rendered judgment for plaintiff. Defendant brought error.

T. J. Freeman, for plaintiff in error.

O. C. Leverett and R. C. De Graffenried, for defendant in error.

Before McCORMICK, Circuit Judge, and LOCKE, District Judge.

McCORMICK, Circuit Judge. P. A. Scoville, the defendant in error, brought this action against the Texas & Pacific Railway Company, the plaintiff in error, to recover damages for injuries he claimed to have received from the willful and wanton misconduct of its servants while engaged in its business. The part of his pleading pertinent to the questions raised on this writ of error is as follows:

"Plaintiff, for cause of action, alleges that on the 2d day of May, 1891, he was riding on horseback (returning home from Longview, Texas) along a public road running parallel with said railway of defendant company (said road on which plaintiff was so riding on horseback being about twenty-five yards south of said railway), and that defendant company, its agents and employes, knew or could have known of the existence of said public road, and its proximity to said defendant company's railway, the same having been used by the traveling public for the period of fifteen years for travel, and in full view of said railway company's agents and employes; that immediately south of the road on which plaintiff was riding was a fence; that while plaintiff was passing along said road, as above set forth and described, the place on said road on which he was riding as above indicated being about one-fourth of a mile from said town of Longview Junction, a point on said railway, a train of cars in charge of, and under the control of, the agents and employes of defendant company, while coming east from said Longview Junction, while nearing the plaintiff, and when directly opposite the plaintiff, the agents and employes of the defendant company, with the intention to frighten plaintiff's horse, commenced, and continued until some distance beyond plaintiff, to blow the whistle of the engine of said train of cars in a manner most calculated to frighten and render unmanageable horses and other domesticated animals; that the manner of blowing said whistle at the time and the place above mentioned was not called for nor demanded by any event or circumstances within the range of defendant company's legitimate business; that when the agents or employes of defendant company began to near, and until they were beyond, plaintiff's horse, they began to give, and continued to give, keen and frightful sounds, in quick and rapid succession, by means of the whistle, the immediate effect of which was to frighten the

plaintiff's horse, which he was then and there riding, causing his horse to leap and jump with him in the most violent manner; that, by reason of such violent capering and jumping of his horse, he, the plaintiff, was placed in great danger of being killed and greatly injured, and was seriously and permanently injured. Plaintiff states that the agents and employes of the defendant company saw the effect of said frightful noise on plaintiff's horse when the whistling commenced, and while the same was going on, and might have ceased making the same, and thereby prevented the said injuries, or greatly lessened the same, but for no legitimate purpose, willfully, knowingly, negligently, wantonly, and intentionally, and only for the purpose of gratifying a base curiosity and malignant spirit, they commenced and continued blowing said whistle in the most frightful manner of which they were capable."

The answer of the railway company is not brought up in the transcript, but it appears from the judgment of the circuit court that a general demurrer to the plaintiff's petition was overruled. Four errors are assigned, but each involves substantially the same question, which the counsel for the railway company, in his printed brief, propounds as follows:

"Is a master responsible for the willful, wanton, and malicious acts of his servants, not done for the master's benefit, and not within the scope of the employment of the servant, and not done by the authority or under the order of the master, but committed willfully, maliciously, and exclusively for the servant's private ends or malice?"

The counsel formulates his answer to his question thus:

"A master is not liable for the willful, wanton, malicious, and deliberate wrongs committed by the servant, not done on the master's account or to further his interest, but done willfully, maliciously, and exclusively for the servant's private ends or malice."

It will be observed that both the question and its answer, as propounded by counsel, are somewhat broader in their terms than the question strictly raised by the general demurrer to the pleading of the plaintiff. The question stated by counsel has exercised judicial inquiry and deliberation from the earliest times. In the often-quoted case of *McManus v. Crickett*, 1 East, 106, decided in the first year of this century, Lord Kenyon said:

"It is a question of very general concern, and has been often canvassed, but I hope at last it will be at rest. * * * When a servant quits sight of the object for which he is employed, and without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and his master will not be answerable for such acts."

In the familiar case of *Wright v. Wilcox*, 19 Wend. 343, Judge Cowen says:

"The line where the master's liability shall terminate must be placed somewhere, and the acquiescence of Westminster Hall for many years on the rule we have cited, as laid down by Lord Kenyon, is an evidence of the common law not to be resisted, especially as it will not be found, I imagine, to conflict with any general principle of that law."

In *Isaacs v. Railroad Co.*, 47 N. Y. 122, Judge Allen, in referring to the case of *Hibbard v. Railroad Co.*, 15 N. Y. 455, says:

"Some of the expressions in the opinions of the judges * * * are open to criticism, as not in harmony with the later authorities, and would not probably be regarded as sound, although they are supported by the earlier

cases and by the elementary authorities;" citing *McManus v. Crickett* and the authorities therein cited, and *Wright v. Wilcox*.

In *Howe v. Newmarch*, 12 Allen, 49, it was held that if the act was done by the servant in the execution of the authority given him by his master, and for the purpose of performing what the master had directed, the master will be responsible, whether the wrong done be occasioned by negligence, or by a wanton and reckless purpose to accomplish the master's business in an unlawful manner.

In *Wallace v. Navigation Co.*, 134 Mass. 95, it is said:

"The instruction given treats the defendant as exonerated from responsibility if the act done by its servant was wanton and malicious, and disregards the inquiry whether he was acting under the general authority of the defendant, as master, and for the purpose of doing its work. There are respectable authorities, certainly, such as *Turnpike Co. v. Vanderbilt*, 1 Hill, 480, and *Wright v. Wilcox*, 19 Wend. 343, which hold that where the acts of a servant are willful the master is not responsible, even if they are done in the performance of his business, because such willful acts are held to be a departure from the master's business."

The court then cites *Howe v. Newmarch*, supra, as holding that the act being willful or malicious is not sufficient to effect a departure from the master's business, and says that case has been since repeatedly recognized, and seems to express the true rule to which it relates.

In *Rounds v. Railroad Co.*, 64 N. Y. 129, it is said:

"It is quite useless to attempt to reconcile all the cases. The discrepancy between them arises, not so much from a difference of opinion as to the rule of law on the subject, as from its application to the facts of a given case."

Strong as was Lord Kenyon's hope that he had put the question at rest, and reluctant as have been Westminster Hall and the courts of last resort in this country to pass the line he set to terminate the master's liability, an examination of the cases shows that the most enlightened and conservative courts no longer hold that a willful and malicious purpose is *prima facie* a departure from the master's business. It will be conceded that, as to passengers on railroads, the line drawn by Lord Kenyon does not now receive the sanction of the courts. It is sometimes contended that this departure results from the contract between the passenger and the carrier, and the reasoning to support the decisions declining to follow the earlier cases often gives emphasis to this feature. No such feature, however, is present in the case of *Wallace v. Navigation Co.*, nor in *Howe v. Newmarch*; and while perhaps most of the cases have presented that feature, and counsel and judges have become so familiar with it that it readily occurs to the minds of both, and often finds expression, it will be found that the cases are few where, in recent years, recovery has been denied strictly on the ground that, as to persons not passengers, public carriers are not liable for the willful or malicious acts of their servants in the use of the instruments of carriage committed to their control in the conduct of such carriage or business. There are some such cases. The most recent of such that I have examined, and one bearing close analogy to the case we have at bar, is *Stephenson v. Southern Pac. Co.* (Cal.) 29 Pac. 234.

In the case of *Railroad Co. v. Derby*, 14 How. 468, it is said:

"Although, among the numerous cases on this subject, some may be found in which the courts have made some nice distinctions, which are rather subtle and astute, as to when the servant may be said to be acting in the employ of his master, yet we find no case which asserts the doctrine that a master is not liable for the acts of a servant in his employment, when the particular act causing the injury was done in disregard of the general orders or special command of the master. Such a qualification of the maxim *respondeat superior* would in a measure nullify it. A large proportion of the accidents on railroads are caused by the negligence of the servants or agents of the company. Nothing but the most stringent enforcement of discipline, and the most exact and perfect obedience to every rule and order emanating from a superior, can insure safety to life and property. The intrusting such a powerful and dangerous engine as a locomotive to one who will not submit to control and render implicit obedience to orders is itself an act of negligence,—the *causa causans* of the mischief,—while the proximate cause, or the *ipsa negligentia*, which produces it, may truly be said in most cases to be the disobedience of orders by the servants so intrusted. If such disobedience could be set up by a railroad company as a defense, when charged with negligence, the remedy of the injured party would in most cases be illusive, discipline would be relaxed, and the danger to the life and limb of the traveler greatly enhanced."

Only negligent misconduct was involved in the case just cited; hence, the language of the court is limited to negligence. The party injured was traveling by railroad; and it may be insisted that only such travelers, and by the railroad sought to be charged, were in contemplation of the court. The whole text of the opinion shows that its logic has a larger scope. The injury was not caused by the negligence or other misconduct of the servants engaged in carrying this traveler. His right to recover damages was expressly held to be independent of any contract for carriage. One who has such a contract may found, in part at least, his right to recover on the contract to carry safely. But the maxim of *respondeat superior* is wholly irrespective of any contract, expressed or implied, or any other relation, between the injured party and the master.

In the case of *Culp v. Railroad Co.*, 17 Kan. 475, it appears that the plaintiff was traveling in his private wagon, drawn by his own team of horses, on the public highway, near a station on the defendant's road, at the time when a train of its cars was standing there on its track; that the servants of the company, carelessly, unnecessarily, and with gross negligence, caused the steam whistle to be blown with great violence, at which the plaintiff's team took fright, ran, and the plaintiff was injured. A demurrer to the petition was sustained by the trial judge, which on appeal was held to be error. In delivering the opinion of the court, Judge Brewer said:

"These acts [sounding the whistle, and causing steam to escape, etc.], which at times are legal and necessary, may be done without any necessity therefor, out of mere heedlessness and negligence, or with a wanton and criminal intent to do wrong. * * * In this case, while the defendant might, under some circumstances, lawfully, and without subjecting itself to responsibility for injuries resulting therefrom, cause the whistle to be blown, * * * yet the same act, done without any necessity therefor,—done negligently and heedlessly,—might render the defendant responsible for all injuries caused thereby. [Citing] *Railway Co. v. Harmon*, 47 Ill. 298. *Sic utere*

tuo ut alienum non laedas' regulates the conduct and determines the liability of corporations, as of individuals."

In the case cited by Judge Brewer the trial court had charged the jury:

"If defendants' engineer, with intent to frighten plaintiff's horses, unnecessarily and wantonly let off steam or blew a whistle, so that plaintiff's horses ran off and injured him, defendants are guilty. Malice in the engineer need not be proved positively, but may be inferred."

—And refused the defendant's request to charge:

"If the injury was caused by the willful and malicious act of the agent of the defendants, the defendant is not liable."

There was a verdict and judgment for plaintiff, which was affirmed on appeal. In a well-considered opinion, replete with sound reasoning, that court, in conclusion, uses this language:

"When employed in the discharge of his duty, or while engaged in operating their engines and machinery on their road, if he uses such agencies in an unskillful manner, or so negligently as to occasion injury to another, or even if, while so engaged, he willfully perverts such agencies to the purpose of wanton mischief and injury, the company should respond in damages."

In the case brought to us by this writ of error the engineer and fireman in charge of the locomotive engine were driving it on the tracks of the company, pulling a regular train of cars, running on schedule time, charged to sound the whistle frequently, with blasts differing in time and tone, according to the signal to be given or the purpose served. If injury had resulted from failure to sound it at the required times and in the required way, the company might have been held liable. If unnecessarily and negligently sounded,—as, for instance, when the train was standing where it should be, and was not about to start, or the time had not arrived for giving the signal to start,—and an injury had resulted from such act or omission, for such negligence the company would be liable. As was aptly said by the supreme court of Illinois, the result to the party injured is the same whether it is the effect of negligence, or from wanton and willful purpose. The malice pleaded in this case is only that which the law implies from an act of wanton cruelty. We are in danger of refining too much when we attempt to distinguish between a negligent and a wanton or malicious use of the steam whistle of a locomotive engine in charge of the proper servants of the company, while engaged in pulling its regular trains, moving at schedule rate, on schedule time, under direct, constant telegraphic orders. If it is contended that in this act the servants were not in the master's service, because not employed to blow the whistle wantonly and maliciously to frighten travelers or their horses, that contention is fully answered by the supreme court of Illinois,—that these servants are not employed to do any negligent or unlawful act, and such a test would exempt the company from liability from all affirmative acts of these servants violating the rights of others. *Railway Co. v. Harmon*, 47 Ill. 298; *Railroad Co. v. Dickson*, 63 Ill. 151. It is conceded that, in case of passengers receiving injury from the action of the servants of the railroad company, no such distinction between negligent and wanton and

malicious conduct obtains. It is contended that in such cases the corporation is held because of its contract to carry safely. That is one reason, and a cogent one, for holding the company in such cases, but it is only one of the grounds for so holding. If public policy and safety require that carriers who undertake to convey persons by the powerful, but dangerous, agency of steam, shall be held to the greatest possible care and diligence, and, whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance, or the negligence of carriers' agents, or their wanton malice, the same public policy and safety demand that these all-pervading corporations, who commit to the custody and use of their servants, in such great numbers, these terrible expressions of the powerful and dangerous agency of steam, shall maintain discipline in their ranks, and, by the utmost care and diligence, protect the public, not only from its negligent use, but from its wanton or malicious use, by these servants, to the hurt of any one in the lawful enjoyment of the state's peace. To say the engineer and fireman who have charge of the locomotive on a regular run may, while so running it, so blow the whistle, wantonly and maliciously, that by their manner of blowing it and motive for blowing it, in the indulgence of their love of mischief or other evil motive, they separate themselves, in and by that act, and for that instant, from the company's service, is to refine beyond the line of safety and of sound reason. Public policy and safety require that the use of the steam whistle by those servants who are in charge of the locomotive, and while the locomotive is in motion on its regular or authorized runs, should be held to be done within the scope of the employment of those servants, so far as to charge the company with liability therefor. The rule propounded by the plaintiff in error, so far as it is sound, does not reach the case. In my opinion the judgment of the circuit court should be affirmed.

PARDEE, Circuit Judge, being recused, this case was heard by Judges McCORMICK and LOCKE, who differing in opinion as to the law of the case, the judgment of the circuit court is affirmed by a divided court.

CRAFT v. NORTHERN PAC. R. CO.

(Circuit Court, D. Oregon. August 13, 1894.)

No. 2,044.

1. MASTER AND SERVANT—NEGLIGENCE—DEATH OF EMPLOYEE—EVIDENCE.

In an action against a railroad company for the death of plaintiff's intestate, evidence that deceased could have been seen in time to avoid running over him, and that the engineer was probably asleep, is sufficient to sustain a verdict of negligence.

2. SAME—CONTRIBUTORY NEGLIGENCE.

The fact that a railroad employe was walking on the track when killed is not conclusive of his negligence.

8. PROVINCE OF JURY—CREDIBILITY OF WITNESSES.

Under Code Or. § 683, making the jury exclusive judges of the credibility of witnesses, they may disregard uncontradicted testimony, where it is unsatisfactory to their minds.

Action by Julia Craft, administratrix of the estate of Benjamin P. Craft, deceased, against the Northern Pacific Railroad Company. There was a verdict for plaintiff, and defendant moves for a new trial. Denied.

E. B. Watson and B. B. Beekman, for plaintiff.

Joseph Simon, for defendant.

BELLINGER, District Judge. This is an action for damages for the death, through defendant's negligence, of Benjamin P. Craft, son of the plaintiff, who brings the action as administratrix of his estate. The jury found a verdict for plaintiff in the sum of \$3,320. Defendant moves for a new trial on the ground that the evidence is insufficient to sustain the verdict. The deceased was a car counter for the defendant on the terminal grounds in this city. He was run over and killed by an engine in the yards of the company early in the morning of August 15, 1893. He was last seen alive about 1:30 on that morning, some three or four hundred feet north of the depot, in this city, going north on the platform along the track, carrying a lighted lantern. The accident occurred about 2 o'clock, or a little after, near the spot where the deceased was last seen, about 50 feet north of such place, according to the testimony of the witness who last saw him alive. The engine that ran over Craft came into the station about 12:45 that night with a train, and shortly afterwards went north to the coal bunkers, not quite a quarter of a mile from the depot, to coal up. Having done this, the engine started back to the depot. Stapleton was the engineer in charge. A switchman named Berry and a watchman named Cobb accompanied the engine. A platform extends from the depot to a point a little north of where Craft was struck. About 200 feet south of the north end of this platform is a switch leading to the roundhouse. It was Berry's habit, when coming up from the coal bunkers with an engine, to jump off the engine after reaching the platform, and run ahead, and throw this roundhouse switch. On this occasion he jumped off at a point about 50 feet south of the north end of the depot platform, and ran ahead to the switch,—a distance of about 150 feet. He had reached the switch, and taken hold of it, when he heard somebody halloo, and, looking in that direction, saw a man on the end of the pilot of the engine, being pushed along. Berry hallooed twice to the engineer—calling him by name—to stop the engine. The engine was stopped shortly after this, when Berry, jumping upon it, laid his hand on the engineer, saying, "Stapleton, the engine has run over a man." At this time the engineer was sitting in his seat, but, upon being accosted by Berry in this way, he threw his legs around the lever, and got down off the engine. Cobb was in the act of getting off the engine when Berry got on. According to Berry's statement, the engineer did not have hold of the lever when he, Berry, took hold of him. The man on the pilot passed under the

engine just after Berry heard the halloo and saw him. The dead body of Craft was afterwards found on the track at this point. It appeared from an examination of the track that deceased was struck about 150 feet from where his body was found. His lantern was picked up near the place where he was first struck. It was lying alongside of the track, unbroken, but with the light out. The engine had a large headlight, which was burning when the accident occurred. There was also an electric light at the depot, probably three or four hundred feet distant. The engineer testified that he could have seen a man lying on the track a distance of 50 feet, if the headlight was thrown straight on the track. A man standing or walking on the track could be seen further. The track curves before reaching the point where the deceased was struck, but there is nothing tending to show that the ability of those on the engine to see far enough ahead to have noticed a person lying or walking on the track in time to have stopped the engine was in the least affected by the curve. There is a clear, unobstructed view for a distance of 100 feet from where deceased was struck, and the light must have been reflected upon the track at least a considerable part of this distance. The engineer testifies that the engine was running about four miles an hour. At least her speed was slow enough to permit the switchman to jump off, and run ahead to the switch. The deceased had made arrangements to go on his vacation, for a month, on the next day. He had taken some beer during the evening, and there is testimony to the effect that he was more or less intoxicated. One witness, an employé, met deceased about 11:45. They had one glass of beer together. He saw deceased eat his lunch about 12:30, and was the last person to see him alive, as he went down the platform with his lantern about 1:30 in the morning. This witness says deceased was pretty full, but that he was able to do his work; that he staggered a couple of times, and bumped against the witness, as they crossed the street together. Another witness says he saw deceased, about 12 o'clock, walking between the witness just referred to and a Mr. Tucker, and that he was jogging first against one and then the other; that he seemed to be a little unsteady on his feet. This Mr. Tucker was also a witness, and he testified that he had one glass of beer with deceased; that he could not see anything wrong with him, and could not swear that he was under the influence of liquor. When pressed by the attorney for the company, he said, in answer to a leading question, that deceased was "slightly intoxicated." All these witnesses are in the service of the company. There was testimony to the effect that near where deceased was struck there were indications of some one having vomited. Berry, the switchman, testifies that he rang the engine bell up to the time he got off the engine, and the engineer testifies to the same thing.

Upon these facts it is contended that there is no evidence tending to prove negligence on the part of the company, and that it conclusively appears that the accident was the result of the negligence of the deceased, or at least was contributed to by negligence on his part. The deceased was last seen about one-half hour before the accident. He was then in the vicinity of where the accident oc-

curred, and was walking on the platform, going north. The theory of the defense is that he became sick, and fell or lay down on the track where he was struck. This is not a necessary inference from the evidence, and the jury was not required to adopt it. It is not for the court to determine as to the probabilities. That is for the jury. The alleged intoxication of deceased, and the evidence of sickness, were proper to be considered; but neither the evidence of those facts, nor the facts themselves, are such as to preclude the jury from finding as it did. Neither of the witnesses as to the intoxication of the deceased seemed to regard it as in any way interfering with the proper discharge of his duties. He ate his lunch at 12:30, no indications of which were found in what is claimed to have come from his stomach not longer than one and a half hours thereafter. If he was so much intoxicated that he fell helpless upon the track within 50 feet of where he was last seen, his intoxication must have been so gross as to render him incapable of rational talk or action at the time he is described as walking up the platform with his lighted lantern, seemingly capable of doing his work all right, and just after he had talked "rationally enough" with one of the witnesses whose testimony is relied upon to prove his intoxication. True, he may have gone into a saloon further up the track, but there is no presumption that he did so. The jury was not only not required to find that deceased was lying upon the track when struck, but such a finding would have been against the strong probabilities. Had he been lying upon the track, he would probably have been run over on the spot, and would not have been seen at the end of the pilot, being pushed along 150 feet further south, hallooing loud enough to attract Berry's attention. The testimony warrants the inference that the deceased went up the track from where he was last seen about some of his usual duties, and that he was returning along the track. Having come from a direction where there was no platform, he might naturally continue along the track for a short distance after reaching the point to which the platform extended. While thus walking with his back to the approaching engine, he was overtaken by it. The inference is also warranted that the engineer was asleep in his seat, or partially so, or was otherwise incapable of properly attending to his duties. A wide-awake man, looking ahead, must have seen deceased, whether he was walking upon the track or lying across it. There must have been something unusual in the conduct of the engineer, that caused the switchman to jump upon the engine, and lay hold of him, and say, "Stapleton, the engine has run over a man." The engine had stopped, but the engineer did not move. He did not even have hold of the lever, as he would likely have had, had he; and not Cobb, stopped the engine. The testimony of the switchman has a significant bearing upon this part of the case. The witness could not be got to say that Stapleton was asleep, and that Cobb was running the engine. But the way in which he avoids saying it is suggestive of the fact that such was the case. Cobb was in a position to know about the facts of the accident. If the engineer was sleeping in his seat, Cobb probably knows it. He knows whether he or the engineer stopped the engine. It was stated in court, upon in-

formation furnished by Stapleton, that Cobb was in the service of the defendant at Tacoma; but his whereabouts were not disclosed to the company's attorney, who inquired at its office in this city for the purpose of finding him. The absence of Cobb creates an impression unfavorable to the defense. The probabilities are that Stapleton was asleep; that when Berry heard the cry of deceased, and hallooed to the engineer, Cobb stopped the engine; and that deceased was run over while walking along the track in the same direction the engine was going. Such, in my opinion, are the probabilities of the case, but probabilities are not required. It is enough if the facts warrant such inferences as will sustain a finding of negligence against the defendant. The fact that deceased could have been seen in time to avoid running over him is evidence sufficient to sustain a verdict of negligence. *Railroad Co. v. Patterson* (Colo. App.) 36 Pac. 913; *Felch v. Railroad Co.* (N. H.) 29 Atl. 557. The fact that the deceased was walking upon the track is not conclusive of his negligence. It is a fact for the jury to find from, not one to authorize a judgment by the court.

It is argued with much force that at least the deceased must be conclusively presumed to have been guilty of contributory negligence, since the uncontradicted evidence is that the engine bell was rung, and that this bell could be heard for a long distance. If the bell was rung, the deceased must have heard it, and hence must have been guilty of negligence in remaining on the track, or if, for any reason, he could not hear, he was guilty of such negligence in placing himself where he could not be warned of the approach of an engine. The switchman, Berry, and the engineer, Stapleton, both swear that the bell was rung. There is nothing to contradict this testimony. But suppose, nevertheless, the jury refuse to believe the testimony. This, it must be assumed from the verdict, is what they have done. It is the province of the jury to pass upon the credibility of all witnesses, whether they are contradicted or not; and, while a witness is presumed to speak the truth, the manner in which he testifies, or the character of his testimony, is sufficient to overcome that presumption. Code Or. § 683. The jury are not bound to find in conformity with the declarations of any number of witnesses, which do not produce conviction in their minds, against a presumption or other evidence satisfying their minds. *Id.* § 845. It must not be assumed that this right of a jury to disregard the testimony of any number of witnesses is a right to be arbitrarily or wantonly exercised. If it should be unreasonably exercised, it would become the duty of the court to correct the injury done in the particular case by setting aside the verdict. In this case, what has already been said as to Stapleton justified the jury in disregarding his testimony. There was enough in the manner in which Berry testified to lead the jury to distrust him, where a question of his own failure of duty was involved. He was an interested witness, beyond the interest which his employment and its consequent duty involved. He has every inducement that can exist, where the question is one of responsibility for the death of a fellow workman, to shield himself from blame. The distance from the coal bunkers to where Berry got off was comparatively short,

and since he expected to get off, and run ahead to the switch, he may have been occupied with this object, and omitted to ring the bell. He says he always watched out when he struck the platform, so as to get off, and does not remember whether anybody rang the bell after he got off. This tends to show that the matter of ringing the bell was not regarded as of the first importance. The greater care was in looking out for switches. I think it probable that the bell was not rung on the return from the coal bunkers, notwithstanding Berry's statement that it was. However that may be, if the jury concluded that the bell was not rung, as they must have done, and my own belief was otherwise, I should not, in view of the facts in the case, feel justified in setting the verdict aside on that account. The motion for a new trial is denied.

WEEBER v. UNITED STATES.

(Circuit Court, D. Colorado. June 15, 1894.)

No. 2,657.

POST OFFICE—USE OF MAILS TO DEFRAUD—INDICTMENT.

In an indictment under Rev. St. § 5480, as amended by Act March 2, 1889, for sending by mail a letter in execution of a scheme to defraud, it is sufficient to allege facts showing that defendant, having devised a scheme to defraud, in the execution of that scheme, and as a necessary or convenient step therein, transmitted through the post office a letter used, or designed to be used, to carry that scheme into effect. It is immaterial that such use of the mails did not result as intended, and was not likely so to result, or that it was only one step in a series of acts intended to accomplish the fraudulent scheme.

In Error to the District Court of the United States for the District of Colorado.

This was an indictment against William J. Weeber for sending through the mail a letter in execution of a scheme to defraud. Defendant was convicted, and brought error.

Charles D. May, for plaintiff in error.

H. V. Johnson, U. S. Dist. Atty.

Before BREWER, Circuit Justice, and CALDWELL and SANBORN, Circuit Judges.

BREWER, Circuit Justice. Section 5480, Rev. St., as amended by the act of March 2, 1889 (25 Stat. 873), so far as is material, provides that:

"If any person having devised or intending to devise any scheme or artifice to defraud * * * to be effected by either opening or intending to open correspondence or communication with any person whether resident within or outside the United States, by means of the post office establishment of the United States, or by inciting such other person or any person to open communication with the person so devising or intending, shall in and for executing such scheme or artifice or attempting to do so, place or cause to be placed any letter * * * in any post office * * * to be sent or delivered

by the said post office establishment, or shall take or receive any such therefrom, such person so misusing the post office establishment shall upon conviction," etc.

Congress has power to provide what shall be carried in the mails, and for what purpose the post office shall be used, and to punish any one for a violation of its provisions in respect thereto. *Ex parte Jackson*, 96 U. S. 727; *In re Rapier*, 143 U. S. 110, 12 Sup. Ct. 374.

The indictment before us charges a scheme to defraud, to be effected by means of a correspondence through the post office establishment, and that in executing such scheme the defendant placed a letter in the post office, and subsequently received it therefrom. The scheme, briefly stated, is this: Stephens was not in fact indebted to Kearney. Kearney pretended to have a claim against Stephens, and placed it in defendant's hands for collection. A suit was pending in the federal court by the United States against Stephens et al. for the recovery of moneys alleged to be due for lumber taken off government lands. The defendant caused to be passed through the mails a letter purporting to be from the United States district attorney to himself, in reference to the furnishing of testimony tending to show Stephens liable to the government, and then caused the letter thus passing through the post office to be sent, by one apparently a stranger, to Stephens, the intention and expectation being that thereby Stephens would be frightened—blackmailed—into paying the claim of Kearney, in defendant's hands for collection, in order to prevent any disclosures by defendant to the United States district attorney. Now, that the post office was used to carry this letter; that the defendant was the one who thus used the post office for the transmission of the letter,—is plainly alleged. That there was a scheme or artifice to defraud is charged, and, indeed, is obvious. The allegation is specific that defendant intended and expected, by this scheme, to compel Stephens to pay this claim of Kearney, which claim was fictitious and fraudulent. There is charged a wrongful use of the mails,—a purpose of defrauding Stephens,—and that this use of the mails was to aid in carrying into effect that scheme or artifice of defendant. That it did not result as intended—that it did not frighten or compel Stephens to pay the claim—is immaterial. That it was uncertain, even exceedingly doubtful, whether Stephens or any other man would be frightened by such a scheme, is also immaterial. The criminality of the defendant does not rest upon the probabilities of the success of a scheme, or upon the fact of success, nor is it avoided by the fact that the act of using the mails is only one step in a series of acts intended to accomplish the fraudulent scheme. It is enough that the defendant, having devised a scheme to defraud, in the execution of that scheme, and as a necessary or convenient step in the execution thereof, transmits through the post office a letter used, or designed to be used, for the purpose of carrying that scheme into effect. I think the indictment is sufficient.

CALDWELL, Circuit Judge. I submitted the record and briefs in this case to Mr. Justice BREWER, who gave the same a patient and careful examination, and his views are expressed in the foregoing

opinion. Circuit Judge SANBORN and myself had previously arrived at the same conclusion.

The other assignments of error have been carefully examined and considered, and found to be without merit.

The result is that the judgment of the lower court must be affirmed.

APPLETON et al. v. ECAUBERT.

(Circuit Court, E. D. New York. April 19, 1894.)

1. PATENTS—WHO ENTITLED—PRIORITY OF INVENTION.

In a suit between owners of rival patents, each praying cancellation of the other's patent under Rev. St. § 4898, the evidence was substantially the same as that in interference proceedings in the patent office, in which priority had been awarded to complainant's assignor, who was shown to have been the first to embody the invention in a perfected machine, as against defendant, whose only prior effort was an abandoned experiment, and who, if he had previously conceived of the invention, as he testified, did not reduce it to practice, but remained for years inactive, without adequate excuse. *Held*, that the issue must be determined in favor of complainant.

2. SAME.

The Ecaubert patent, No. 434,539, for a method of ornamenting watch-case centers and other like articles, canceled, as containing nothing patentable not covered by the prior invention of the Hofmann patent, No. 435,835.

This was a suit by Daniel Fuller Appleton and others against Frederic Ecaubert for cancellation of a patent.

On the 31st day of December, 1887, Adolph W. Hofmann, the assignor of Appleton et al., filed in the United States patent office an application for a patent for an improved method of ornamenting watch-case centers and other like articles, which application was, on the 11th day of January, 1889, put in interference with an application of Frederic Ecaubert, filed February 13, 1888, for a similar invention. Testimony was taken at large in the interference, and on the 2d day of August, 1890, final judgment of priority was rendered in favor of Hofmann by the commissioner of patents. While the interference was still pending, undetermined, Ecaubert filed a second application, covering the subject-matter at issue in the interference, which application was allowed to go to patent by the examiner after the decision in the interference case, and resulted in letters patent No. 434,539, dated August 19, 1890. On September 2, 1890, patent No. 435,835 issued upon the Hofmann application, and, on the 10th of September following, Appleton et al., as owners of the Hofmann patent, filed a bill in the eastern district of New York, under section 4898, Rev. St., against Ecaubert, as the owner of the Ecaubert patent, praying the cancellation of the latter patent. Ecaubert answered the bill, and filed a cross bill praying in turn the cancellation of the Hofmann patent.

The opinion of the commissioner of patents on appeal from the decision of the examiners in chief in the interference proceedings between Ecaubert and Hofmann was as follows:

Mitchell, Commissioner. This controversy relates to an improved method of ornamenting the peripheries of watch-case centers and other like articles; including also, as stated in the letter declaring the interference, the claims of the respective parties for combinations to carry into effect said method of ornamenting. Prior to the invention of the method in controversy watch-case centers had been ornamented by hand engraving. They had also been ornamented by a knurling process, in practicing which an engraved knurl or die roll was continuously rotated in contact with the outer face of the watch-case center, the latter being mounted upon a rotating

chuck. Another process was known as the "spinning process." The spinning process was invented and patented by Ecaubert, one of the parties to this controversy. In practicing it a matrix die was used, having a design or pattern upon its inner circumference. Into this matrix the watch-case center was placed, and then, by a small pressure roller revolving upon the inner face of the center, the latter was spun or expanded outward, so as to take the impression from the pattern on the inner circumference of the die. The matrix die was made in parts, so that it could be removed after the ornamentation was produced. The last method was somewhat expensive; the second, difficult to employ, and of restricted utility; and it is inferred from the testimony that the first method was the one more commonly in use when the present invention was introduced. The present method is expressed in the language of the issue as follows: "The improved method hereinbefore described of ornamenting the peripheries of watch-case centers or other like articles; the same consisting in holding the surface of an embossing die in contact with the surface of the article to be ornamented, imparting a reciprocating or reversing rotary movement to one of said surfaces, and at the same time laterally moving the point of contact of the die with the surface being ornamented, as set forth." The examiner, in declaring the interference, stated that the issue was covered by Ecaubert's first, second, and third claims, by Hofmann's first and second claims in Case A, and by Hofmann's single claim in Case B. Ecaubert's claims, thus declared to be in interference, are as follows: "(1) The combination, with the knurl or ornamenting wheel, and the mandrel and chuck or tool for holding the watch-case center or other article to be ornamented, of a shaft and adjustable crank pin, and a rod from the crank pin, connected with the mandrel, for turning the mandrel first in one direction and then in the other direction, substantially as set forth. (2) The combination, with the knurling tool and its holder, of a slide for supporting the same, a rack bar connected with the holder of the knurling tool, a pivot stud for connecting the holder and rack bar to the slide, a slide rest for supporting the slide, a base upon which the slide rest is supported, and a pinion at the center of the base, with which the rack bar comes into contact, substantially as set forth. (3) The combination, with the knurling tool and its holder, of a slide and slide rest, and a base upon which the knurling tool and its holder are supported, and a pivot at right angles to the axis of the knurling tool, connecting the holder to the slide, to allow the holder to be swung as the said knurling tool acts upon the convex surface of the watch-case center or other article perpendicularly, and without lateral slip, substantially as set forth." Hofmann's claims are as follows: "Case A. (1) The combination of a rotary embossing roll or die having an engraved periphery, a pivoted holder whereby said die may be inclined or moved laterally, a work holder or chuck, and means for imparting to said chuck reversing rotary movements of predetermined length, and thereby keeping the relief lines of the die in operative engagement with the impressions made by it in the case center or other article held by the chuck, as set forth. (2) The combination, with the embossing roll, its holding devices, and the chuck, b, of the gear, q, affixed to the shaft carrying said chuck, the rack, r, engaged with said gear, the countershaft, v, and the pitman, s, connecting said rack with an eccentric wrist pin on a crank wheel on the shaft, as set forth. Case B. The improved method hereinbefore described of ornamenting the peripheries of watch-case centers or other like articles; the same consisting in holding a portion of the surface of an embossing die in contact with the surface of the article to be ornamented, said portion being less in width than the entire width of the ornamenting surface of the die, imparting a reciprocating or reversing rotary movement to one of said surfaces, and at the same time laterally moving the point of contact of the die with the surface being ornamented, thereby laterally extending or widening the area of ornamentation, as set forth."

It will be noted that in declaring this interference the fact that a process is necessarily a different invention from a machine or apparatus (Ex parte Atwood, Com'rs' Dec. 1888, 74; Crane v. Merriam, 51 O. G. 1783) was ignored. But that fact may now be disregarded, as, in the event that Ecaubert should be found to be the first inventor of the process, his equal right with Hofmann to make a claim therefor would be undoubted, in view of the history

of the proceedings in the case. Hofmann's applications were first in the office, and the burden of proof is upon Ecaubert, under rule 116. In *Bruce v. Traver*, 43 MS. Dec. 260, the present commissioner said: "When the rule places the burden of proof upon the last applicant, it means precisely what it says. It announces to parties before the office that the last applicant must prove his case or fail. Nor is the rule an arbitrary one. It has its foundation in the same legal principle which finds expression in the maxim '*prior tempore potior jure*.' The senior party litigant has a right to expect that the rule will be applied, and that he may be absolutely silent until a *prima facie* case is made out against him." Has, then, Ecaubert proved that he was the first inventor (1) of the apparatus for practicing the process, and (2) of the process itself?

As to the apparatus for practicing the process:

Ecaubert testifies that in the year 1879 he made an ordinary watch-case maker's lathe, with a "gear wheel on the spindle, and a rack and an adjustable crank and countershaft," to make the spindle go backward and forward; that he intended to ornament watch-case bezels and watch-case centers by means of engraved rollers to be pressed against the article to be ornamented; that he used the common knurling quadrant which was in use at that date to support the engraved roller or milling wheel; that the apparatus was tried, and seemed to work satisfactorily, as far as concerned the reciprocating motion, but the milling wheel slipped sidewise, and injured the looks of the ornaments; that after this trial the parts, other than those constituting it "an ordinary watch-case maker's lathe," were taken off and stored away; and that he has since tried to get hold of them, but they could not be found. If all the testimony as to what was done in 1879 be credited, it must still be considered that this effort on the part of Ecaubert was nothing more than an abandoned experiment. Ecaubert himself testifies that the machine "was done away with, and did not remain in use," on account of the milling-wheel slipping over the article sidewise. Indeed, what was done is referred to by counsel for Ecaubert, in his brief, as "this experiment;" and, in the summing up of Ecaubert's argument at the close of the brief, it is only claimed that it constitutes evidence "that Ecaubert conceived the invention now in controversy in 1879." It does not appear, so far as I can ascertain from the record, that, from 1879 to the present time, Ecaubert has ever made or tried to make a machine containing the elements specified in his first claim—that is to say, the elements necessary to practice the process of the issue—without producing the backward and forward motion by hand. Nor did he make a model or a drawing, or even a sketch, until he came to apply for a patent. Meanwhile, in the early part of December, 1887, Hofmann conceived of the invention in controversy, applied for a patent on the 31st day of December, 1887, and before that time had a machine in operation for the practical knurling of gold watch-case centers for the market, which machine contained all the mechanical elements of the first claim of Ecaubert, and both claims of Hofmann's application, *Case A*. Subsequently, other machines were built, and a considerable industry came into being, based upon Hofmann's invention. I have not overlooked what was done by Ecaubert in 1885. It is not claimed on his behalf that he at that time built a machine capable of transforming the rotary motion of the countershaft into the backward and forward motion of the spindle. The bearing of what was done in 1885 upon the question of priority, as relates to the process, will be considered hereinafter. So far as the machine or apparatus is concerned, the question is simply whether Hofmann's *prima facie* case, based upon his earlier applications, preceded by actual reduction to practice, is overcome by an abandoned experiment of Ecaubert in 1879. Of course, there is but one answer to that question, which is that Ecaubert, not having proven either that he was the first to reduce to practice, or that he followed up his conception with diligence, has failed to discharge the obligation which the burden of proof placed upon him.

(2) As to the process:

The principal difference between Ecaubert's case, as it stands related to the process, from his case as it stands related to the apparatus or mechanism, arises upon the testimony relative to what was done in 1885 in the way of knurling watch-case centers upon a machine operated by pulling the

belt up and down by hand. It appears that in May, 1885, Ecaubert made a tool like that introduced in evidence, and marked "Ecaubert's Exhibit A," some of the parts of that exhibit being parts of the tool made at that time. Ecaubert says that he succeeded by means of this tool in "overcoming the slipping sidewise of the knurl on the articles to be ornamented." He further states that he knows he made this tool in 1885, for he says he delivered to Alfred Humbert, of Philadelphia, on May 20, 1885, a center-turning lathe combined with a pendent-turning lathe; that "this particular part that makes the knurl move sidewise, and holds the knurl in position, was made to be delivered with that center-turning lathe to the said Alfred Humbert;" that, after considering that he did not want this invention to become public property, he "took these particular parts off from the lathe, and substituted a regular knurling quadrant, of the ordinary kind;" that these "particular parts" remained in his shop from the time they were made, in 1885; that the knurling-tool, the stock that holds it, the V-slide, the rack connected to the stock, the stationary pinion, and the block below the bed, are the parts of the exhibit that were made in 1885, and that the other parts—the quadrant, plate, and stud, the handles, and the V-shaped-groove stock—were made in 1889, or, as he states it, "I made them only this year, 1889, simply because I wanted to show how it was to work." It is to be borne in mind that this machine made for Humbert was a machine having a continuous rotary motion, and designed to ornament watch-case centers by the second process already alluded to. It is to be borne in mind that Ecaubert testifies that the Exhibit A was "made to be delivered with that center-turning lathe to the said Alfred Humbert." Ecaubert's Record, Q. 19, p. 9. Exhibit A, therefore, was not made with special reference to the difficulty developed by the 1879 experiments in knurling by a backward and forward movement; but it was made to be used in knurling by the old and well-known rotary process; and any use, experimental or otherwise, of Exhibit A, in practicing the process of the issue, must have been incidental to the main purpose for which it was built.

All the testimony as to the practicing of the process in controversy in 1885 relates to the use of this Exhibit A in connection with the Humbert machine designed to practice the continuous rotation process. It should be remembered that after the Humbert machine was sent away the original of Exhibit A was in a dismantled condition, parts of it having been used in making the ordinary quadrant with which the machine was finally equipped. To be sure, some testimony is found in the record as to the use of parts of Exhibit A after the Humbert machine was shipped away; but, as will be seen hereinafter, it does not relate to the practicing of the present process. Wilhelm, who worked for Ecaubert continuously after 1880, testifies to the use of Exhibit A on the Humbert machine. He says, "By pulling the belt backward and forward, we rotated the spindle." This certainly looks like practicing the process. On cross-examination it distinctly appears that the backward and forward motion was to get "the impression all round," and that he "did rotate the work continuously" after he got "the impression all round." Now, a single complete rotation would be disastrous to the process in controversy. Wilhelm's testimony not only fails to show the practice of the process, but, so far as it goes, shows the contrary. A preliminary backward and forward motion is necessary to the continuous rotary process, but a single, complete rotation would be fatal to the forward and back process. As to what was done after Humbert's lathe was sent away, Wilhelm testifies as follows: "Question 17. Has any portion of Exhibit A been made use of, to your knowledge, in Mr. Ecaubert's shop, since the lathe was sent to Mr. Humbert's? Answer. Yes, sir. Q. 18. What was done with these parts? A. I used it for making barley-corn knurls to make dies with. Q. 19. About when was this? A. This was in the shop in which we are now. I could not state exactly when it was. May have been three years, or probably four years ago. Q. 20. Can you produce any such barley-corn knurl so made as referred to in your answer 18? A. I can. This is one of them. Q. 21. In making this knurl (Exhibit C), was there a rotary motion given to the same, or a backward and forward alternating motion? A. A rotary motion." This testimony shows that the use to which the remaining portion of Exhibit A was put after the lathe went

to Humbert did not involve the present process, nor anything like it. Ecaubert testified as follows as to what was done after the lathe was sent away: "Question. 26. Have you used any of the parts of Exhibit A that were made in 1885 for any purpose since the lathe was delivered to Mr. Humbert? Answer. Yes. Q. 27. What for, how, and where? A. In my own shop, for making fancy knurls. Q. 28. What were these fancy knurls for? A. I was making dies to spin watch-case centers in, and I was using the knurls. Q. 29. Have you, or not, at any time since 1885, made any watch-case centers, or similar article, by the use of any portion of Exhibit A, or experimented in that direction? A. Yes. Q. 30. Tell us, generally, what you did. A. I am not a watch-case maker myself; so, therefore, the work done with that device is limited to experimenting on brass watch-case centers to find out results." Undoubtedly, this testimony relates to the use of Exhibit A in making the knurls by rotary motion, as testified to by Wilhelm; and it is certainly probable that the brass watch-case centers were operated on, as Wilhelm testifies, by a back and forth motion, followed by a continuous rotary motion,—the old process. All that Ecaubert says is that Exhibit A was used in making "fancy knurls" and "brass watch-case centers" by some process, and that the work done by that device was "limited to experimenting on brass watch-case centers to find out results." I find nothing in Ecaubert's testimony unmistakably relating to the practice of the present process upon the Humbert lathe; and it may be said, generally, that, taking into consideration the testimony of the remaining witnesses for Ecaubert, I am unable to find credible evidence of the reduction to practice by Ecaubert of the process in controversy in 1885. Ecaubert distinctly states that what was done after the Humbert machine was sent away was experimental, which could hardly have been the case if there had been previous reduction to practice; and, although some of the witnesses may go further than Ecaubert, yet, upon the whole testimony, I cannot accept the theory that in connection with Exhibit A, which was made to go with a continuous rotary machine, the reciprocating process was carried to the point of reduction to practice as a completed invention. The principle applicable to the kind of testimony introduced by Ecaubert is laid down in the case of *Thayer v. Hart*, 28 O. G. 542, as follows: "The evidence of prior invention is usually entirely within the control of the party asserting it, and, so wide is the opportunity for deception or mistake, that the authorities are almost unanimous in holding that it must be established by proof clear, positive, and unequivocal. Nothing must be left to speculation or conjecture." Syllabus.

The only remaining question is whether reasonable diligence is proved on the part of Ecaubert, in reducing his process to practice. Reasonable diligence is established by satisfactory proof of affirmative action, and, within limits, by excuses for inaction. No attempt is made to prove affirmative action on the part of Ecaubert between 1885 and 1888, when he applied for a patent. The passage quoted herein from the testimony of Wilhelm (see answer to question 19) shows that what was done on Exhibit A after the lathe went to Humbert was "probably four years ago." His testimony was given in 1889, so that the barley-corn knurls were ornamented by Exhibit A in 1885. Besides, as has been seen, the process in controversy was not practiced in ornamenting the knurls. No attempt was made even to enlist the favorable interest of watch-case makers in the invention, although, at the same time, Ecaubert was endeavoring to have them adopt the spinning process. Nor are his excuses sufficient, in view of his continued inaction. He was not poor, his situation was favorable, and his opportunities were, almost literally speaking, daily. He obtained six patents between 1879 and 1887,—some of them relating to improvements in ornamenting watch-case centers,—and it is probable that he would have patented the present invention if he had perfected it. The excuse that prior to 1885 he had no knurling quadrant which would prevent the knurl from slipping sidewise must be held to be unavailing, in view of the fact that the quadrant made in 1885 was taken apart in the same year only to be reorganized in the year 1889, in connection with the taking of the testimony. The excuse that there was no known, satisfactory process of preventing the discoloration of the work resulting from the action of fire in the joining of the backs and caps indicates

rather that he did not think it worth while to patent the invention than that there was any uncontrollable obstacle in the way. Besides, this objection was equally applicable to the spinning process and to all mechanical processes, yet it did not prevent Ecaubert from displaying considerable, not to say great, energy in perfecting the spinning process, and in obtaining protection therefor. In *Agawam Co. v. Jordan*, 7 Wall. 583, the supreme court laid down the settled rule of law, stating that rule as follows: "The settled rule of law is that whoever first perfects a machine is entitled to the patent, and is the real inventor, although others may have previously had the idea, and made some experiments towards putting it in practice." To this settled rule a single exception is recognized, to wit, that, if the one first to conceive the invention was at the time using reasonable diligence in adapting and perfecting the same, he is to be recognized as the first inventor, although the second to conceive may have been the first to reduce to practice. *Reed v. Cutter*, 1 Story, 590, Fed. Cas. No. 11,645.

For reasons already given, I cannot find that Ecaubert first perfected the machine or the process, so as to come within the rule, or that he used reasonable diligence in adapting and perfecting the invention, so as to come within the exception. At the time when Hofmann entered the field, Ecaubert was not using reasonable diligence in adapting and perfecting his invention; but the indifference towards it which he had manifested for a long period prior thereto continued, so far as the record discloses, down to a period subsequent to the time when Hofmann had completed his machine, and applied for a patent. Effort is made to show that Hofmann derived his knowledge of the invention from Ecaubert. The burden is heavily upon Ecaubert to prove that such was the case. Hofmann denies that Ecaubert at any time spoke to him of any way of ornamenting the centers, except by the spinning process, and his denial is coextensive with the allegation. Hofmann also insists that it was knowledge of what he had done, and was doing that prompted Ecaubert to apply for a patent. If Ecaubert had obtained such knowledge, it would certainly explain why sudden action supervened upon years of inaction, delay, and indifference; but, in the view which I have taken of the case, it is not necessary to determine whether Ecaubert's applying for a patent when he did may not be otherwise explained. The decision of the examiners in chief is reversed, and adjudication of priority must be made in favor of Hofmann.

M. B. Philipp and Melville Church, for complainants.
Francis Forbes, for defendant.

COXE, District Judge. The question presented by this controversy is whether Frederic Ecaubert or Adolph W. Hofmann was the first to invent and perfect a method of ornamenting the peripheries of watch-case centers by holding the surface of an embossing die in contact with the surface to be ornamented, imparting a reciprocating motion to one of said surfaces, and at the same time moving laterally the point of contact of the die with the surface being ornamented. This question was argued, upon substantially the same facts, before Commissioner Mitchell, on an appeal from the examiners in chief, in interference proceedings, and a decision was reached in favor of Hofmann. That decision is reported in 52 O. G. 2107 (issue of September 30, 1890). It contains a statement of the salient points of the testimony, and is such a clear and full exposition of the facts and the law that additional statement is unnecessary. I do not think this decision is *res judicata*, but it is certainly entitled to great weight. *Wire Co. v. Stevenson*, 11 Fed. 155; *Shuter v. Davis*, 16 Fed. 564; *Swift v. Jenks*, 19 Fed. 641; *Box Co. v. Rogers*, 32 Fed. 695; *Smith v. Halkyard*, 16 Fed. 414; *Butterworth v. Hoe*, 112 U. S. 50, 5 Sup. Ct. 25; *Morgan v. Daniels*, 153 U. S. 120, 14 Sup. Ct. 772.

The commissioner finds that if Ecaubert conceived of the invention prior to December, 1887, he certainly did not reduce it to practice; that at the time Hofmann made his operative machine the whole matter was in a nebulous and experimental state, so far as Ecaubert was concerned. I see no reason to disagree with these conclusions. Though a commissioner's decision is entitled to respect and consideration in every controversy, particularly is this so when, as in the present cause, it comes from a lawyer of conceded ability, fairness and diligence. After giving considerable time to the consideration of the questions involved, I cannot resist the conclusion that the controversy was properly disposed of in the patent office, and that nothing has been presented since which will justify the court in setting aside the judgment then pronounced. The same argument which convinced the supreme court in the Telephone Cases (8 Sup. Ct. 778) seems equally persuasive here. Can it be that Ecaubert, familiar with patents as he undoubtedly was, if he had made an invention of conceded importance in 1879, or in 1885, would have remained inactive and taken no steps to secure the fruits of his genius for eight or even for two years? His excuses for this supineness are wholly inadequate, especially in view of the fact that during this period he took out several patents for comparatively trivial improvements in the same art. But, if it be conceded that the idea of the invention was clearly defined in his own mind, he certainly failed to embody it in a perfected machine. Hofmann was the first to do this. He made a simple but successful machine, and used it almost immediately in ornamenting centers for practical business purposes. With this issue of priority determined in favor of Hofmann there is nothing patentable left in the Ecaubert patent.

It follows that the complainants are entitled to the relief demanded in the bill.

ECAUBERT v. APPLETON et al.

(Circuit Court, S. D. New York. April 19, 1894.)

This was a suit by Frederic Ecaubert against Daniel Fuller Appleton and others for infringement of the patent to complainant, No. 434,539, brought after the commencement of a suit against him by defendants herein to cancel said patent (62 Fed. 742). The two causes were heard together. Complainant moved to strike out certain testimony taken by defendants.

COXE, District Judge. The foregoing considerations dispose of this cause also, which is an ordinary action of infringement. The bill is dismissed.

Note: As these causes have been decided upon the broad ground that if Ecaubert conceived of the invention before December, 1887, he had not succeeded in reducing it to practice until after Hofmann had made an operative machine, it seems unnecessary to pass, *seriatim*, upon the questions raised by the motions to strike out. In view of the fact that the actions were, practically, tried together, all the testimony complained of seems to have a bearing upon some of the issues presented. I am of the opinion that the testimony should not be stricken out, and this ruling may be put in any form which counsel for Ecaubert may suggest to enable him to present the questions on appeal.

THE THOMAS MELVILLE.

COUL v. LOUISIANA CONST. & IMP. CO.

(Circuit Court of Appeals, Fifth Circuit. May 22, 1894.)

No. 219.

1. WHARVES—DUES—VESSELS "ARRIVING FROM SEA."

Under the ordinance of the city of New Orleans of 1875, as amended in 1881, for collection of wharf dues, requiring ocean steamships "arriving from sea" and landing at any wharf in the city to pay a certain rate per ton for the first two months or less, and extra charges if remaining longer, such a vessel, so arriving and landing, and then departing for a coastwise port for part of her cargo, is liable for additional wharf dues on returning to New Orleans to finish loading and again departing, all within two months; the intention being apparent from other provisions of the ordinance that dues should be charged on each entry or trip of a vessel.

2. SAME—TONNAGE.

Such wharfage is to be computed on gross tonnage, as contemplated at the time of the ordinance and its amendments, not on the net tonnage basis subsequently adopted by act of congress (Act Aug. 5, 1882).

Appeal from the District Court of the United States for the Eastern District of Louisiana.

This was a libel by the Louisiana Construction & Improvement Company against the steamship Thomas Melville (J. Coul, claimant), for wharfage. The district court rendered a decree for libellant. Claimant appealed.

Henry P. Dart, for appellant.

J. R. Beckwith, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge. The Louisiana Construction & Improvement Company, a corporation created under and by virtue of the laws of the state of Louisiana, is the contractor and lessee of the public wharves and landing places of the city of New Orleans, and, as such lessee, in consideration of maintaining the wharves and landings and making other outlays in relation thereto, is entitled, under its contract with the city of New Orleans, to collect wharf dues from vessels using the wharves at the rates established by the ordinance of the city of New Orleans adopted January 19, 1875, as amended May 12, 1875, and again amended May 27, 1881.

Among other rates, the said ordinance as amended provides as follows:

"Section 1. Upon all ships and other decked vessels and steamships arriving from sea and landing or mooring at any wharf in the city, the charges shall be as follows: On 1,000 tons and under, 20 cents per ton; excess over 1,000 tons, 15 cents per ton; steamships in Gulf of Mexico trade, 15 cents per ton.

"Sec. 2. The same payments on ships or sail vessels shall be exacted as on steamships; and an extra charge of one-third these rates shall be paid by all sail vessels or steamships which may remain in port over two months, the same to be recovered before departure, and, if they remain over four months,

an additional charge of one-third these rates per term of two months from arrival to departure.

"Sec. 3. The wharfage dues on all steamboats shall be fixed as follows: Not over 5 days, 10 cents per ton; each day after, \$5 per day; boats arriving and departing more than once a week, 5 cents per ton each trip; boats laying up for repairs during the summer months to occupy such wharves as may not be required for shipping, for, thirty days or under, \$2 per day; all over thirty days, \$1 per day.

"Sec. 4. On barges, steamboat hulls used as barges, flatboats, and other licensed vessels employed regularly in transportation of merchandise on the Mississippi river, the wharfage rates shall be the same as charged now for steamboats in the same business, viz.: If in port eight days, 10 cents per ton; after said eight days, \$5 per day. Barges arriving and departing more than once a week shall pay only on each trip 5 cents per ton; provided, also, that this resolution shall not apply to barges, flatboats, and vessels that come to this port for a single trip, to be broken up or their use as carriers of merchandise to be discontinued at end of trip.

"Amended May 27, 1881, to take effect from and after May 29, 1881: Ocean steamships shall pay at the rate of 15 cents per ton for the first two months or less. Ocean vessels arriving in ballast shall not be charged wharfage during that time they may be engaged in unloading, but which period shall not exceed five days from time of arrival; provided, said ballast be sold to the city or wharf lessees. Vessels arriving in ballast, and loading exclusively with grain, shall not pay more than five cents per ton for the first fifteen days, and one-third of one cent per day each additional lay day."

The present case is an appeal from a decree of the district court on a libel brought by the Louisiana Construction & Improvement Company, claiming wharf dues from the ocean steamship Thomas Melville, and presents two questions, both dependent upon the interpretation to be given to the city ordinance as above quoted: (1) Is an ocean steamship which arrives from sea, lands at a city wharf, and then departs for a coastwise port for part of cargo liable for additional wharf dues when she returns to New Orleans to finish loading, and again departs, all within two months? (2) Is the wharfage due from ocean steamships to be computed upon the basis of the gross tonnage, or upon the net tonnage?

The facts are not in dispute. The proof shows that the Thomas Melville was an ocean steamship, with gross tonnage of 1,706 tons, underdeck tonnage 1,573 tons, net tonnage 1,066 tons. She arrived in the port of New Orleans, and went to the wharf to unload a cargo of fruit and sulphur from the Mediterranean, on January 23, 1893, where she remained until February 1, 1893, when, having discharged her cargo, she cleared from New Orleans for Galveston, Tex. At Galveston she took on cargo, returning to the port of New Orleans on the 10th of February, 1893, landing at another wharf than that previously occupied, and there taking on cargo until March 8, 1893, when she cleared and sailed for a foreign port. She paid the wharfage dues on her departure for Galveston, but refused to pay the wharfage dues for the use of the wharf on the second entry, following her voyage from Galveston. The libellant demanded pay for this last use of the wharf, which the steamship refused, on the ground that, both voyages having terminated in 40 days from the date of her arrival from the Med-

iterranean, the ship was liable to only one charge for both voyages and both moorings at the wharf.

1. So far as the use of the wharves is concerned, the clearance and departure of the Thomas Melville for the port of Galveston, although to take on only a portion of her intended cargo, was the entrance upon a distinct voyage; and, on her return from Galveston to the port of New Orleans, she was again "a vessel arriving from sea," without any necessary connection with her former entry into the same port. The ordinance is framed with the apparent intention that, on each entry or trip of a boat or vessel, wharfage dues shall be charged and collected; for, in relation to those vessels which were expected to arrive and depart more than once a week, the ordinance was careful to provide for a reduced wharfage; for instance:

"Boats arriving and departing more than once a week, five cents per ton each week." "Barges arriving and departing more than once a week shall pay only on each trip 5 cents per ton." "Vessels arriving in ballast, and loading exclusively with grain, shall not pay more than five cents per ton for the first fifteen days, and one-third of one cent per day each additional lay day."

We think a fair interpretation of the ordinance is that a vessel arriving from sea shall pay wharfage dues for each entry, irrespective of the length of time she may occupy the wharves.

2. The word "ton," in the ordinance and amendments thereto controlling this case, as applied to the measurement of vessels, has a certain definite meaning, well settled by custom and by the navigation laws of the United States, and it means 100 cubic feet of interior space. The entire cubic contents of the interior space, numbered in tons, is called the "gross tonnage." When, from the entire cubic contents of the interior of a vessel, there are deducted the spaces occupied by the crew and by propelling machinery, the remainder, numbered in tons, is called the "net tonnage." When the ordinance and amendments thereto in question were adopted, the navigation and customs laws of the United States dealt only with gross tonnage; and, at the same time, canal tolls in the state of Louisiana and general charges for towage and dock services were based upon gross tonnage. There is every reason to conclude—in fact it is not seriously disputed—that, at the time of the ordinance and amendments referred to, gross tonnage was contemplated and intended as a basis upon which wharf dues were to be charged and collected. Since the adoption of the said ordinances, there has been no expression upon the part of the city of New Orleans that any other interpretation should be given to the said ordinances. The contract of 1891 between the Louisiana Construction & Improvement Company and the city of New Orleans contains no intimation or suggestion that any different interpretation is to be given to the ordinance which formed the basis of the contract. On the 5th of August, 1882, the United States, by an act entitled "An act to provide for deductions from the gross tonnage of vessels of the United States" (22 Stat. 300), departed from the practice of cal-

culating customs dues upon the gross tonnage of vessels, and adopted the practice of calculating customs and tonnage dues upon the net tonnage, which was to be determined according to certain rules laid down in the statute, and denominated the "net register tonnage;" the said law providing, however, that the register of the vessel must show the gross tonnage, all deductions made therefrom, and the resulting net or register tonnage. The said act also provides that all foreign vessels must be remeasured on entering any port of the United States, unless the secretary of the treasury should become satisfied that the nation to which the ship belongs has adopted our system of measurement. This change of practice by the United States in the collection of customs and tonnage dues is the main argument presented to this court to sustain the proposition that, in determining the amount of wharfage dues which the Louisiana Construction & Improvement Company is entitled to collect under its contract with the city of New Orleans, depends upon the net rather than upon the gross tonnage. We cannot see that the acts of congress passed in 1882, in which departure is made from a long-established practice, can affect the interpretation of an ordinance of the city of New Orleans adopted in 1881. If the ordinance in 1881 contemplated gross tonnage, an amendment adopted by the city council would be necessary to change it so as to eliminate gross tonnage, and substitute net tonnage. Our attention has been called to the case of *The Craigendoran*, 31 Fed. 87, wherein Judge Benedict, construing an act of the legislature of the state of New York limiting wharf charges, which act provided a rate of wharfage to be demanded of vessels in proportion to their tons burden, held that the wharfage dues thereunder should be calculated upon the registered, and not the gross, tonnage. This case seems to have been well decided, but it is not applicable here, for the reason that, in the statute which the learned judge interpreted, the wharf dues collectible thereunder are dependent upon the burden or carrying capacity of the vessels using the wharves; and the case was decided in 1887, when the registered tonnage, the net tonnage, and the burden or carrying capacity of a vessel were substantially the same.

The decree appealed from seems to be correct, and it is affirmed.

THE TIVERTON.

MELBURN et al. v. LOUISIANA CONST. & IMP. CO.

(Circuit Court of Appeals, Fifth Circuit. May 22, 1894.)

No. 220.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

This was a libel by the Louisiana Construction & Improvement Company against the Tiverton (William Melburn and others, claimants), for wharfage. The district court rendered a decree for libellant. Claimants appealed.

Henry P. Dart, for appellants.

J. R. Beckwith, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge. This appeal raises only the question of whether wharfage dues, under the contract of the Louisiana Construction & Improvement Company with the city of New Orleans, of date May 23, 1891, should be charged and collected upon the gross or the net tonnage of the vessels using the wharf. For the reasons given in the case of *Coul v. Improvement Co.* (just decided) 62 Fed. 749, this case is ruled the same way, and the decree appealed from is affirmed.

THE ANGERTON.

MELBURN et al. v. LOUISIANA CONST. & IMP. Co.

(Circuit Court of Appeals, Fifth Circuit. May 22, 1894.)

No. 221.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

This was a libel by the Louisiana Construction & Improvement Company against the Angerton (William Melburn and others, claimants), for wharfage. The district court rendered a decree for libellant. Claimants appealed.

Henry P. Dart, for appellants.

J. R. Beckwith, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge. This appeal raises only the question of whether wharfage dues, under the contract of the Louisiana Construction & Improvement Company with the city of New Orleans, of date May 23, 1891, should be charged and collected upon the gross or the net tonnage of the vessels using the wharf. For the reasons given in the case of *Coul v. Improvement Co.* (just decided) 62 Fed. 749, this case is ruled the same way, and the decree appealed from is affirmed.

WOOD et al. v. HUBBARD.

(Circuit Court of Appeals, Third Circuit. July 9, 1894.)

No. 2.

1. SHIPPING—CHARTER PARTY—FREIGHT EARNED—COMMENCEMENT OF VOYAGE.

On completing loading, a vessel proceeded, pursuant to her charter, in tow of the charterers' tug, down a river in prosecution of her voyage, but became icebound in the river, and so remained several weeks, until the river opened, when, by order of the charterers, she was towed back to the port of loading, and her cargo was discharged. Her crew was not complete at the time of leaving port, but was sufficient while she was being towed down the river, and men to fill the vacancies had been engaged to board her at its mouth. *Held*, that she had commenced the voyage, so as to earn freight, as she had actually left her port of loading with manifest intent to proceed to her port of destination, and the absence of part of her crew had not contributed to the delay.

2. SAME—FRUSTRATION OF VENTURE.

While the vessel remained icebound, the day by which the charterers had contracted to deliver the cargo to purchasers passed, and the contract was canceled by the purchasers for the delay. No notice of the necessity of delivery by that day had been communicated to the master of the vessel or any one representing her. *Held* that, there having been no breach of any essential stipulation by the vessel, necessarily resulting

in the frustration of the charterers' venture, the vessel was not chargeable with its failure.

3. SAME—GROSS FREIGHT—EXPENSES OF VESSEL.

No other charter for the vessel was procurable until after the time within which she would have completed her voyage had she proceeded after the river opened. *Held*, that she was properly allowed the gross freight she would have earned, without deduction for expenses which would have been incurred on the voyage, the expenses of detention being offset against them.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

This was a libel by Andrew J. Hubbard, master of the schooner Percy W. Schall, against Richard Wood, George Wood, Walter Wood, and Stuart Wood, trading as R. D. Wood & Co., for freight and damages. The district court rendered a decree for libellant. Respondents appealed.

The following opinion was rendered in the district court, November 10, 1893, on the hearing upon exceptions to the report of the special commissioner in the case:

Butler, District Judge. There are but two exceptions which call for remark,—the libellant's first, that "the commissioner erred in disallowing the claim of \$325 for demurrage," and the defendants' sixth, that, "the commissioner erred in finding the libellant entitled to full gross freight." Each exception seems to be founded on a misunderstanding of what the commissioner did. In effect, he held the respondent answerable for the time lost by the vessel, while icebound at Millville, and found her to be compensated by the saving of time and expenses resulting from the termination of her voyage there. A reference to pages 21, 22, and 23 of his report shows this. In other words, he found that the time lost by the vessel at Millville, and her consequent expenses and incidental charges during this period, were equal to the time and expenses necessary to complete her voyage to Florida. He therefore allowed her the stipulated freight for the voyage. This is just. In the absence of her detention at Millville, the libellant would have been entitled to the entire freight stipulated for, less so much as she might have saved or made by its termination there. Had she found other employment within the time required to make the voyage contemplated, the value of this employment must have been deducted. If she had not, but remained idle under expenses equal to those she would have incurred on the voyage, there would have been nothing to deduct. This is the common rule applicable to such cases, and was applied in *The Gazelle*, 128 U. S. 474, 9 Sup. Ct. 139. Here she was idle, necessarily, and the respondent must therefore pay the entire sum stipulated for. He cannot urge that she might and should have been employed, because she was icebound, and thus prevented earning anything, by his conduct. The delay at Millville was the natural result of compelling her to go there. The river had been frozen over for several days, and she was enabled to move only because of a temporary thaw. That she would be frozen in, as she was, after unloading, should have been expected. Receiving the stipulated freight, she cannot, however, claim further compensation for the detention, because she lost no more time thereby than would have been necessary to complete the voyage, for which it was the price.

Possibly it is as well to say a word respecting the libellant's second exception, which relates to the disallowance of his claim founded on the charter for a return cargo. The evidence respecting this claim is too indefinite to justify its allowance. We are not informed when the voyage from Jacksonville was to commence, and cannot, therefore, judge whether it is probable the vessel would have reached that point in time. In view of the obstacles encountered, and delay experienced, in the attempt to get out of the river after loading at Millville, the time occupied in reaching Jacksonville must have exceeded the expectation of the libellant considerably. Nor

are we informed of the probable advantages of that charter, and we cannot, therefore, know that the charter obtained here on March 3, the earliest period at which the vessel could have reached Jacksonville, did not compensate for all the loss incurred on account of the former charter.

N. Buboia Miller & J. Rodman Paul (Biddle & Ward, on the brief), for appellants.

Curtis Tilton and H. R. Edmunds, for appellee.

Before ACHESON and DALLAS, Circuit Judges, and GREEN, District Judge.

GREEN, District Judge. This is an appeal from the district court of the United States for the eastern district of Pennsylvania. The libel, which was to recover freight and damages, was filed by the master of the schooner Percy W. Schall, under the following circumstances: The appellants and respondents below are manufacturers of iron pipe at Millville, in the state of New Jersey. It appears that they had entered into a contract with the firm of Fairbanks, Morse & Co. to manufacture for them, and to deliver at Smyrna, Fla., a large quantity of iron pipe and fittings, which were to be used in the construction of an irrigation scheme in that state. By the terms of the contract the last delivery of these pipes was to be made on or about the 1st day of February, 1893. The greater portion of the pipes was to be delivered during the year 1892, but there still remained a certain quantity undelivered in December of that year; and on or about December 22, 1892, the appellants chartered the schooner Percy W. Schall to convey them to the port of delivery. On the date of the charter the schooner was lying at Philadelphia. Immediately upon the charter being perfected, she left Philadelphia, bound for Millville, N. J., there to take on the cargo of pipes. She arrived at Millville in due time, and the cargo was completely loaded, and the schooner ready to sail, on the 5th day of January, 1893. The rate of the freight was to be \$3 per ton of pipe, and the weight of the pipes shipped was 273 634/2240 tons. Upon the completion of the loading of the cargo, and on the 5th day of January, 1893, pursuant to the terms of the charter party, the Schall was taken in tow to Millville by a tug furnished by the appellants, and, in prosecution of her voyage to Florida, proceeded down the Maurice river to a point about five miles below Millville, where she was obliged to come to anchor on account of the ice which impeded her progress; the river below that point being entirely frozen over, and wholly impassable to vessels. The weather became, and remained thereafter, exceedingly cold; and the Schall was frozen up in the Maurice river until the 14th day of February, 1893. On that day, by orders of the appellants, a tug under their control towed the Schall back to Millville. It appears that in the meanwhile, and while the Schall was frozen up in the river, Fairbanks, Morse & Co., the purchasers of the iron pipes, notified the appellants that as the time for delivery had passed, and as the franchise under which they were operating had expired by limitation, they would not receive the pipes, if sent; and thereupon, on the 9th of February, the appellants notified the master of the Schall that he need not proceed

upon the voyage, as the orders for the pipes had been canceled because of this delay in delivery. Upon the arrival of the Schall at Millville, her cargo was discharged, and claim was made upon the appellants for the freight. This claim being ignored, this libel was then filed by the master to recover the full amount of gross freight, certain expenses to which the schooner had been put by the failure to proceed upon the voyage, and for demurrage. A mass of testimony was taken touching these various points, which, being considered by the court below, it awarded the libelant full gross freight and some minor expenses, but disallowed the claim for demurrage, as made. From the decree thereupon made the appellants bring this appeal.

Ten errors are assigned by the appellants, but they need not be separately discussed. It will be better to consider them under one or two general heads. It is insisted by the counsel for the appellants that the court below erred in allowing the libelant any freight, it not having been earned by the libelant, since the voyage had not actually commenced, and the commercial venture in which the freight was to have been earned was frustrated by the delay of the Schall without the fault of the respondents. Second, because the libelant was allowed full gross freight; that, if he was entitled to freight, he was not entitled to full gross freight, without deduction for the expense he would have incurred in earning it. And, incidentally, because the court held the respondents practically liable for all the delay which ensued upon the return of the libelant to Millville, although such delay was caused partly by the act of God, and was not immediately connected with the discharge of the cargo.

We do not think that any of these contentions can be successfully maintained. Certainly, it cannot be asserted as a matter of law that the voyage had not commenced. It cannot be denied that when the Schall left the port of Millville in charge of the tug, to be towed down the Maurice river, the full complement of the crew was not on board. She was short a second mate and one seaman. She had on board a chief mate, steward, two common seamen, and the master. And the allegation is that when the schooner left Millville she was not in a condition ready for making her voyage, because her crew was not complete, and that under such circumstances the courts hold it cannot be assumed that the voyage has commenced. While the proposition, broadly stated, is undoubtedly true, we do not see its application to the case under consideration. Under the terms of the charter party the Schall was to be towed down the Maurice river to the Delaware by the tug of the appellants. It cannot be doubted that for the purposes of that part of her voyage the complement of men upon her was sufficient. Besides, it is undisputed that the master had engaged a second mate and another seaman to board the schooner when she arrived at the mouth of the Maurice river. Nowhere in the testimony does it appear that the absence of these two men in any way contributed to the inability of the schooner to pass down the Maurice river on her voyage. It was solely because she became icebound that her further progress

was barred. The failure to have a full complement of her crew on board, passing down the Maurice river, when it is shown that the vacancies were to be filled before the vessel left the river, does not militate against the idea that the voyage had commenced. A ship may be thoroughly seaworthy, so far as her crew is concerned, for a voyage down the river, when she would not be seaworthy for a voyage upon the ocean. The case would have been different had the appellants shown that the delay of the schooner was caused by the absence of these two men,—part of the crew,—but such evidence is wholly wanting.

Nor does the allegation that the voyage had not actually commenced at Millville when the Schall left her berth seem to rest on any solid foundation. It might be asserted with great confidence that the voyage really commenced at Philadelphia, where the Schall was lying when she was chartered; but, without holding that as a matter of law, it is quite clear that the voyage in question did commence when the schooner left the port of Millville to proceed down the river on her way to Florida. At that time the cargo had been duly loaded, bills of lading had been signed and forwarded to the consignees, part of the freight had been paid by the appellants, and everything antecedent to the sailing had been fully done, and then the vessel left the port, bound for Florida. In other words, technically speaking, she "broke ground," and that constituted the commencement of the voyage. In Carver on Carriage by Sea (section 148), it is stated that, where a vessel lying at her port of loading moves from the place where she is lying to another loading berth, the voyage commences as soon as she "breaks ground" to go to that berth. A fortiori, where a vessel actually and in fact leaves her port of loading, with manifest intent to proceed to her port of destination, it is clear that that voyage had begun, both as a matter of fact and a matter of law.

And the contention of the appellants that the appellee should be charged with the frustration of their venture cannot be assented to. The venture was the sending of the iron pipes by the appellants to Florida. It was wholly within their knowledge that these pipes were to be delivered by a day certain. Such knowledge was not communicated in any way, so far as the evidence shows, to the master of the schooner, or to any one representing the schooner. It is clear from the testimony that the progress of the schooner was arrested, not by any fault on the part of the schooner, but by an act of God. It is true that it is the duty of a ship to complete a voyage for which she is chartered within a reasonable time, having due regard to the adventure of the shipper; that is, in such a time that the commercial speculation of the shipper may be successfully carried out. For willful breach of this duty the ship would be liable in damages, if it resulted in a frustration of the venture. But, as stated, there is no evidence tending to show that the master was aware of the terms of the contract between the appellants and Fairbanks, Morse & Co., limiting the time of delivery. The undertaking on the part of the Schall was that the cargo should be delivered in a reasonable time, perils of the sea, etc., excepted. The primary

cause, as appears from the testimony, of the frustration of the venture, may be found in the delay of the appellants in chartering a vessel to convey their pipes to Florida. Considerable correspondence had passed between the appellants and their consignees as to the delivery of the pipes. Originally, the contract which had been entered into on July 23, 1892, was to be completed by December 15, 1892. At the request of the appellants this time was afterwards extended to February 1, 1893. But no notice of the necessity of a delivery on or before that day was ever communicated to the master of the Schall, and it was not until the 9th day of February, 1893, that he first became aware of the fact that the consignees had declined to receive the cargo, and had canceled the contract because of the delay. Had the appellants sought an earlier charter, in all probability, they would have fulfilled their contract in ample time. Delaying the charter until the middle of winter, when they must have known that the liability to have navigation impeded, if not wholly closed, by the effect of intense cold, was a fault on their part, and not on the part of the schooner, which they actually did charter. They must have known that the time for delivery of their pipe was growing very short, and when they chartered and loaded the Schall they must have assumed the risk of interference by severe weather. If, under these circumstances, they have suffered loss, they cannot now cast the blame upon the innocent schooner. There are no facts whatever in the case which would justify the court in holding the Schall liable for the failure of this commercial adventure. The inquiry in such a case is whether there has been a breach of an essential stipulation by the ship, necessarily resulting in a frustration of the object which the charterer had in view when he chartered the ship. Such inquiry in this case must be answered in the negative.

But the appellants further insist that the court below erred in allowing gross freight, without deduction for such expenses as she would have incurred had she made her trip. The court, in considering the report of the special commissioner in this case, used this language:

"In effect, he holds the respondents answerable for the time lost by the vessel while icebound at Millville, and found her to be compensated by the saving of time and expenses resulting from the termination of her voyage there. In other words, he found that the time lost by the vessel at Millville, and her consequent expenses and incidental charges during this period, were equal to the time and expenses necessary to complete her voyage to Florida, and he therefore allowed her the stipulated freight for the voyage. This is just. In the absence of her detention at Millville, the libellant would have been entitled to the entire freight stipulated for, less so much as she might have saved or made by its termination there. Had she found other employment within the time required to make the voyage contemplated, the value of this employment must have been deducted. If she had not to remain idle under expenses equal to those she would have incurred on the voyage, there would have been nothing to deduct. This is the common rule applicable to such cases, and is laid down clearly in the case of *The Gazelle*, 128 U. S. 474, 9 Sup. Ct. 139."

We fully concur in these remarks of the learned court below. The evidence shows that the voyage was broken up by the act of the ap-

pellants on the 14th of February. On that day the Maurice river was open, and the Schall could have gone to sea, but her cargo had been unloaded on the wharf at Millville by the express orders of the appellants. Although diligent efforts were made by the master of the Schall to procure another charter, none was procurable until the 3d of March following. During all that time of enforced idleness, directly arising from the breaking up of her voyage by the act of the appellants, she had her crew on board, and was put to all the other necessary expenses which she would have incurred had she made her voyage. None of these expenses were allowed in the court below as a liquidated amount, but they were offset against the expenses which she would have incurred had she made her voyage, which, under the evidence, it seems would have been completed, under usual circumstances, long before the 3d of March. As the court below said, then it was exactly just to set the one claim off against the other. The ship was idle as a necessary consequence of the act of the appellants. They cannot urge that she ought to have been employed before she was. It was the result of their fault that the vessel became icebound, and unable to earn anything. The delay at Millville was the consequence of her going to that point. Her detention there ought to have been anticipated by the appellants, for the evidence shows that the river had been frozen over solidly just previous to their ordering the Schall to Millville; and it was only by reason of a temporary thaw that she was able to reach that port at any rate. But, having had awarded to her the gross freight which she would have earned, of course she ought not to be awarded the expenses of the detention, because she lost by that detention in the Maurice river no more time than she would have lost had she made her contemplated voyage to Florida.

We do not think it necessary to consider the other minor points that are raised in the case. The answers to the contentions of the appellants could not be stated more clearly than in the finding of the commissioner, and in the opinion of the court sustaining his conclusions; and, adopting them as the views of this court, the result is, the judgment below is affirmed.

THE BROOKLYN.

JOHNSON v. THE BROOKLYN.

(District Court, S. D. New York. June 19, 1894.)

COLLISION—STEAM VESSELS CROSSING—RULE OF THE STARBOARD HAND.

Where a ferryboat, approaching her slip in the East river, saw a tug and tow coming up on her port hand, and blew them one whistle, thereby notifying the tug of her intention to insist on her right of way, and pass ahead, and there was then time and space for the tug to have avoided her by going astern or stopping, but the tug blew two whistles, and kept on until too late to avoid collision, *held*, that the tug was solely liable.

Libel by Lorenzo D. Johnson against the ferryboat Brooklyn in a case of collision.

Stewart & Macklin, for libellant.
Hyland & Zabriskie, for claimant.

BROWN, District Judge. On the 29th of April, 1892, at about 1 p. m., as the ferryboat Brooklyn, of the South Ferry, was approaching her New York slip, she came in collision with the tug R. S. Garrett, which had a schooner in tow on a hawser, and was rounding the Battery to go into the East river. The collision was at about right angles, the stem of the tug striking the ferryboat on her port side just forward of her paddle wheel. The libel was filed to recover the damages.

There is considerable difference in the testimony as to the position of the two boats at the time when they were first observed, and the whistles exchanged. There is no doubt, however, that the Brooklyn had the right of way to her slip, and that it was the duty of the Garrett to keep out of the way; and that the Brooklyn, when she was at least 600 feet from the New York shore, and the Garrett 200 to 300 feet below the slip, gave a signal of one whistle to the Garrett, which required the Garrett to go astern of the Brooklyn. The Garrett gave two short whistles in reply, and kept on, but reversed too late, and came in collision, as above stated.

The fault in this collision lies, I think, wholly with the Garrett. Whatever confusion about the signals may have arisen from an exchange of whistles between the Brooklyn and other vessels to her right before her signal of one whistle was given to the Garrett, that signal was a clear notice to the Garrett that the Brooklyn intended to assert her right of way to go into her slip, and that the Garrett must go astern. I have not the least doubt that at that time there was plenty of time and space for the Garrett to turn to starboard, or stop, if necessary, and thus avoid collision. The weight of proof is that at collision the head of the Brooklyn was only a few feet from the entrance to her slip, and the Garrett could not have been more than from 100 to 150 feet from the ends of the piers.

I could not exempt the Garrett from fault in this case, without virtually holding that tugs coming up near the shore can at pleasure reverse the rule of the road, and require ferryboats to forfeit their right of way to their slips, and to wait for the mere convenience of tugs hugging the shore contrary to law.

Nor can I hold the Brooklyn partly in fault upon the analogy of the case of *The Fanwood*, 28 Fed. 373, and many other similar cases. In all those cases the position of the other vessel was such as to show that she was intending to cross ahead and could not, or would not, keep out of the way. In the case of *The Fanwood*, the tug was already partly across the slip, while the ferryboat was far enough away to stop easily before reaching her. In this case the tug had not reached the ferryboat's slip, and when the ferryboat's signal of one whistle was given, the tug was far enough below the slip to enable her to stop without difficulty before reaching the line of the ferryboat's course. That was the tug's duty. The ferryboat had every reason to suppose that the tug would stop or turn to the right as it was her duty to do, and therefore properly kept

on; and the tug's contrary whistles and alarm came too late. The ferryboat stopped; to reverse would have been dangerous to the tug.

The libel is, therefore, dismissed, with costs.

THE RITA.

CLARKE et al. v. THE RITA.

(Circuit Court of Appeals, Fifth Circuit. May 8, 1894.)

No. 176.

SALVAGE—AMOUNT OF COMPENSATION.

While a steamship was at anchor, loading with cotton, fire broke out in cotton already stowed. There being some delay in putting into service the steamship's hose and pipes provided for using steam to suppress fire, she accepted the assistance of a tug lying near, and in about three hours, by the use of the tug's pumps and the labor of her officers and crew, participating with the steamship's appliances and crew and stevedores employed on her, the fire was extinguished. No serious risk was incurred by the tug, her officers, or crew, and the services rendered required no greater skill than her ordinary business. The value of the steamship and cargo was about \$194,000. The tug was worth about \$15,000, and had seven men, including officers, in her crew, who were paid \$480 per month. *Held*, that an award of \$1,500 to the tug and an equal amount to her crew was sufficient.

'Appeal from the District Court of the United States for the Eastern District of Texas.

This was a libel by Charles Clarke and others against the steamship Rita, for salvage. The district court rendered a decree for libelants. They and certain interveners appealed, assigning as error that the amount awarded was inadequate.

Charles Clarke & Co., a firm composed of Charles Clarke, Robert P. Clarke, and Fred A. Brock, owners of the steam tug Seminole, for themselves and others interested as salvors, filed a libel in the district court of the United States for the eastern district of Texas on October 14, 1892, against the steamship Rita, her machinery, cargo, etc., and alleged that on the 11th of October, 1892, the Rita was at anchor in the Gulf of Mexico, about 3½ miles from the port of Quintana, engaged in loading cotton. That the Seminole had just towed a barge of cotton to the steamer, and made it fast thereto, when it was discovered that the cotton in the upper cross bunkers of the Rita and below the wooden deck was on fire. That about 125 bales were stowed in that place. In response to the alarm, the tug passed her hose aboard the steamer, to aid in extinguishing the flames. The steamer at first refused the assistance, but afterwards hailed the Seminole, and requested help in putting out the fire, it having been found that the steam appliances of the steamer would not work, and that the steamer alone and those on board could not overcome the fire. The tug went to the rescue, putting her hose on board the steamer, and her officers and crew threw water upon the fire steadily for over three hours, until it was subdued, and the danger averted. That, but for such service, it was probable that the Rita and cargo and those on board would have been lost, and, as it was, all were in serious jeopardy, as there were no other means of saving the vessel at hand, and the Rita was unable to make proper steam connections or otherwise to control the fire unaided. In performing this service the efforts of the tug and crew were attended with great labor and hardship, and considerable peril. That such service contributed to save the steamer, which was of the value of \$75,000, and about 4,000 bales of cotton, worth \$40 per bale, or a total of \$235,000. That the

Seminole was of the value of \$20,000. That at the time of the fire and the rendition of the services a hard wind was blowing from the eastward, and the sea was running high, thus increasing the danger and difficulty. Salvage compensation was prayed by libelants for their tug and her officers and crew. Certain stevedores on board the Rita at the date mentioned intervened, also claiming salvage, as did the master of the Seminole. The Rita was claimed by the Serra Line of Bilbao, Spain, Adoue & Labit, agents, who answered, denying the existence of any danger to either the Rita or the salvors, and denied that the services rendered were salvage services, and traversed the material averments of the libel, admitting, however, that "said Seminole did tender her services, which were at first declined and afterwards accepted by the master of said Rita, but not from necessity of peril, but out of abundance of precaution." Upon the hearing a decree was entered March 14, 1893, awarding salvage in the sum of \$4,000,—\$1,000 to the screwmen, \$1,500 to the owners of the Seminole, and \$1,500 to her crew, to be apportioned according to their rate of pay. The screwmen abide by the decree, and do not appeal. The other salvors bring the case for review, upon the following assignments of error: "The district court erred in awarding the appellants and interveners salvage to the amount of only four thousand dollars, or three thousand dollars to appellants, the owners of the steam tug Seminole, and their crew, as the sum was inadequate, and disproportionate to the nature and result of the services rendered in saving a large amount of property from destruction by fire; the value of the steamship, equipments, and cargo being over two hundred thousand dollars, and the same being in imminent peril of total loss had it not been for the successful exertions of the salvors in aiding in the extinguishment of the fire. The compensation, under the authorities, should have been about, or not less than, ten per cent. of the value of the property. As it was, the award was less than ten per cent. Appellants were requested by the officers of the steamship to come to her aid and rescue, and under the evidence were entitled to a much larger award."

The Rita cost and was worth about \$58,000. Her capacity was 5,500 bales of cotton. She had been partly loaded at the port of Velasco with 3,400 bales of cotton, but was compelled to go across the bar at the mouth of the Brazos river, and complete her loading in the Gulf of Mexico. The Seminole, worth about \$15,000, towed out a barge load of cotton of some 600 bales, and, delivering it on the lee side of the vessel, had dropped a cable's length astern, to await the unloading of the barge, which she was to tow back to port. The tug had also brought the screwmen out, who had just commenced work, when the fire was discovered in the cross bunkers, at a point in the cotton already there stowed, which indicated that it had been smouldering there. The steamer's hose was, after some little delay, put into use, but without a nozzle, as it could not be found. The Rita was provided with a system of tubing or pipes through which steam was designed to be conveyed into the holds of the vessel for the purpose of suppressing fires, but this had been cut off by a flange that had been inserted in the pipe on deck, where it was covered by a box, and the bolts could not be removed by a wrench, and were required to be cut off with chisels before the flange could be taken out, and the circulation of the steam allowed, all of which occupied considerable time, the evidence as to the length of time varying from a few minutes to over an hour. The barge had been secured to the port or lee side of the vessel, and the Seminole was compelled to go upon the starboard side of the steamer to proffer her assistance, as service from the further side of the barge, owing to the distance, could not have been so effective. In so doing, she was exposed to some risk of injury from striking against the steamer. The mate of the Rita refused the hose of the Seminole, and threw it overboard, but shortly thereafter, when it was found that the steam could not be put into service promptly, and that the fire was gaining, the Rita hoisted her flag at half-mast, which was a signal of distress, or call for help, and her master then accepted the assistance of the Seminole, whose hose, from a double-acting pump, throwing 600 gallons per minute through a nozzle, was directed into the hatch and towards the fire, but the height of the combing, and the location of the fire back of the hatch, prevented its being effectively reached by the streams from the two vessels, and upon the advice of Capt. Carroll, of the Seminole, two holes were cut in the deck of the Rita, and through these the streams

were directly played upon the burning cotton below, so that men could go down and break out the cotton. When the steam was at last gotten to work, it was of little or no benefit, as the air could not be excluded from the bunkers, there being openings in the lower hatch, and the two holes in the deck and the upper hatch were only partly covered. There were also other air passages in the after part of the bunkers. The officers and crew of the Seminole assisted in handling the hose, and rendered all the service possible in extinguishing the fire, which, after about two hours' work, was under control, and a little later the cotton was broken out of the bunkers, and hoisted on deck, where the fire could be better dealt with. The upper cross bunkers where the fire occurred contained coal on the inward voyage. The Rita was of iron, the upper deck wood, and about 2,000 feet of lumber had been placed in this bunker, to keep the cargo clean which was to be stowed therein on the return trip. On the floor was a hatch about five feet square, covered with boards loosely placed together, but not caulked. This hatch led into the lower coal bunker, which contained about 140 tons of coal and was nearly full. Cotton compactly stowed stood upon the boards, which, when the fire was out, were found to be burned nearly through. Some of the water thrown into the hold had gone through the hatch to the lower bunker. The fire was confined to the upper bunkers, where there were 118 bales, all of which had been stowed—that is, screwed tightly into position—except about 5 bales. It could contain 200 bales. On the starboard side a wing of several bales had been stowed up against the bulkhead which separated this from No. 2 hold, and was five-eighths of an inch in thickness. In the lower No. 2 hold there were about 1,000 bales of cotton stowed, and the hatch between that and the upper hold was open, and it could not be closed, as it was packed with cotton projecting above it. There were some loose bales in upper No. 2 hold, and two tiers of bales stowed and screwed into position against the bulkhead next to the bunker where the fire was. This cotton had to be broken out by the screwmen with their tackle as the fire progressed, to prevent its communication to the No. 2 hold, which would have involved directly 1,000 bales, with the possibility of spreading to the rest of the vessel. The crew of the Seminole was composed of seven men, including officers, with a pay roll of \$480 per month. The evidence does not show that the Seminole was in any wise injured, or that in rendering the services to the Rita she ran any other or greater risk than in following her ordinary business of towing. The officers and crew of the Seminole, in assisting on board the Rita, were exposed to discomfort from heat and smoke, but were exposed to little, if any, danger.

James B. Stubbs, for appellant.

A. R. Campbell, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge (after stating the facts). "Salvage, in its simple character, is the service which volunteer adventurers spontaneously render to the owners in the recovery of property from loss or damage at sea under the responsibility of making restitution, and with a lien for their reward." Macl. Shipp. 608. "Salvage is the compensation due to persons by whose voluntary assistance a ship or its lading has been saved to the owner from impending peril, or recovered after actual loss." Ben. Adm. § 300. "Salvage consists of an adequate compensation for the actual outlay of labor and expense used in the enterprise, and of the reward as bounty allowed from motives of public policy as a means of encouraging extraordinary exertions in the saving of life and property in peril at sea." The Egypt, 17 Fed. 359. "The amount awarded as salvage comprises two elements, viz.: adequate remuneration,

and a bounty given to encourage similar exertions in future cases, the relative amount to depend on the special facts and merits of each case." The *Sandringham*, 10 Fed. 556. "The leading considerations to be observed in determining the proportion or amount of an award for salvage services are well defined. * * * We are to consider (1) the degree of danger from which the lives or property are rescued; (2) the value of the property saved; (3) the risk incurred by the salvors; (4) the value of the property employed by the salvors in the wrecking enterprise, and the danger to which it is exposed; (5) the skill shown in rendering the service; (6) the time and labor occupied. These are the ingredients which must enter, each to a greater or less degree, as a *sine qua non*, into every true salvage service." The *Sandringham*, *supra*. In the case of the *Rita* the degree of danger from which the property was rescued is not clearly ascertainable from the evidence; and, from our consideration of it, we are unable to say whether, without the services of the *Seminole* and her crew, the master and crew of the *Rita* would have been able to control the fire, and with little damage to property. The master and other officers of the *Rita* are vigorous in their depositions to the effect that without the *Seminole* and her crew the fire on board the *Rita* would have been seasonably controlled, and with little damage to property. The value of the property, more or less in jeopardy in the case, was about \$194,000. The *Seminole* was worth about \$15,000, and, in our view of the evidence, the said tug incurred no serious risk, nor did the officers and crew of the *Seminole* incur any risk of life or limb, though, it is true, they were exposed to discomfort from heat and smoke. The skill shown in rendering the services on the part of the officers and crew of the *Seminole* was the ordinary skill to be expected of competent and energetic men engaged in the towage service. At the outside, during three hours, the use of the pumps of the *Seminole* and the labor of her officers and crew were fully given to the assistance of the *Rita* and her cargo, and there is no doubt that they rendered faithful, efficient, and successful services. If it is to be considered that the *Rita* and her cargo were saved from total loss by fire by the services rendered on the occasion in question, it must also be considered that in the work done to extinguish the fire, not only the *Seminole* and her officers and crew were engaged, but that all the appliances of the *Rita* herself, with her master, officers, and crew, and about 35 screwmen or stevedores, participated, and that it would be unjust to credit the *Seminole* and her officers and crew with all the meritorious services. If the *Seminole* and her officers and crew were paid only upon a quantum meruit for actual work and labor performed, their outside recovery would not be over \$150. By the decree complained of, the owners of the *Seminole*, whose property incurred no serious risk, are given ten times the amount of \$150, a sum certainly equal to 15 days' gross earnings of their tug. The officers and crew of the *Seminole*, for three hours' labor, are each of them awarded a sum equal to, if not exceeding, three months' full pay. From this it is easily seen that the award of the court below com-

prises not only adequate remuneration, but a large bounty, sufficient to induce others, on a proper occasion, to "go and do likewise." We think the reward allowed fully meets all the objects and purposes contemplated by the law, and that a larger amount would have been an improper exercise of judicial liberality. Unless the appellants are to be rewarded beyond their own merits, and because of the misfortune of the Rita, they have no reason to complain of the decree in this case. The decree appealed from is affirmed.

THE IDA B. COTHELL.

COTHELL v. LAMB.

(Circuit Court of Appeals, Fifth Circuit. May 1, 1894.)

No. 213.

SHIPPING—PERSONAL INJURIES—NEGLIGENCE.

While a small stern-wheel steamer was towing a large raft up a river against a strong current, two of her crew, for the purpose of making fast to the bank, attempted to take ashore the end of a line coiled on her deck, but, failing to reach the point intended, dropped it in the river, and took the other end of the same line from under the coil, whereupon the fireman went to pass them the line. The end of line which had been dropped into the river had been caught in the wheel, which was moving only enough to keep the boat in her place; and the fireman was injured by that part of the line getting around his foot. The vessel had on board a master, two engineers, a deck hand, fireman, and a boy. *Held*, that no fault was shown in the vessel, her appliances, equipment, or officers, tending to cause the injury.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

This was a libel by Lamb against the steamer *Ida B. Cothell* for personal injuries. The district court rendered a decree for libellant. Claimant appealed.

This was an appeal from a decree of the district court of the eastern district of Louisiana for personal injuries. It appears from the testimony in the case that the libellant, appellee herein, was serving upon appellant's steamer, the *Ida B. Cothell*, during the month of July, 1892, in the capacity of a fireman. The steamer, which was a flat-bottom, square-bow, stern-wheel river boat of about 57 tons' burden, had at the time a raft, which she was attempting to tow up Old river against a strong current, making about a mile and a half per hour. The master, determining to make fast to the bank until the next day, sent two men to examine the strength of a tree standing upon the bank some distance ahead. Finding it sufficient, upon their return they took the end of a large line which they had brought from the raft, and which was lying coiled upon the steamer's deck, and attempted to take it ashore, but, not being able to reach the point intended, they gave up the attempt, and dropped the line into the river, and returned for the other end, which was under the coil still remaining on the deck, when libellant went to assist in turning the coil over, and was aiding in paying it out. In the meantime the end of the line which had been thrown into the river became entangled in the wheel of the steamer, and, upon libellant's attempting to pay out the rope from the coil lying upon the deck, the part of the rope the end of which had been thrown into the river got around his foot, and he was drawn overboard over the bow of the vessel, and by this means the foot and ankle were broken and torn off. As soon as the outcry was made, the engineer stopped the motion of the vessel, and he was taken from the water, and,

as soon as the steamer could make the raft, which she was towing, fast to the bank, the master took the injured man to the nearest place where a surgeon could be employed, where the foot was amputated. He was then sent by the first conveyance to the Marine Hospital at New Orleans. Subsequently, after having been nearly two months in the hospital, he sent word to Capt. Cothell to come to see him, which he did, and an attempt was made at a compromise of his demand against the steamer. Capt. Cothell gave him \$100, and agreed to provide him with a cork leg. He also gave Lamb, at different times, several small amounts of money, of which Lamb was shown to be in need. At the time of the payment of the \$100 by Capt. Cothell to Lamb a written agreement was entered into, in which the libellant waived all claims for damages against the steamboat and against the captain, Robert Cothell. This agreement was made in writing, and presented at the trial of the case. Capt. Cothell also deposited \$50 for the payment of a cork leg which he agreed to give him. Subsequently Lamb, being in need, applied for money in place of the cork leg which had been promised him, and, believing that he could never wear it, accepted \$20 of the \$50 which had been deposited for that purpose. Upon the case being heard in the district court, the district judge apparently considered that the party was bound by his promise and agreement, and gave a decree for \$30, the amount which had been deposited for the payment of the artificial leg, less the \$20 which had been paid to Lamb. Upon a subsequent rehearing it was considered that the steamer was in fault for the injury suffered by libellant, and a decree for \$1,000 was given in his favor. From this decree an appeal has been taken on behalf of the vessel by her owner, and a counter appeal allowed, without bond by the libellant, upon his affidavit of his poverty, he praying a larger decree.

J. R. Beckwith, for appellant.

O. B. Sansum, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

LOCKE, District Judge. The only allegation contained in the pleadings of the libellant by which it is claimed that the steamer is liable, or charging any fault upon the steamer or any of her officers, is that "the engineer of said steamer, not regarding the danger to which libellant would be subjected by moving said steamer ahead, negligently and carelessly set the steamer in motion, and in consequence thereof said steamer ran ahead, and caused said coil of rope to run off very rapidly, and in consequence of that negligence and carelessness the right foot of the libellant became entangled in one of the coils of said rope." It is not averred that the vessel was not properly manned or equipped, or that libellant was ordered by the master to any extrahazardous position or service, although, upon the hearing of the appeal in this court, it is contended that the master of the steamer was negligent, careless, and indifferent, giving improper orders, and recklessly disregarding the fact that the line which had been thrown into the river had been caught in the wheel of the steamer, and was, at the time they were paying out the second line, in the act of being drawn around it; and that the vessel was responsible for the total damage, and that the amount given was very much less than the circumstances of the case justly demanded and required. In behalf of the appellant, the claimant of the vessel, it is contended: First, that the action in rem for an injury suffered on board a vessel by any carelessness or negligence of any person on board, and not relating to

the furnishing, appliances, or equipments of the vessel, or of the manner in which the vessel herself was being handled, should not be sustained; that, if any action would lie on behalf of the libelant for injuries sustained by him, it would be in personam against the owner or master, and not against the steamer; that the engineer—the only one charged with any negligence or fault—was a co-servant with libelant; that the facts and circumstances of this case show conclusively that there was no negligence on the part of any of the officers of the vessel which would render her or her owners liable or responsible for any injuries suffered; that the damage suffered by the libelant was the result of his own negligence or carelessness, or the negligence and carelessness of his fellow servants, for which the vessel cannot be made liable.

We will consider these points in an inverse order from herein stated, and a decision in favor of appellant upon any one of them will determine the case. There has been much conflicting testimony in this case, but the material points may be clearly determined. In reviewing the entire facts of the case, notwithstanding the absence of allegations of fault except in one particular, we consider it immaterial whether or not the line was first being taken out by the order of the master or against it, as he states it was, for if this was the cause of the disaster which subsequently occurred, it was too remote to influence this case. If there was any negligence in permitting the line to drop into the river, it must have been the carelessness or negligence of the men in the skiff who attempted to take it ashore, and, finding it insufficient, let it go, as they testified, and could in no way make the vessel liable. The master testifies that he found the libelant at the coil of the rope when he came from the pilot house, and blamed him for meddling with it, but went to help him about uncoiling and paying it out, as it was necessary that something should be done then. The allegation is that the engineer carelessly and negligently set the steamer in motion, but the testimony shows that the engine had been continually going. The only signal bell which the engineer had received had been the slow bell, when she came to the bank, to slow down and keep the wheel moving just enough to keep her against it until the lines were taken out and she made fast. The steamer was headed up stream against a strong current, with a large raft immediately astern, with no line out; and not to have kept the wheel moving forward, so as to have kept her in her place, would have been reckless and improper. Up to that time no one knew or could have known by reasonable diligence and care that the rope had been caught in the wheel; and it appears that at the first intimation that such was the case the engineer immediately stopped and backed.

It has been urged in argument in behalf of the libelant that the steamer was insufficiently manned; that had there been ample crew the master could have remained in the pilot house where he could have signaled the engineer to have backed the steamer upon discovery that Lamb was caught in the coils of the rope; but we fail to find any insufficiency in the crew which in any way

affects the facts of the case herein. There appears to have been on board the vessel the master, two engineers, a white deck hand or line man, a fireman, and a colored boy. There has been no evidence given either in favor of or against the sufficiency of such a crew, and, in the absence of such evidence, we cannot find that it was insufficient, but, upon the contrary, considering the service in which the steamer was employed, that she was engaged in river navigation, able at any time to make fast to the bank in case of an emergency, believe that it was ample. The master appears to have acted with judgment and discretion in all matters, as far as the evidence shows. It does not appear that, had he been in the pilot house at the time of the disaster, the wheel of the steamer could have been stopped any sooner, or the accident prevented. We can but consider that the cause of the disaster was the negligence of the libelant himself, who, while turning over the coil of the rope, and attempting to pay out the end, unthinkingly and carelessly stepped within the loose coils as they were lying upon deck. Any other view would be utterly inconsistent with the positively proven circumstances. That the coil of the rope could in any way have "ran around" the ankle or the leg does not appear from the evidence, and we consider it impossible.

There is an uncertainty arising from the testimony in regard to the manner in which the libelant was called upon to pass the line to the boat. It was true he had shipped as a fireman, and that was his duty. He says that he was directed by the engineer to leave his fire, and to pass the men the end of the line. But this the engineer positively denies. The master also denies that he gave him any orders for passing out the line, and says that he rebuked him severely for meddling with it, and states that the reply he made was that the men in the boat wanted it. Considering the testimony most favorably for appellee, we fail to find that any fault in the vessel, her appliances, equipment, or officers tended to produce the injury of appellee, and this will preclude the necessity of examining and deciding the further defenses urged by appellant in regard to the impropriety of the action in rem, the relation of the master and engineer as fellow servants of the libelant, or the force or effect of the compromise. It will necessarily follow that the decree of the court below be reversed, and the case remanded to the court below, with instructions to dismiss the libel; and it is so ordered.

WAITE v. PHOENIX INS. CO.

(Circuit Court, M. D. Tennessee. May 10, 1894.)

No. 2,947.

1. REMOVAL OF CAUSES—FILING OF PAPERS IN STATE COURT—RECORD.

The fact that the petition for removal and accompanying papers were not marked "Filed" before their presentation to the state court is immaterial, when it appears from the copy of the record and the clerk's certificate that they were a part of the record and in the files of the cause. They became part of the record when they were presented and tendered to the court, whether they were marked "Filed" or not.

2. SAME—ADDITIONAL PETITION TO FEDERAL COURT.

A petition presented to the federal court with the removal papers, and alleging facts not stated in the petition to the state court, cannot be looked to as conferring jurisdiction, if the latter petition does not state sufficient grounds for removal.

3. SAME—RIGHT OF REMOVAL—AMENDMENT REDUCING DEMAND.

On the third day of the term at which suit in a state court for \$3,000 was made returnable, plaintiff having filed no declaration, defendant presented a petition, affidavit, and bond for removal. On the same day plaintiff was allowed to amend his original summons so as to reduce his demand to \$1,999.95. *Held*, that the right of removal depended on whether the petition therefor was presented before the amendment was made, and that this was a question which the federal court was authorized to try and decide before deciding the motion to remand.

4. SAME—WAIVER OF REMOVAL—AGREEMENT FOR TRIAL IN STATE COURT.

Where a state court continues to assert jurisdiction after the filing of removal papers, defendant does not waive his removal by agreeing that the case shall stand under the rule to plead and try at the next term.

This action was commenced in a state court by William Waite against the Phoenix Insurance Company, and was removed by defendant to this court. Plaintiff moved to remand the case to the state court.

Thos. R. Myers, for plaintiff.

W. L. Eakin and John Ruhm & Son, for defendant.

KEY, District Judge. This suit was commenced in the circuit court of Bedford county, Tenn., returnable the first Tuesday after the first Monday in August, 1893, which was the 7th day of the month. On the 10th day of the month, which was the third day of the term, plaintiff having filed no declaration, the defendant presented to the court its petition, affidavit, and bond for the removal of the cause to this court, and a motion is made on behalf of plaintiff to remand the cause to the state court.

The petition for removal alleges the diverse citizenship of the parties, that the amount in controversy exceeds, exclusive of interest and costs, the sum of \$2,000, and tenders the requisite bond for removal. Upon its face the application for removal appears to be such as to authorize the removal sought. It is insisted that the record does not support, but, upon the contrary, contravenes, the allegations of the petition, because it does not show that the petition and accompanying papers were filed. The copy of the record shows that they were a part of the record, and the certificate of the clerk verifying the record states "that the foregoing is a correct copy

of the summons, entries on minutes, and papers filed in the case." The copy of the record shows that they are a part of the record, and are in the files of the cause. Whether they were marked "Filed" before their presentation to the court is not material. When they were presented to and tendered to the court they became a part of the record.

Defendant accompanies his record with a petition to this court alleging facts that do not appear in his petition to the state court. It cannot be looked to as conferring jurisdiction on this court. If the petition in the state court does not allege sufficient grounds for removal, its failure to do so cannot be remedied by the amended petition. It can only be looked to when the petition filed in the state court shows on its face sufficient grounds for removal to the circuit court of the United States, and may be amended in the latter court by adding to it a fuller statement of the facts germane to the petition upon which the statements in it were grounded. *Carson v. Dunham*, 121 U. S. 421-430, 7 Sup. Ct. 1030.

This record shows that defendant's petition for removal was presented and filed August 10, 1893. It shows that upon the same day the plaintiff was allowed to amend his original summons so as to reduce the damages claimed from \$3,000 to \$1,999.95. The damages laid in the summons originally were \$3,000. If defendant's petition for removal was presented to the court before plaintiff's motion to amend was made, that presentation removed the suit, and the state court could take no further step therein. There would be nothing of the suit left in the court upon which the court could operate. On the contrary, if the motion to amend was prior in time, the suit was not removable. If the presentation of the petition was first, that petition could not allege the fact of the motion to amend and the amendment, because these facts occurred subsequent to its preparation and presentation. In the light of this record I do not think that by the order made August 18, 1893, that the case should stand under the rules to plead and try at the next term of the court, the parties by their attorneys agreeing thereto, the defendant waived its removal. The court, by its amendment, was asserting its jurisdiction, and the defendant might litigate in that forum without a surrender or waiver of its removal. *Insurance Co. v. Dunn*, 19 Wall. 214, 227; *Kanouse v. Martin*, 15 How. 208. It seems to me that the controlling point as to the jurisdiction of this cause is as to whether the petition for removal or the motion to amend is prior in time; and this is a fact this court may try before determining finally the motion to remand. *Railroad Co. v. Dunn*, 122 U. S. 517, 7 Sup. Ct. 1262. If it turns out that the application to remove is first in time, the damages laid in plaintiff's summons will prevent him from denying that the amount in controversy did not exceed \$2,000, exclusive of interest and costs.

The parties to this suit have until the rule day in June next to take testimony in regard to the priority of the presentation of defendant's application for the removal of the suit, or of the motion to amend the plaintiff's summons by a reduction of the damages therein. Final action upon the motion to remand will be reserved until after the coming in of said proof.

PHINIZY et al. v. AUGUSTA & K. R. CO. et al. CENTRAL TRUST CO.
OF NEW YORK v. PORT ROYAL & W. C. RY. CO.

Ex parte COMER et al.

(Circuit Court, D. South Carolina. August 18, 1894.)

1. **RECEIVERS—EXPENSE OF OPERATING BRANCH OF CONSOLIDATED ROAD.**
Where a railroad company manages and controls another as part of its system, not through any contractual relation, but solely by virtue of its control of the voting power of the latter, which it absorbs by virtue of such power, and the latter is operated, not in the interest of its stockholders and creditors, but for the former's benefit, a receiver into whose hands both roads have passed, the latter as a part of the former, by virtue of such absorption, cannot recover from the latter expenses incurred in operating it.
2. **SAME—IMPROVEMENTS.**
Where, however, the receiver incurs expense in making the roadbed of a branch of the subordinate railroad company secure, such expense becomes a charge on the entire road of such company, for which the receiver is entitled to reimbursement.
3. **SAME—IMPROVEMENTS—SUBORDINATION TO LIEN OF MORTGAGE.**
There being a mortgage on the branch thus improved, the receiver's right to reimbursement is subordinate to the lien of the mortgage.
4. **SAME—INTEREST ON MORTGAGE BONDS.**
As the roads forming the subordinate company, on consolidation, took and held such branch subject to the mortgage, and by statute (Gen. St. S. C. § 1428) assumed liability for the debt, the receiver's claim for interest paid on such mortgage bonds is subordinate to the lien of the mortgage.

Petition of H. M. Comer and R. Somers Hayes, receivers of the Central Railroad & Banking Company of Georgia, for allowance of certain expenditures.

Lawton & Cunningham and Mitchell & Smith, for petitioners.

W. K. Miller, W. G. Charlton, Charles H. Phinizy, N. B. Dial, and J. R. Lamar, for respondents.

SIMONTON, Circuit Judge. These cases now come up upon a petition of Comer and Hayes, receivers of the Central Railroad & Banking Company of Georgia, setting up certain claims against the Port Royal & Western Carolina Railway Company, for balances due on operating expenses while the said road was in the hands of H. M. Comer, receiver, \$129,225.31, and for the value of certain steel rails laid during the same period on the Augusta & Knoxville Railroad, a part of its system, \$40,084.52 and for interest paid on the first-mortgage bonds of the Augusta & Knoxville Railroad Company, \$22,277.50, and praying that receivers' certificates may be issued for the total amount claimed to be thus due. The Port Royal & Western Carolina Railway Company is made up of several roads. Among them, and the principal part, is the Augusta & Knoxville Railroad. Upon this road is a first mortgage, securing a number of bonds. Upon the whole system of the Port Royal & Western Carolina Railway is a mortgage, subordinate to this first mortgage on the Augusta & Knoxville Railroad, at least over the property of this last-named road. The certificates asked for would be prior in lien to both mortgages. The Central Railroad & Banking Company of Georgia, for which the petitioners are receivers, was a large and

powerful combination of railroads, forming a complete system, under one controlling management, all the component parts of which were made contributory to the Central Railroad of Georgia, having its ocean terminus at Savannah. This great combination had obtained and exercised complete control over the Port Royal & Western Carolina Railway, and had made it an integral part of its system, —one of the feeders of the stem. This control was secured, not by any lease or contract, nor by ownership of the property, but by means of the voting power in the corporation, through holdings of stock and bonds which had a voice in its management. The officers and agents of the Port Royal & Western Carolina Railway Company were virtually appointed by the Central. Its financial arrangements were made by the Central. Its traffic rates were adopted by agents of the Central. All of its funds were received by the Central. In fact, it was dominated, treated, and managed as a subdivision of the Central. In the course of railway manipulation, the Central Railroad & Banking Company of Georgia had itself, with every part of its great system, come under the control of the Richmond & Danville Railroad Company, by virtue of a lease; and, in its turn, it was managed as a part of the system of the lessee. In March, 1892, a bill was filed in the circuit court of the United States for the southern district of Georgia, in the name of Rowena Clark et al. against the Central Railroad & Banking Company of Georgia et al.; and, as a result of this bill, the domination of the Richmond & Danville Railroad Company was ended. Subsequently, on 4th July, 1892, upon a bill filed by the Central Railroad & Banking Company, in the same court, against the Farmers' Loan & Trust Company et al., the complainant road was placed in the hands of receivers, and finally of one receiver, H. M. Comer. The prayer and purpose of that bill were that a receiver should be appointed to take charge of and to operate the whole system of the Central Railroad & Banking Company, with its auxiliary, owned and controlled, corporations and properties of every description; among them by name, the Port Royal & Western Carolina Railway Company. As we have seen, H. M. Comer was appointed such receiver. The declared object of this appointment, made at the instance of the insolvent corporation (complainant), was the maintenance, preservation, and protection of the entire system, in all its parts, conducted by the Central Railroad & Banking Company, and the prevention of its disintegration; in other words, the preservation and security of the object for which the great system was created. H. M. Comer, having thus been appointed receiver, under these circumstances and for these purposes, entered into the possession and control, as such receiver, of the whole system, or such parts thereof as were within the jurisdiction of the court appointing him. The Port Royal & Western Carolina Railway was a corporation both of Georgia and South Carolina, and by far the largest part of its property was in the latter state. Auxiliary proceedings were instituted in this district under the same name and to the same effect as the Georgia suit, and under them the appointment of H. M. Comer as receiver, to the same intents and purposes, was recognized and confirmed in this district; and under this order

Comer entered into possession and control of the Port Royal & Western Carolina Railway in this district, as a part of the system. As such receiver,—that is, as receiver for the whole system of the Central Railroad & Banking Company,—he operated the road in question from the 20th day of July, 1892, to 4th June, 1893. On this last-named day he was removed as such receiver, and the whole of the Port Royal & Western Carolina Railway Company was placed in the hands of John B. Cleveland, appointed as receiver in proceedings instituted by Phinizy and another trustee of the first mortgage of the Augusta & Knoxville Railroad Company, praying foreclosure of this mortgage, and also in proceedings instituted by Central Trust Company of New York against the Port Royal & Western Carolina Railway Company. During the period of his receivership, H. M. Comer had operated this Port Royal road as a part of his system, and its operations were unprofitable. He had also paid interest at one time on bonds of the Augusta & Knoxville Railroad Company. He had also placed on the tract of this last-named road secondhand steel rails, under these circumstances: New steel rails were needed for the Central Railroad,—the main stem of the system,—and they were furnished. The old rails replaced by them were put down on the Augusta & Savannah Branch of the Central, and the steel rails for which these were substituted were put on the Augusta & Knoxville Railroad. The iron rails of this latter road, taken up to be replaced by the steel rails, were put on the Port Royal & Augusta Railroad, another part of the great system, under the control of the same receiver. All the moneys needed for the operating expenses and the interest and the rails were furnished by H. M. Comer, receiver of the Central Railroad & Banking Company; that is, by himself to himself. Mr. Hayes having been appointed to assist him as coreceiver, the account now in question is presented in their joint names. This is proper. The receivership is continuous, and is analogous to a corporation sole. The claim belongs to the receivership, not to the person of the receiver. *McNulta v. Lochridge*, 141 U. S. 331, 12 Sup. Ct. 11. If any claim exists in behalf of the Central Railroad & Banking Company for advances or improvements made anterior to the appointment of any receiver, it could be presented and prosecuted by them. *Oil Co. v. Wilson*, 142 U. S. 325, 12 Sup. Ct. 235. No such claim has been presented, nor does it appear that any such claim exists. The question before us naturally divides itself into three heads:

Amount Due for Operating Expenses.

The Port Royal & Western Carolina Railway Company, as has been seen, was controlled and managed by the Central Railroad & Banking Company of Georgia, as a part of—a subdivision of—its whole system, under no contractual relation, but solely by virtue of its control of the voting power in the first-named corporation. By virtue of this power, it absorbed it into its system; and, by reason of this absorption, it was included among the corporations placed in the hands of Comer as receiver. As has been seen, this appointment was made for the purpose of preserving and protecting the

integrity of the system, maintaining its status quo, and was made at the suit of the Central. So Comer, the receiver, occupied to this controlled road precisely the same relations which the Central Railroad & Banking Company had done, controlling it through and because of the voting power, and using it through that control. When, therefore, the receivers present this account for operating expenses, they can rely for reimbursement on no express contract, but must seek it *ex equo et bono* on some contract which the law, or principles of equity, would imply. This subordinate road was conducted as a part of a great system,—a system conceived and created by the Central Railroad & Banking Company, for its benefit solely. Every part of the system contributed to the good of its creator, and to this end the interest of the Central, and not of the feeders, was the dominating idea. The advantages derived by the Central from the operation of the other parts of the system were vastly disproportionate to those derived by the contributing roads. It poured into its channel all the freight coming from or going to these subordinate roads. It gave to the Central a potent influence in its contracts with rival systems, and in its negotiations with connecting lines. It furnished constant and profitable use of its plant and capital. It added to and sustained its credit at all financial centers. By the increase of the volume of business on the main line, it could make the most attractive offers to the agricultural and business community. In short, under the complete domination of this majority vote, the subordinate road was conducted, not with a view to the interest of its stockholders and creditors, but for the benefit of the central figure of the system. No implied contract, therefore, could arise on the part of the subordinate corporation to reimburse the controlling corporation for expenses incurred in operating it. The profit of the adventure inured to the Central. This profit could not be measured by a money balance. The benefits sought were wholly for the Central. "*Qui sentit commodum sentire debet et onus*," is the maxim of equity and good morals. As the Central Railroad & Banking Company could not have looked to or demanded from its controlled subordinate reimbursement for moneys advanced in operations conducted for the benefit of the Central, so the receiver appointed to take the place of the Central, to maintain the integrity of its system, to preserve, protect, and secure the status of this system, conceived and created for its benefit solely, is in the same plight as the Central, and must bear the loss of these operating expenses, whatever they may be.

Rails Placed on Augusta & Knoxville Railroad.

This expenditure is on a different footing. The first duty of a railroad corporation enjoying its franchise is to the public. The roadbed must always be kept so that safety is secured, and expenditures for this purpose are looked upon with favor. The receiver is authorized, in his own discretion, to make expenditures not of an extravagant character, to this end; and even in cases where perhaps he should have applied to the court in the first instance, but, in his own discretion, he has made expenditures, the

court will sanction them upon proper investigation. *Cowdrey v. Railroad Co.*, 1 Woods, 336, Fed. Cas. No. 3,293. The present instance is a case of this character; and, as the expenditure would have been allowed if authority had been asked, it is now confirmed; but the charge will be upon the entire road of the Port Royal & Western Carolina Railway, and must be subordinate to the lien of the first mortgage on the Augusta & Knoxville Railroad, the trustees of this mortgage having no part or lot in the receivership.

Interest on Bonds of Augusta & Knoxville Railroad Company.

This is a question of much difficulty. If the receivers, by virtue of this payment, can require its return in the shape of receivers' certificates, they would then be placed in a position superior to any bond or coupon holder of the company. The payment of the interest under these circumstances would work no advantage whatever to the first-mortgage bondholders, and there would be no equity for its reimbursement. On the other hand, the payment of these coupons prevented the foreclosure of the mortgage, and thereby prevented the disintegration of the system,—the object for which the receivership was created. When the roads now forming the Port Royal & Western Carolina Railway Company were consolidated, however, the consolidation held the part of their road formerly the Augusta & Knoxville Railroad subordinate to this first mortgage, and under the act of the legislature it assumed a liability for this debt. Gen. St. S. C. § 1428; Pub. Laws S. C. § 1539. The claim under consideration is admitted, ranking next after the sum necessary to satisfy the outstanding bonds and coupons secured by the first mortgage on the Augusta & Knoxville Railroad.

The prayer for receivers' certificates is refused. In the order for sale of the property, let provision be made for the sums allowed in accordance with this opinion.

DENISON et al. v. MAYOR, ETC., OF CITY OF COLUMBUS.

(Circuit Court, N. D. Mississippi, E. D. September 6, 1894.)

No. 265.

1. MUNICIPAL BONDS—DONATION TO RAILROAD COMPANY—VALIDITY—RATIFICATION.

Act Feb. 1, 1872 (Acts Miss. 1872, p. 297), gave the city of Columbus power to subscribe in aid of the C., F. & D. R. Co., and to issue its bonds therefor. No provision was made for an exchange of bonds for stock, and stock is not mentioned in the act. Acts Miss. 1882, p. 836 (ratifying the consolidation of such railroad company and others into the G. P. R. Co.), § 2, provides that the "donation of \$100,000 in its bonds" by the town of Columbus to the C., F. & D. R. Co., but which have not yet been paid over. "be and are hereby declared to be payable to the" G. P. R. Co. In 1884 the city charter of Columbus was amended so as to authorize it to levy and collect a special tax to pay the interest on such bonds, and provide a sinking fund to pay the principal. The bonds were voted as a donation by the constitutional majority of two-thirds of the qualified voters, and interest was paid on the bonds for 11 years. *Held* that, if a donation was

not originally authorized, but only a subscription to the capital stock of the C. F. & D. R. Co., such donation has been ratified by the legislature, the city authorities, and the people.

2. **SAME—CHANGE OF ROAD AFTER ISSUANCE OF BONDS—ESTOPPEL.**

Acts Ala. 1868, p. 462 (a general act for the creation of railroads), § 21, authorized railroads to consolidate on certain conditions. Section 23 transferred all the property and choses in action of each constituent company to the consolidated company. Acts Miss. 1871, pp. 187, 188, granted the C. F. & D. R. Co. "all the privileges, rights and immunities" conferred by the Alabama act. Acts Miss. 1882, p. 836, authorized the bonds which were payable to the C. F. & D. R. Co. to be delivered to the consolidated company under the same limitations and restrictions under which they would have become payable to such payee. Acts Miss. 1872, p. 298, required the city authorities to issue the bonds only "when the terms of subscription are complied with." *Held*, that such city, in an action by an innocent holder of such bonds on overdue interest coupons, could not set up as a defense that the consolidated company was authorized to build a different road from the one originally chartered, and to leave such city off its line entirely.

This was an action on overdue coupons on bonds issued by the city of Columbus, Miss., to the Columbus, Fayette & Decatur Railroad Company, but delivered to the Georgia Pacific Railway Company, and afterwards transferred to plaintiffs. Defendant demurs to the declaration, and plaintiffs demur to defendant's special pleas. Defendant's demurrer overruled. Plaintiffs' demurrer sustained.

Critz & Beckett, for plaintiffs.

Arnold, Evans & Baldwin, for defendants.

NILES, District Judge. This is a suit on overdue coupons for interest on bonds issued by the defendant to the Columbus, Fayette & Decatur Railroad Company, and delivered to the Georgia Pacific Railway Company, into which the first-named company and several others were consolidated. The main points relied on as defenses are that the bonds were voted as a donation, when the act under which they were voted only authorized a subscription to the capital stock, and that the consolidated company was authorized to build a different railroad from that originally chartered.

The act approved Feb. 1, 1872 (see Acts Miss. 1872, p. 297), gave the city authorities power to subscribe to aid in the construction of the Columbus, Fayette & Decatur Railroad Company, and to issue its bonds to the amount of said subscription. No provision is anywhere made for an exchange of bonds for stock, and stock is nowhere mentioned in the act. The act ratifying the consolidation (Acts Miss. 1882, p. 836, § 2) provides that "the donation of \$100,000 in its bonds heretofore agreed to be made by the town of Columbus, to the Columbus, Fayette and Decatur Railroad Company, but which have not yet been paid over, be and are hereby declared to be payable to the said Georgia Pacific Railway Company." This is a legislative construction, at least, that a donation was authorized, which in such cases is entitled to great respect, and will frequently amount to a legislative ratification. *Pompton v. Cooper Union*, 101 U. S. 196. In 1884 an act was passed amending the charter of the city of Columbus, in which it was authorized to levy and collect a special tax to pay the interest on these bonds, and to

provide a sinking fund for the ultimate redemption of the principal. The declaration shows that the interest has been paid for 11 years, since 1882. Here is a ratification by the legislature, in authorizing the bonds to be issued as a donation, and taxation to pay them; a ratification by the city authorities, in issuing them as a donation, and levying the taxes; and a ratification by the people, in the continued payment of the taxes. It is difficult to conceive a stronger case of ratification, if that were necessary. The bonds were voted as a donation by the constitutional majority of two-thirds of the qualified voters, as recited in the face of the bonds themselves; and, this only barrier against legislative power being removed, the legislature clearly had the right to ratify. *Supervisors v. Brogden*, 112 U. S. 261, 5 Sup. Ct. 125; *Katzenberger v. Aberdeen*, 121 U. S. 178, 7 Sup. Ct. 947.

It is next objected that by the consolidation a different road was authorized to be built, and that the consolidated company had authority to leave Columbus off its line entirely, and to build by way of Aberdeen. It is not alleged that the consolidated company was deprived of the right to build the road for which the bonds were voted, or that it actually did build by way of Aberdeen. The rule is that, if bonds are voted to a railroad company which at that time is authorized to consolidate with other railroads, then the bonds may properly be delivered to the consolidated company. This principle is announced, and the authorities reviewed, in *Livingston Co. v. First Nat. Bank*, 128 U. S. 102, 9 Sup. Ct. 18. There was a general act for the creation of railroads passed by the legislature of Alabama on December 29, 1868 (see *Acts Ala.* 1868, p. 462). By the twenty-first section of this act, railroad companies were authorized to consolidate on certain conditions. By the twenty-third section, all the property and choses in action of each constituent company were transferred to the consolidated company. By the Mississippi act this Columbus, Fayette & Decatur Railroad was granted "all the privileges, rights and immunities" conferred by the Alabama act. See *Acts Miss.* 1871, pp. 187, 188. Hence, the companies were authorized to consolidate, and the bonds, or right to the bonds, which is a chose in action, was transferred to the consolidated company, unless this right was cut off by the allegation that the consolidated company had an option to build a different road, by way of Aberdeen. The answer to this is that the city authorities were only required to issue the bonds "when the terms of subscription are complied with." See *Acts Miss.* 1872, p. 298. On their faces, the bonds are payable to the Columbus, Fayette & Decatur Railroad Company. They were authorized to be delivered to the Georgia Pacific Railway Company, the consolidated company, under the same limitations and restrictions that they were or would have become payable to the Columbus, Fayette & Decatur Railroad Company. See *Acts Miss.* 1882, p. 836. The city authorities of Columbus, Miss., were the tribunal to determine when these conditions were complied with, and issue and deliver the bonds. They did issue and deliver the bonds, with proper recitals; and they are now estopped, as against innocent purchasers, from alleging that they

acted wrongfully. *Block v. Commissioners*, 99 U. S. 686; *Commissioners v. January*, 94 U. S. 202; *Commissioners v. Clark*, Id. 278; *Brooklyn v. Insurance Co.*, 99 U. S. 362; *Moran v. Commissioners*, 2 Black, 722.

For these reasons, I think the demurrer to the declaration should be overruled, and the demurrers to the special pleas (from the third to the fifteenth, inclusive) should be sustained, and judgments can be entered accordingly.

NATIONAL LIFE INS. CO. OF MONTPELIER v. BOARD OF EDUCATION OF CITY OF HURON.

(Circuit Court of Appeals, Eighth Circuit. July 16, 1894.)

No. 402.

1. RECITALS IN MUNICIPAL BONDS—ESTOPPEL.

Where a municipal body has lawful authority to issue bonds or negotiable securities, dependent only upon the adoption of certain preliminary proceedings, and the adoption of those preliminary proceedings is certified on the face of the bonds by the body to which the law intrusts the power, and upon which it imposes the duty, to ascertain, determine, and certify this fact before or at the time of the issuing of the bonds, such a certificate will estop the municipality, as against a bona fide purchaser of the bonds, from proving its falsity in order to defeat them.

2. ESTOPPEL—RECITAL OF PERFORMANCE OF CONSTITUTIONAL REQUIREMENT.

Such an estoppel may arise, in a proper case, upon a recital that an act required by a constitution has been performed, as well as upon a recital of the performance of an act required by statute.

3. ESTOPPEL—RECITALS.

Recitals in municipal bonds may constitute an estoppel in favor of a bona fide purchaser, even where the body that issued the bonds had no power to issue them, and could not, by any act of its own or of its constituent body, make a lawful issue of the bonds, if the fact of this want of power does not appear from the bonds the purchaser buys, the constitution and statutes under which they are issued, nor the public records referred to therein.

4. RECITALS—ESTOPPEL.

But recitals in municipal bonds, by the representative body that issues them, to the effect that all the requirements of the laws with reference to their issue have been complied with, will not estop the municipality from proving, as against a bona fide purchaser, that the representative body had no power to issue them where no act of the representative or constituent body could make the issue lawful at the time it was made, and this fact appears from the constitution and statute under which the bonds are issued, the public records referred to therein, and the bonds the purchaser buys.

5. MUNICIPAL CORPORATIONS—BONDS—ESTOPPEL BY RECITALS.

A board of education, authorized to issue bonds, issued them without complying with a constitutional requirement (Const. S. D. art. 13, § 5) that, at or before the time of incurring such indebtedness, provision should be made for the collection of an annual tax to pay interest and principal, although the board had full power to make such provision, but the bonds recited "that all conditions and things required to be done precedent to and in the issuing of said bonds have duly happened and been performed in regular and due form as required by law." *Held*, that the noncompliance with such requirement was not available to the board as a defense against bona fide purchasers of the bonds.

6. MUNICIPAL CORPORATIONS—BONDS—BONA FIDE PURCHASERS.

A city board of education, authorized to issue bonds for certain purposes, and to sell them for not less than 98 cents on the dollar, issued bonds purporting to be for such purposes, but in fact for an unauthorized purpose, accepted a bid from S. therefor at par, delivered them to him, received part of the price, and transferred its right to the balance to the city, receiving a city warrant for the amount. S. sold the bonds for 97½ cents on the dollar. *Held*, that this constituted an executed sale of the bonds to S. at par, and purchasers from him, who were strangers to his purchase from the board, were not chargeable with notice of the invalidity of the bonds, because they supposed they were buying from the board.

7. SAME—RIGHTS OF BONA FIDE PURCHASERS — APPLICATION OF PROCEEDS OF BONDS.

As against innocent purchasers for value, before maturity, of bonds issued by a city board of education, it is no defense that the board loaned nearly the entire proceeds of their sale to the city, for city warrants that were never paid, and that cannot be legally enforced.

8. SAME—PURPOSE OF ISSUE OF BONDS.

Neither is it a defense to such bonds, as against bona fide purchasers thereof, that the citizens and officers of the municipal corporation, with intention to use the proceeds of the bonds for an unlawful purpose, took the necessary steps to issue them for a lawful purpose, certified on the face of them that they were issued for such lawful purpose, and then appropriated the proceeds to an unlawful purpose.

9. STATUTES—ADOPTION OF ACT BY MUNICIPALITY.

The adoption, by a vote of the electors of a city, at an election duly called in accordance with the provisions of the city charter, of an act relating to schools pursuant to the provisions of that act, is not void because a resolution of the city council calling the election, which was not required by any provision of the statute or the charter, never took effect, because it was not legally published.

10. SCHOOL DISTRICTS—ELECTION OF OFFICERS.

Under an act relating to schools, allowing adoption of its provisions at any time by organized cities, and also by towns or villages not organized, and making provision for an immediate election of school officers in such unorganized territory, but not in an organized city, such officers may be chosen, in an organized city adopting the act, at a special election called in compliance with the requirements of the city charter.

11. SAME—DE FACTO CORPORATION—BONDS.

Where a de facto board of education, exercising all the powers and functions of such a corporation legally organized, is recognized, and its action acquiesced in, by the state and the citizens, bonds issued by it, within the powers granted to a board legally organized, are binding in the hands of bona fide purchasers.

(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of South Dakota.

The National Life Insurance Company of Montpelier, Vt., the plaintiff in error, brought an action in the court below against the board of education of the city of Huron, S. D., the defendant in error, upon 300 coupons cut from 120 bonds of the defendant, issued October 4, 1890. At the close of the evidence the court instructed the jury to return a verdict for the defendant, and, upon that verdict, rendered judgment in its favor. This writ of error is sued out to reverse this judgment.

The following is a copy of one of the bonds from which these coupons were cut:

"Issued in accordance with the provisions of sections 1830, 1831, and 1832 of the Compiled Laws of 1887, of Dakota territory, and in force in the state

of South Dakota, authorizing boards of education to issue bonds to raise funds to purchase school sites, erect school buildings, or to fund bonded indebtedness.

"No. 1. United States of America. \$500.00.

"The State of South Dakota, Board of Education, City of Huron.

"The board of education of the city of Huron, county of Beadle, state of South Dakota, fifteen years after the date hereof, for value received, promises to pay bearer five hundred dollars, lawful money of the United States, at the office of the Chase National Bank, New York City, with interest thereon at the rate of six per cent. per annum, payable semiannually according to the tenor and effect of the annexed coupons. This bond is one of a series of bonds of like date, tenor, and effect, amounting in the aggregate to sixty thousand dollars, and numbered from one to one hundred and twenty, inclusive, issued to raise funds for the purchase of a school site, and for the erection of a school building thereon. And it is hereby certified and recited that all acts, conditions, and things required to be done, precedent to and in the issuing of said bonds, have duly happened and been performed in regular and due form as required by law, and that the total amount of this issue of bonds, together with all other outstanding indebtedness of said board of education, does not exceed the statutory or constitutional limitation, and that this bond has been duly registered by the clerk of the board of education in a book provided for that purpose, as required by law.

"In testimony whereof, the board of education of the city of Huron, in the county of Beadle, state of South Dakota, has caused this bond to be signed by its president, attested by its clerk, and countersigned by [Seal] its treasurer, and the seal of said board of education to be hereunto affixed, at the city of Huron, this 4th day of October, A. D. 1890.

"[Signed]

F. F. Smith, President.

"[Countersigned]

J. C. Klemme, Treasurer.

"Attest: John Westdahl, Clerk."

In August, 1890, the city of Huron was a municipal corporation organized under a special act. Its board of education then consisted of two members from each of the four wards of the city, and, under its act of incorporation, one-half of these members would hold office until the first Tuesday of May, 1891, and one-half until the first Tuesday of May, 1892. Article 3 of chapter 17 of the Compiled Laws of Dakota Territory, which were then in force in South Dakota, relating to schools in cities, towns, and villages, provided as follows:

"Sec. 1808. All cities hereafter organized under the general act to provide for the incorporation of cities shall be governed by the provisions of this act; provided, that any city, town or village now organized under a general or special act, either for civil government or educational purposes, may at any time adopt the provisions of this act by a majority vote of the electors; provided further, that any town or village having a population of two hundred and fifty inhabitants or over within a radius of one mile from the center, and not organized for civil government nor under an independent school district act, may adopt the provisions of this act. In such case the county superintendent shall, upon petition of a majority of the legal voters within the proposed district, call the first election thereof by posting notices in not less than three of the most public places within it; which notice shall contain a full description of the boundaries of said proposed districts besides the time and place of holding the election, and the names and number of offices to be filled." Comp. Laws Dak. 1887.

Section 1811 provided that the public schools of each organization effected in pursuance of this act shall be a body corporate and shall possess the usual powers of a corporation for public purposes by the name of "The Board of Education of the City, Town or Village (as the case may be) of — of the Territory of Dakota."

"Sec. 1814. When any city or town is divided into wards, at each annual election there shall be a board of education consisting of as many members from each ward as there are members of the council, who shall be elected by the qualified voters thereof, one of whom shall be elected annually, and

shall hold his office for the term of two years, and until his successor is elected and qualified. * * *

Section 1824 provided that the board of education should annually levy a tax for the support of the schools of the corporation, to be approved by the city council.

Section 1825 provided that the taxable property of the whole corporation, including the territory attached for school purposes, should be subject to taxation.

Sections 1830-1833 read as follows:

"Sec. 1830. Whenever it shall be deemed necessary by the board of education, in order to raise sufficient funds for the purchase of a school site or sites, or to erect a suitable building or buildings thereon or to fund any bonded indebtedness, it shall be lawful for the board of education of every corporation coming under the provisions of this act to borrow money, for which they are hereby authorized and empowered to issue bonds bearing a rate of interest not exceeding seven per cent. per annum, payable annually or semi-annually, at such place as may be mentioned upon the face of said bonds, which bonds shall be payable in not more than twenty years from their date; and the board of education is hereby authorized and empowered to sell such bonds at not less than ninety-eight cents on the dollar; provided, that no bonds shall be issued until the question shall be submitted to the people, and a majority of the qualified electors who shall vote on the question at an election called for that purpose shall have declared by their votes in favor of issuing such bonds.

"Sec. 1831. It shall be the duty of the mayor of each city or town governed by this act, upon the request of the board of education, forthwith to call an election, to be conducted in all respects as are the elections for city or town officers in the same corporations, except that the returns shall be made to the board of education, for the purpose of taking the sense of such district upon the question of issuing said bonds, naming in the proclamation of such election the amount of bonds asked for and the purpose for which they are to be issued; provided, that where the corporation is not organized for civil government the board of education may call and conduct the election provided for in this section.

"Sec. 1832. The bonds, the issuance of which is provided for in the foregoing section, shall be signed by the president, attested by the clerk and countersigned by the treasurer of the board of education; the said bonds shall specify the rate of interest and the time when principal and interest shall be paid, and each bond so issued shall be for a sum not less than fifty dollars; but no corporation shall issue bonds in pursuance of this act in any sum greater than three per cent of its assessed valuation.

"Sec. 1833. The board of education at the time of its annual levy of taxes for the support of schools as hereinbefore provided, shall also levy a sufficient amount to pay the interest as the same accrues on all bonds issued under the provisions of this article, and also to create a sinking fund for the redemption of said bonds, which it shall levy and collect in addition to the rate per cent authorized by the provisions aforesaid for school purposes; and said amount of funds, when paid into the treasury, shall be and remain a specific fund for said purpose only, and shall not be appropriated in any other way except as hereinafter provided."

The charter of the city of Huron contained the following provisions:

"The clerk shall give at least ten days' notice of the time and place and object of every municipal election, whether general or special, by publishing the same in a newspaper published in said city or by posting notices thereof in three public places in each precinct." City Charter, § 4. "No ordinance, resolution or law of the city shall be passed, altered or amended or repealed by the city council, except by a vote of a majority of the entire council elect, to be taken by yeas and nays and entered on their records, nor take effect until the same shall have been published at least two successive weeks in some newspaper published in the city." Id. § 9

August 30, 1890, pursuant to a petition of citizens presented to the city council of Huron, that body passed a resolution calling a special election of the electors of that city on September 11, 1890, to determine whether or not

they would adopt the provisions of article 3, relating to schools in cities, towns, and villages, from which we have quoted. The city clerk gave the 10 days' notice of this election. It was held. The city council canvassed the votes, declared the proposition carried, and on September 11, 1890, passed a resolution adopting article 3, and calling a special election for the 22d day of September, 1890, for the purpose of choosing eight members of the board of education of the city of Huron, under the said article. September 22, 1890, the election was held, members of the board were elected, and it is stipulated that the members so elected, and their successors in office, continued to act as the board of education of the city of Huron, to carry on the schools, and to exercise all the functions of the board of education of that city, from September 22, 1890, until the month of April, 1892. September 22, 1890, the newly-elected board of education organized, and adopted a resolution declaring that it had become necessary, in order to raise sufficient funds for the purchase of a school site and to erect a suitable school building thereon, to borrow \$60,000, and requesting the mayor of the city to call an election to see whether a majority of the qualified electors of the city would vote to authorize the board of education to issue bonds to the amount of \$60,000 for that purpose. The city council also passed a resolution directing this special election to be called. The mayor called the election. It was held October 3, 1890. The returns were made to the board of education, canvassed, the majority declared to be in favor of the issue of the bonds, and on the same day a resolution was adopted by the board, directing their issue, signature, and authentication by the proper officers of the board. It is agreed that notices of these elections called and held on September 11, 1890, September 22, 1890, and October 3, 1890, were duly given in the form and manner required by law for elections held in the city of Huron.

On October 3, 1890, one D. L. Stick, the president of one of the banks of Huron, made a bid of par for the bonds; and the board passed a resolution that the bonds be delivered to him, and that he be directed and authorized to pay to the city of Huron the sum of \$55,000 out of the sum paid for the bonds. The board subsequently passed a resolution to the effect that the sum of \$55,000 derived from the sale of the bonds be temporarily loaned to the city of Huron upon the security of a city warrant delivered to the treasurer of the board of education for the said sum. Forty-five hundred dollars of the balance of this purchase price was subsequently loaned to the city in substantially the same way, and only \$500 used for school purposes. The bonds were delivered to Mr. Stick, October 3, 1890. He, in company with the mayor of the city, carried them to the city of New York, and on October 17, 1890, sold them to the New England Loan & Trust Company and one Gilbough for 97½ cents on the dollar. There was some evidence tending to show that Gilbough supposed that they were buying direct from the board of education; and that the mayor telegraphed the board of education while the bonds were in process of negotiation in New York, because he did not feel like selling them at a price named without further authority; but there was no evidence that the New England Loan & Trust Company was aware of these facts, nor that the board of education ever claimed that any one was the purchaser from it, except Mr. Stick. The bonds numbered 1 to 60, inclusive, and all the coupons here in suit, except 60 which were cut from bonds numbered 61 to 120, inclusive, were sold by the trust company, for par or more, to, and paid for by, the plaintiff and the Dartmouth Savings Bank, respectively, before any of the coupons matured; and they purchased them without notice of the price at which the trust company had bought them, and without notice of any defects in or defenses to them. The remaining 60 coupons were cut from bonds numbered 61 to 120 by the New England Loan & Trust Company, and the bonds, with the remaining coupons, were then sold by them to a third party. All the coupons in suit were properly transferred to the plaintiff in error before this suit was commenced.

There was evidence tending to show that in the fall of 1890 the city of Huron was a candidate before the electors of South Dakota for permanent capital of that state, and that all the proceedings taken for the purpose of issuing and selling these bonds, ostensibly for buying a site and building a

schoolhouse, were really taken with the intent on the part of the citizens and officers of the city of Huron, and of the board of education, to use the money raised upon these bonds for the purpose of successfully carrying on the campaign of the city for the capital; that neither the treasurer of the board of education nor the treasurer of the city of Huron ever received any of the proceeds of the bonds, except \$5,000; and that the warrants of the city of Huron, which were issued to the board for the temporary loan, were never paid, and were in fact void. The evidence of one officer was that he did not know what became of the proceeds, but that 't was generally supposed that they were used to carry on the campaign of the city of Huron for the capital. But there was no evidence that the New England Loan & Trust Company, or Mr. Gilbough, or any of the subsequent purchasers of the bonds, ever knew of this purpose before they paid for the bonds, and there was evidence that they all supposed that the bonds were honestly issued for the purpose stated upon their face.

The constitution of the state of South Dakota provides that: "Any city, county, town, school district or any other subdivision incurring indebtedness shall at or before the time of so doing provide for the collection of an annual tax sufficient to pay the interest and also the principal thereof when due, and all laws and ordinances providing for the payment of the interest or principal of any debt shall be irrepealable until such debt is paid." Const. S. D. art. 13, § 5. The board of education did not, at or before the time of issuing or selling these bonds, provide for the collection of any such annual tax. The evidence of this fact, and all the evidence of the conspiracy to issue these bonds for a purpose other than that appearing upon their face, and all the evidence attacking the good faith of the eastern purchasers of the bonds, was received under the objections and exceptions of the plaintiff.

N. T. Guernsey (E. D. Samson, Wm. H. Baily, and Joe Kirby, on the brief), for plaintiff in error.

F. L. Boyce (Jesse W. Boyce and H. C. Hinckley, on the brief), for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

Before entering upon the discussion of any other question in this case, it is well to dispose of the contention that the holders of these bonds had notice of their invalidity before they paid for them. This contention rests chiefly upon the proposition that the defendant was forbidden by the statute to sell the bonds for less than 98 cents on a dollar (section 1830, Comp. Laws Dak.), and that the New England Loan & Trust Company bought them October 17, 1890, for 97½ cents on a dollar. The records of the board of education, however, disclose the facts that Mr. Stick, the president of one of the banks of Huron, bid 100 cents on a dollar for them, and that the defendant, the board of education, accepted that bid, and ordered the bonds delivered to him, October 3, 1890. Under this order, evidenced by a resolution of the board, the bonds were delivered to him, and he accepted them. This constituted a sale of the bonds at par. It vested the title in Mr. Stick, and a perfect right of action for the \$60,000 in the board of education. If the board failed to enforce its right and to collect the purchase price, that cannot affect the sale, or the title to the bonds. So far as Mr. Stick was concerned, however, it did collect the full purchase price. Its treasurer received a credit of \$5,000 from the sale of these bonds, in the First

National Bank of the city of Huron; and the board, by a resolution passed October 3, 1890, transferred its right of action for the other \$55,000 to the city of Huron, directed Mr. Stick to pay that amount to the city, and subsequently received therefor a city warrant for \$55,000. The records of the board of education themselves exhibit, not only a sale of these bonds to Mr. Stick, but a disposition by the board, not of the \$58,500 paid to Mr. Stick by the trust company, but of the entire \$60,000 bid by Mr. Stick for the bonds. The only testimony that tends in the least to throw suspicion on the truth of these records is that a Mr. Gilbough, who was a joint purchaser of the bonds with the trust company, October 17, 1890, testified that he supposed or understood that he was buying of the defendant; and the mayor of the city of Huron, who accompanied Mr. Stick to New York to assist in selling the bonds, testified that he telegraphed to the defendant about the price that was offered for them, because he did not feel like selling them at that price without further authority. But this is evidence of no material fact. The supposition, understanding, or feeling of strangers to the transaction between the board and Mr. Stick cannot be held to overthrow the executed sale which the records of the board, the admitted delivery of the bonds to Mr. Stick, and the appropriation of their proceeds by the defendant effected. A careful perusal of all the testimony has brought us to the settled conviction that there is no evidence in this record that would warrant either court or jury in finding that the records of this corporation do not here disclose the truth. Under this evidence, Mr. Stick must be considered the first purchaser of these bonds. The first sale was at par, and all purchasers subsequent to him were innocent purchasers for value, before maturity, or assignees of such purchasers, equally protected.

This conclusion disposes at the outset of two defenses that are urged against these bonds.

It is no defense to these bonds, against innocent purchasers for value, before maturity, that the defendant loaned \$59,500 of the proceeds of the sale of them to the city of Huron for city warrants that were never paid, and that cannot be legally enforced, so that it has actually realized but \$500 from the sale of its bonds. That a municipal corporation has given away or squandered the proceeds of negotiable securities which it placed upon the market cannot affect the rights of bona fide purchasers, who had no knowledge of, nor part in, the gift or waste. They are in no way responsible for the wise and economical use by the corporation of the funds it borrows. *County Com'rs v. Beal*, 113 U. S. 227, 240, 5 Sup. Ct. 433; *Cairo v. Zane*, 149 U. S. 122, 137, 13 Sup. Ct. 803; *Maxcy v. Williamson Co.*, 72 Ill. 207.

Nor is it any defense to such bonds, as against bona fide purchasers, that the citizens and officers of a municipal corporation, with the intention to use the proceeds of the bonds for an unlawful purpose, took the necessary steps to issue them for a lawful purpose, certified on the face of the bonds that they were issued for such lawful purpose, and then appropriated the proceeds to the unlawful purpose. Corporations are as strongly bound to an adherence

to truth in their dealings with mankind as are individuals, and they cannot, by their representations or silence, induce others to part with their money or property, and then repudiate the obligations for which the money was expended, and which their statements represented to be valid. The defendant, in its resolutions and records, in all the resolutions and records of the city council of Huron, in the call for and vote at the election which authorized the issue of the bonds, and in the bonds themselves, declared that they were issued for a lawful purpose, viz. "to raise funds for the purchase of a school site, and for the erection of a school building thereon." The present holders purchased them and paid for them with no notice or knowledge that they were issued for any other purpose, and in the full belief that these declarations were true. It is no defense for this corporation, as against these bona fide purchasers, that during all this time it intended to use, and has since used, the money it raised from these bonds for the unlawful purpose of conducting a campaign for the state capital. It is no defense that it knew at the time it was taking these proceedings and making these declarations that they were false, and that during all this time it intended—First, to deprive itself of the school site and building; and, second, to deprive the purchasers of the bonds of the moneys they paid for them on the faith of its representations, and that it has accomplished the former purpose, and now seeks, with the aid of the courts, to accomplish the latter. Such a plea cannot be entertained in a court of justice. The corporation is estopped to deny that these bonds were issued to raise money for a school site and school building. *Moran v. Commissioners*, 2 Black, 722; *Hackett v. Ottawa*, 99 U. S. 86, 90; *Ottawa v. National Bank*, 105 U. S. 342, 345; *Zabriskie v. Railroad Co.*, 23 How. 381; *Omaha Bridge Cases*, 10 U. S. App. 101, 189, 2 C. C. A. 174, 51 Fed. 309; *Paxson v. Brown*, 61 Fed. 874, and cases cited.

Another contention of counsel for the defendant is that article 3, c. 17, of the Compiled Laws of Dakota, under which the bonds were issued, was never legally adopted, and hence the bonds were void, and this, because the resolution of the city council of Huron passed August 30, 1890, calling the election for the adoption of this article, was required, by a positive provision of the city charter, to be published two weeks before it took effect, and the election was held September 11, 1890, and before it could have been so published. In support of this contention, they cite *National Bank of Commerce v. Town of Granada*, 4 C. C. A. 212, 54 Fed. 100. In that case the bonds were issued under section 4541 of Mills' Annotated Statutes of Colorado, which expressly provides that the city council or board of trustees shall call the election, and shall publish the notice of the election, to determine whether or not the bonds shall issue, and shall then issue the bonds if the vote is favorable. The board of trustees of the town of Granada passed an ordinance which in itself called the election, prescribed the notice, and authorized the mayor and clerk to issue the bonds if the vote was favorable. A general statute of the state provided that such an ordinance should be published, and that it should not take effect until five days after its

publication. The ordinance never was published, and this court held that it was never in force, and that the mayor and clerk never had any authority to issue the bonds; that it was a case of total want of authority on their part to act upon any conditions. *McClure v. Township of Osgood*, 94 U. S. 429, is a similar case of want of authority, because in that case the statute had not taken effect before the notice of election was given, so that there was no authority to give it. But these cases have no relevancy to the question presented here. In the Case of the Town of Granada the statute required the board of trustees to call the election, and to publish the notice of it. There is no such provision relative to the election for the adoption of article 3 in any of the statutes under which these bonds were issued. That article provides that any organized city may at any time adopt the provisions of the act by a majority vote of the electors. It is silent as to the person or body that shall call the election, and as to the notice of it. All those questions were left to the charter of the city. Article 3 imposed no duty on the city council,—required no act on its part before the election was held. Nor has our attention been called to any provision of the city charter of Huron that required any action on the part of the city council in order to legally call such an election. That charter does provide that the city clerk shall give at least 10 days' notice of the time and place and object of every municipal election, whether general or special; and this notice of the election of September 11, 1890, he gave in the manner prescribed by the charter. At that election the electors voted, the city council subsequently canvassed and declared the vote, and all parties treated it as a valid election until the time came to pay these coupons. In that election every requirement of the charter and of the statute was complied with, and in our opinion the election was valid, and article 3 was duly adopted. If the city council had passed no resolution calling the election, it would yet have been called and held in strict accordance with the charter, and the election cannot be invalidated by the fact that the city council passed a futile resolution that never took effect.

It is next urged that if article 3 was adopted at the election of September 11, 1890, the election of the members of the board of education September 22, 1890, was void, and there was no legal organization of the defendant corporation in that year, because article 3 makes provision for the election of members of the board at the annual elections of the city, which occur in March in each year, but makes no provision for their election at any other time. Section 1808, Comp. Laws Dak., provides that any city organized under the general law or under a special act may adopt the provisions of article 3 by a majority vote of its electors at any time. It also provides that any town or village not so organized, having 250 inhabitants within a radius of a mile, may adopt its provisions, and that in the latter case the county superintendent shall, upon a petition of a majority of the legal voters, call the first election by posting notices which shall state the time and place of holding the election, and the names and number of offices to be filled. Thus it

will be seen that the same section allows organized and unorganized inhabitants to adopt the provisions of the article at any time, and makes provision for an immediate election of officers by the inhabitants of the unorganized territory, and no provision for such an election in the organized city. It is hardly conceivable that it was the intention of the legislature to give to the sparsely inhabited parts of the state the benefits of this law earlier than to the cities. It is far more reasonable to suppose that the cause for the difference lies in the known fact that the charters of cities generally designate the officers whose duty it is to call, and the method of calling, general and special elections; and under these provisions the legislature well supposed that an election of the members of the board of education might be held immediately in the cities without special legislation, while such an election could not be so held in the unorganized territory. Strong support is lent to this view by the provision that any city may adopt this article "at any time," which is at least inconsistent with the position that the provisions of this article could never be put in force at any other time than at an annual election when only members of the board could be chosen. This is undoubtedly the view the officers and citizens of Huron took of this law when they issued these bonds, and until the coupons fell due. They held a special election of members of this board, under a notice that conformed strictly to the requirements of their charter, on September 22, 1890; and the members then elected immediately took charge of the schools and school property, and they and their successors discharged all the functions of the board of education of that city until April, 1892. In our opinion, their original view of this law and of their authority under it was correct, and the election of September 22, 1890, was authorized by it.

Moreover, in October, 1890, when these bonds were issued, this board of education was in any event a *de facto* corporation, exercising, under article 3, all the powers and functions granted to a corporation legally organized. It was recognized, and its action was acquiesced in, by the state and by the citizens, for at least 18 months; and, as against bona fide purchasers of its bonds, its acts, as a *de facto* board of education, if within the powers granted to a board legally organized under this law, are binding upon the defendant corporation. It is the province of the state to question, by proper judicial proceedings, its incorporation; not that of a defendant in a private suit, when it has asserted its corporate existence, and incurred liabilities to innocent parties on the faith of it. "When a municipal body has assumed, under color of authority, and exercised, for any considerable period of time, with the consent of the state, the powers of a public corporation, of a kind recognized by the organic law, neither the corporation nor any private party can, in private litigation, question the legality of its existence." *Ashley v. Board*, 8 C. C. A. 455, 60 Fed. 55, 63; *County of Ralls v. Douglas*, 105 U. S. 728, 730; *Coler v. School Tp.* (N. D.) 55 N. W. 587; *Clement v. Everest*, 29 Mich. 19; *Burt v. Railroad Co.*, 31 Minn. 472, 18 N. W. 285, 289; *State v. Carr*, 5 N. H. 367; *People v. Maynard*, 15 Mich.

463; *Fractional School Dist. No. 1 v. Joint Board of School Inspectors*, 27 Mich. 3.

Finally it is insisted that the bonds are void because the defendant failed to comply with section 5, art. 13, of the constitution of South Dakota, which provides that any city, county, town, school district, or other subdivision, incurring indebtedness, shall, at or before the time of so doing, provide for the collection of an annual tax sufficient to pay the interest and also the principal thereof when due. Whether or not this provision of the constitution is self-executory, and whether it is mandatory or simply directory, are questions exhaustively discussed in the briefs, which we will not now stop to consider. Conceding, without deciding, that it is both self-executory and mandatory, the question arises whether or not the defendant's noncompliance with its provisions is an available defense against bona fide purchasers of these bonds, in view of the recitals they contain. Among other things, these bonds recite: "That all conditions and things required to be done, precedent to and in the issuing of said bonds, have duly happened and been performed in regular and due form as required by law." One of the conditions and things required to be done, precedent to and in the issuing of these bonds, was to provide, in accordance with this constitutional requirement, for the collection of the annual tax to pay the principal and interest of the bonds. The defendant certified on the face of these bonds that this thing had been done. On this certificate the present holders bought the bonds. Can the defendant now prove the falsity of this certificate to defeat them?

Our attention has not been called to any decision of the supreme court of South Dakota upon this question, and it is, in any event, a question of general commercial law, which the national courts must decide for themselves. If the decisions of the supreme court have settled the question, it will be unnecessary to consider those of the state courts, but we remark, in passing, that the cases of *Wilson v. Shreveport*, 29 La. Ann. 673, *Knox v. City of Baton Rouge*, 36 La. Ann. 427, and *City of New Orleans v. Clark*, 95 U. S. 644, which suggest that bonds may be void that are issued in violation of a constitutional provision which requires the provision for the collection of the annual tax to pay them to be contained in the act or ordinance which authorizes their issue, have no relevancy to the question before us. It is well settled that all purchasers must take notice of the existence and contents of the statute or ordinance under which the bonds declare that they are issued. If, as in *National Bank of Commerce v. Town of Granada*, supra, the ordinance recited in the bonds was never passed, or never took effect, the mayor and the clerk of the town, who signed the bonds, could not enact it into an ordinance by referring to it, and the purchasers must take notice that no act of theirs could give these agents the necessary authority to issue the bonds. If, as in *Coffin v. Board*, 6 C. C. A. 288, 57 Fed. 137, the statute recited in the bonds expressly prohibited their issue at the time they were issued, purchasers must take notice of that provision of the law; and recitals

in the bond to the effect that all requirements have been complied with will not relieve them of this notice, because no compliance or act of the county or its commissioners would enable them to make a lawful issue of the bonds at the time they were issued.

The distinction between these cases and that at bar is marked and manifest. An examination of the statutes or ordinances recited in the bonds in those cases disclosed the fact that it was not in the power of the representatives who issued them, by any act of theirs, to make a lawful issue of the bonds, and that if they had done every act and performed every condition in their power the bonds would still have been unauthorized. In the case at bar there was no lack of power in the board of education to make a lawful issue of bonds when those in suit were issued. Article 3, under which they were issued, provided that the taxable property of the whole corporation should be subject to taxation by them (section 1825, Comp. Laws Dak.), and that they should annually levy a sufficient amount to pay the interest on all bonds they issued under this article, and to create a sinking fund for the payment of the principal (section 1833, Id.) An ordinance or resolution of this board, passed at or before the issuance of the bonds, providing for the collection of such an annual tax until the bonds and coupons were paid, would have complied with the provision of the constitution. If this was not passed, it was not from lack of power in the board, but from a failure on its part to exercise the power with which it was vested in the manner provided by the constitution.

It is this difference between the inadequate exercise of ample power and the total absence of power to be exercised that widely separates this case from *Dixon Co. v. Field*, 111 U. S. 83, 4 Sup. Ct. 315; *Northern Bank of Toledo v. Porter Tp. Trustees*, 110 U. S. 608, 4 Sup. Ct. 254; *McClure v. Township of Osgood*, 94 U. S. 429; *Lake Co. v. Graham*, 130 U. S. 674, 9 Sup. Ct. 654; *Nesbit v. Independent Dist.*, 144 U. S. 610, 617, 12 Sup. Ct. 746; *Sutliff v. Commissioners*, 147 U. S. 230, 235, 13 Sup. Ct. 318; and *Hedges v. Dixon Co.*, 150 U. S. 182, 14 Sup. Ct. 71,—cited by counsel for defendant.

In *Dixon Co. v. Field*, *supra*, each bond disclosed upon its face that it was a part of an issue of \$87,000. The constitution prohibited the county from issuing bonds to an amount in excess of 10 per cent. of its assessed valuation. Eighty-seven thousand dollars was more than 10 per cent. of that valuation, and the supreme court held that the recitals in the bond did not estop the county from showing these facts, because the purchaser was bound to take notice of the constitution and statute under which his bond was issued, the assessed valuation to which the constitution referred him, and the total amount of the issue of bonds disclosed on the face of each, and from these facts he must know that the county commissioners could not, by any act of theirs, lawfully issue the bonds.

In *Sutliff v. Commissioners*, *supra*, the constitution and the statute limited the power of the county commissioners to incur debts for the county to a certain percentage of the assessed valuation. They had incurred indebtedness in excess of that limitation before any of the bonds were issued. The statute required the county com-

missioners to publish and to make a public record of a true statement of the indebtedness of the county, semiannually; and the court held that purchasers of the bonds must take notice of the constitution, the statute, the assessed valuation, and the public record of the debt referred to in them, which together disclosed the entire absence of power in the commissioners to issue any bonds, and that no recitals in the bonds themselves would estop the county from proving these facts.

The other cases cited above rest upon the same principle. In each of them the bonds failed, not because the municipal representatives who issued them failed to exercise the power they had in the manner prescribed, but because they had no power to exercise, and the constitution, statutes, and public records referred to therein gave notice to the purchasers of this want of power. It is clear that these authorities do not rule the case before us. Nor do such cases as *Marsh v. Fulton Co.*, 10 Wall. 676; *Buchanan v. Litchfield*, 102 U. S. 278; *Lake Co. v. Rollins*, 130 U. S. 662, 9 Sup. Ct. 651,—in which warrants or bonds that contained no recitals were declared void for want of compliance with some provisions of the law under which they were issued.

It is, however, insisted that there is something in a constitutional provision so sacred that no certificate of a compliance with its terms can estop the corporation that makes it from proving its falsity. The remark of Mr. Justice Jackson in *Hedges v. Dixon Co.*, 150 U. S. 187, 14 Sup. Ct. 71, that, when municipal bonds are issued in violation of a constitutional provision, no estoppel can arise by reason of any recitals contained in the bonds, and his reference to *Lake Co. v. Rollins*, 130 U. S. 662, 9 Sup. Ct. 651; *Lake Co. v. Graham*, 130 U. S. 674, 9 Sup. Ct. 654; and *Sutliff v. Commissioners*, 147 U. S. 230, 13 Sup. Ct. 318,—are cited in support of this position. But there was no question of the effect of such recitals before the court in *Hedges v. Dixon Co.*, and the remark was entirely unnecessary to the decision of the case. The bonds there in question had been adjudged void in *Dixon Co. v. Field* years before, and the question then before the court was whether, inasmuch as only a part of the issue was beyond the constitutional limit of indebtedness, a court of equity would scale down the amount, and permit a recovery for such a sum as was within the limit. When he made the remark the learned justice had in mind the bonds of Dixon county, and it was true that the recitals in those bonds, and in the bonds in the particular cases he cites, did not constitute estoppels, because the purchasers were charged with notice of the want of power of those who issued them, by the statutes and the records they referred to. The remark should undoubtedly be limited to the particular facts of those cases.

It is a general and salutary principle of the law that one who, by his acts or representations, or by his silence when he ought to speak out, intentionally or through culpable negligence, induces another to believe certain facts to exist, and the latter rightfully acts on such belief, so that he will be prejudiced if the former is permitted to deny their existence, is conclusively estopped to interpose

such denial. No reason occurs to us why a municipal body that has induced others to act to their prejudice by its certificate that it has performed an act that the laws intrusted to it to perform should be excepted from this rule, and permitted to deny its certificate, to the prejudice of those it has deceived, simply because the performance of the act was required by the constitution. This view is not novel.

In *Buchanan v. Litchfield*, 102 U. S. 278, 290, Mr. Justice Harlan intimated the opinion that, in a case where neither the constitution nor the statute prescribed any rule or test by which persons should ascertain the indebtedness of a corporation, a recital in the bonds that the requirements of the constitution were complied with might estop the corporation from denying it.

In *Pana v. Bowler*, 107 U. S. 529, 539, 2 Sup. Ct. 704, the supreme court upheld the estoppel of a recital in bonds, as against an alleged defect in the mode of conducting an election held prior to the adoption of the constitution of Illinois, when the bonds were issued after its adoption, in the face of a prohibition contained in that constitution against the issuing of any bonds unless their issue had been authorized under then existing laws by a vote of the people prior to the adoption of the constitution.

In *Oregon v. Jennings*, 119 U. S. 74, 7 Sup. Ct. 124, the supreme court held that recitals in bonds to the effect that a constitutional provision had been complied with estopped the town of Oregon to deny the statement. In delivering the opinion of the court, Mr. Justice Blatchford said:

"In respect to this compliance with the conditions imposed by the vote of the people, whether the question is to be regarded as arising under the provision of the constitution or that of a statute, it must equally be regarded as concluded by the recitals in the bonds made by the supervisor and town clerk."

And in *Chaffee Co. v. Potter*, 142 U. S. 355, 364, 12 Sup. Ct. 216, the supreme court held, in 1891, that the recital in the bonds that the total amount of the issue did not exceed the limit prescribed by the constitution of Colorado estopped the county, as against a bona fide holder, from proving the violation of this constitutional provision.

Upon reason and authority, therefore, our conclusion is that an estoppel may arise in a proper case upon a recital that an act has been performed which was required by a constitution, as well as upon the recital of the performance of an act required by statute.

From the decisions to which we have referred, we think the following rules are fairly deducible:

Recitals in municipal bonds, by the representative body that issues them, to the effect that all the requirements of the laws with reference to their issue have been complied with, will not estop the municipality from proving, as against a bona fide purchaser, that the representative body had no power to issue them, where no act of the representative or constituent body could make the issue lawful at the time it was made and this fact appears from the constitution and statute under which the bonds are issued, the public rec-

ords referred to therein, and the bonds the purchaser buys. *Dixon Co. v. Field*, supra, and cases cited thereunder.

Such a recital may constitute an estoppel in favor of a bona fide purchaser, even where the body that issued the bonds had no power to issue them, and could not, by any act of its own or of its constituent body, make a lawful issue of bonds, if that fact does not appear from the bonds the purchaser buys, the constitution and statutes under which they are issued, and the public records referred to therein. *Chaffee Co. v. Potter*, supra.

Another rule that is established by a long line of decisions of the supreme court is that:

Where the municipal body has lawful authority to issue bonds or negotiable securities, dependent only upon the adoption of certain preliminary proceedings, and the adoption of those preliminary proceedings is certified on the face of the bonds by the body to which the law intrusts the power, and upon which it imposes the duty, to ascertain, determine, and certify this fact before or at the time of issuing the bonds, such a certificate will estop the municipality, as against a bona fide purchaser of the bonds, from proving its falsity, to defeat them. *Commissioners v. Aspinwall*, 21 How. 539; *Bissell v. City of Jeffersonville*, 24 How. 287; *Moran v. Commissioners*, 2 Black, 722; *Meyer v. City of Muscatine*, 1 Wall. 384, 393; *Lee Co. v. Rogers*, 7 Wall. 181; *Pendleton Co. v. Amy*, 13 Wall. 297, 305; *City of Lexington v. Butler*, 14 Wall. 282; *Grand Chute v. Winegar*, 15 Wall. 355; *Lynde v. Winnebago Co.*, 16 Wall. 6; *Marcy v. Township of Oswego*, 92 U. S. 637; *Town of Colomo v. Eaves*, Id. 484; *County of Moultrie v. Rockingham Ten-Cent Sav. Bank*, Id. 631; *Commissioners v. Bolles*, 94 U. S. 104; *Commissioners v. Clark*, Id. 278; *Commissioners v. January*, Id. 202; *County of Warren v. Marcy*, 97 U. S. 96; *Pana v. Bowler*, 107 U. S. 529, 2 Sup. Ct. 704; *Oregon v. Jennings*, 119 U. S. 74, 7 Sup. Ct. 124; *Chaffee Co. v. Potter*, 142 U. S. 355, 12 Sup. Ct. 216.

In *Commissioners v. Aspinwall*, supra, a favorable vote of the electors of a county at an election called by prescribed notices was a condition precedent to the lawful exercise by the county commissioners of the power to issue the bonds. The defense was that the requisite notices of the election had not been given, but the court held that the county was estopped to make that defense by a recital in the bonds that they were issued in pursuance of the statute.

In *Pana v. Bowler*, 107 U. S. 539, 2 Sup. Ct. 704, Mr. Justice Woods, who delivered the unanimous opinion of the supreme court, said:

"This court has again and again decided that if a municipal corporation has lawful power to issue bonds or other negotiable securities, dependent only upon the adoption of certain preliminary proceedings, such as a popular election of the constituent body, the holder in good faith has the right to assume that such preliminary proceedings have taken place, if the fact be certified on the face of the bonds by the authorities whose primary duty it is to ascertain it."

In *Marcy v. Township of Oswego*, 92 U. S. 637, the bonds recited the statutory prerequisite to the exercise of the authority to issue them,—that three-fifths of the electors of the town had voted in fa-

vor of their issue,—and the court held that the town was estopped to prove that less than three-fifths had so voted.

In *Town of Colomo v. Eaves*, 92 U. S. 284, 491, in which the defense was that the proper notice of the popular election that was a condition precedent to the lawful issue of the bonds had not been given, the court again held that the recital in the bonds estopped the town, and declared that the rule that “where legislative authority has been given to a municipality, or to its officers, to subscribe for stock of a railroad company, and to issue municipal bonds in payment, but only on some precedent condition, such as a popular vote favoring the subscription, and where it may be gathered from the legislative enactment that the officers of the municipality were invested with power to decide whether the condition precedent had been complied with, their recital that it has been, made in the bonds issued by them, and held by a bona fide purchaser, is conclusive of the fact, and binding upon the municipality, for the recital is itself a decision of the fact by the appointed tribunal,” had become so firmly seated in reason and authority that it could not be shaken. It never has been shaken, but has been uniformly reaffirmed in the later cases we have cited.

In view of the rule these authorities establish and illustrate, there is no longer any difficulty in disposing of the question we have been considering. Full power to perform the condition precedent that was not fulfilled in the case before us, and to make a lawful issue of the bonds, was vested in this board of education. The constitution and statute intrusted to this board the power, and imposed upon it the duty, to ascertain and determine, before it issued the bonds, whether or not this condition had been performed. Neither the statute nor the constitution referred the purchaser to, or required any public record of the performance of this condition, before or at the time of the issue of the bonds, other than the act of the board in issuing them. The board not only had special means of knowledge regarding the performance of this condition, but it had absolute knowledge, for the board alone could perform the condition, and the purchaser had a right to assume that it knew and truthfully certified to what it had itself done. This board, by the act of issuing the bonds, decided that this and all other conditions precedent to their issue had been performed. It certified that fact on the face of the bonds it issued, and bona fide purchasers have bought them. The defendant corporation cannot now be heard to deny the truth of this certificate, to their prejudice. The case falls far within the rule adopted by the supreme court. That rule commends itself to our judgment as just and equitable, and the long line of decisions in that court, affirming it, has foreclosed all discussion of the rule itself in the national courts.

The judgment below must be reversed, and the cause remanded, with directions to grant a new trial, and it is so ordered.

BOOTH et al. v. BROWN et al.

(Circuit Court, D. Washington, N. D. August 11, 1894.)

RECEIVERS' EMPLOYEES—SYMPATHETIC STRIKE—REINSTATEMENT.

Employés of receivers of a railroad joined in a general strike, without grievance of their own, for the purpose of compelling, by obstruction of travel and hindrance to traffic, parties to one side of a pending controversy to yield actual or supposed rights; quitting the service under such circumstances as made it necessary to fill their places in order to continue the operation of the road. *Held*, that the court should not, by reason of their past services, direct the receivers to reinstate them, as they had not been discharged for fault, and their reinstatement would displace competent and worthy men, who had worked during the strike under abuse from crowds in sympathy with the strikers. Nor was an order for their re-employment in other positions necessary, where without it they would be called upon to fill vacancies as they should occur.

This was a petition by John Booth and 14 others to be reinstated in their former positions as engineers and trainmen on the Seattle, Lake Shore & Eastern Railroad, which they had vacated by joining in the general strike of railway employés instigated by the American Railway Union.

James Hamilton Lewis, for petitioners.

HANFORD, District Judge. The petition to reinstate former employés of the Seattle, Lake Shore & Eastern Railroad in the positions which they respectively held prior to the late general railroad strike and boycott, presented to me in their behalf by Col. James Hamilton Lewis, and his argument in support thereof, has been duly considered; and I am constrained to refuse to make any order controlling the discretion of the receivers, as prayed for in the petition, for the following reasons:

This petition sets forth no accusation against the receivers or their subordinate officers, nor any grievance whatever. I regard it as an application for employment from men who, by experience and past service, have become proficient in the operation of trains upon this road; and, in that light, it merits respectful consideration, so far as to weigh the reasons for and against making the order as prayed.

For answer to the representations made by the petition as to the character and past behavior of these ex-employés who are now asking to be reinstated in the positions which they held prior to going out, as they say, "from the employ of the company, out of respect and deference to the order of which, as a fraternity and a brotherhood, we were members," it is sufficient to say that no charges have been made against them, and they were not discharged for any fault. On the contrary, they all voluntarily quit the service under such circumstances as to not only leave the superintendent free to engage other men to fill their places, but under the necessity of either doing so, or suspending the operation of the road. Fortunately for the road and the communities served by it, the management was not lacking in will or ability to keep the road open. Competent and worthy men were found to fill every vacancy, so that

every scheduled passenger and mail train made its run during the continuance of the strike.

While I appreciate the good intentions of the business men of Seattle and others who have joined in making this appeal, and while I consider that these ex-employés should not be blacklisted, and that it is desirable that they should be employed, I cannot forget that it is impossible to reinstate them without turning out of employment an equal number of worthy men, who not only possess the ability, but also the courage, necessary to handle trains during turbulent times. Mr. Bird, Mr. Brooks, and others now in charge of engines on this road rank with the most competent railroad engineers in the United States. They have lived in Seattle for a long time and have families dependent upon their labors for support. For no offense, other than doing honest work, they have been jeered at and abused by crowds of people subservient to or in sympathy with Debs. The cabs in which they ride show the scars made by stones and missiles hurled at their heads. To deprive them of their situations at this time would be an injustice to them, and base ingratitude on the part of their employers. I shall not order the receivers to pursue any such policy, and it is not necessary for the court to make an order authorizing or requiring the receivers to employ again any of those who were formerly in the service of the company, for the reason that without such order the superintendent will place all applicants upon the waiting list, and call them to fill places for which they are competent, as fast as vacancies occur, without directions from the court. The officers of this court keep no black list.

I do not wish my statement to the effect that these petitioners were not discharged for any fault on their part to be misunderstood as an assent on my part to the proposition advanced in this petition that the ex-employés joined in a general strike without having "any intention of interfering with the successful management of the road," or that such action may be properly regarded as nothing more than a misfortune to themselves, and as involving no degree of culpability. I have only intended to make the point that, as they were not discharged, they are not now entitled to have an opportunity for vindicating themselves, and the court is not called upon to settle any controversy between the receivers of the road and their employés. The action of these men in joining a so-called "sympathetic strike," otherwise known in this country as a "boycott," must be condemned as an attempt, without justification or excuse, to destroy the business which had heretofore yielded them wages, and the misfortune which they now complain of is entirely a result of their own folly. A strike by men employed to operate a railway always has for its object the obstruction of travel, and a hindrance to traffic on that line, and means oppression to all who are dependent upon it for means of transportation; and an attempt by the men so employed, when they have no grievance of their own, to deprive innocent people of their rights, and to oppress the public, for the purpose of subjecting the parties on one side of a pending controversy to such an irresistible pressure as to compel

them to yield actual or supposed rights, is necessarily intended to inflict injury upon others, and must be condemned by all right-minded people as an intentional wrong. By joining in a strike under such conditions and for such purpose, these employes have absolved their employers from all obligations to accord them any preference right to employment over others, by reason of their past services. They are receiving fair treatment by being placed upon the waiting list.

SOUTHERN CALIFORNIA RY. CO. v. RUTHERFORD et al.

(Circuit Court, S. D. California. June 30, 1894.)

INJUNCTION—PERFORMANCE OF DUTY BY EMPLOYES.

Where employes of a railroad company, though remaining in its employment, refuse to perform their duties of operating its trains so long as Pullman cars are hauled, though the company is bound by contract to carry them, thus interrupting interstate commerce and the transmission of mails, and subjecting the company to suits and great and irreparable damage, injunction will issue requiring them to perform their duties during their continuance in the company's employment.

Suit by the Southern California Railway Company, a corporation of the state of California, against C. C. Rutherford and others for injunction.

W. J. Hunsaker, for complainant.

ROSS, District Judge. Time does not admit of an extended statement of the facts of the case or of the reasons for awarding the injunction applied for. The bill shows, among other things, that the complainant railway company is one link in a through line of road extending from National City, San Diego county, Cal., to the city of Chicago, in the state of Illinois, engaged in the transportation, among other things, of interstate commerce and the mails of the United States; its connecting roads being the Atlantic & Pacific and the Atchison, Topeka & Santa Fé Railroad Companies. That there is a valid existing contract between the complainant company and its connecting companies and the Pullman Palace Car Company by which all regular passenger trains running over the said through line of road, including that of the complainant, carrying the mail and passengers, shall carry Pullman cars. That the defendants are in the employ of the complainant company, and were employed by it to, among other things, handle and operate its trains so engaged in carrying the United States mail and passengers and freight between National City, Cal., and Chicago, Ill., and to and from intermediate points, and from the time of their employment up to the time of the commission of the acts complained of by the complainant were duly accustomed to handle and operate such trains, including Pullman cars. That subsequently the defendants, although remaining in the employment of the complainant company, refused, and still refuse, to handle or operate any train of cars of the complainant company to which a Pullman car is attached; and because of the discharge by the receivers in pos-

session and control of the Atchison, Topeka & Santa Fé Railroad Company of certain employes of theirs for refusing to handle or operate any train of that road to which a Pullman car is attached, the defendants to the present bill, while remaining in the employment of the complainant company, refused, and still refuse, to handle or operate any of the trains of the complainant company engaged in carrying the mail of the United States and in the aforesaid interstate commerce, which their regular and accustomed duties as such employes required, and still require, them to operate and handle. Undoubtedly, in the absence of a valid existing contract obligating the defendants to remain in the employment of the complainant company, they would ordinarily have the legal right to quit the employment and cease work at any time. But the bill alleges that the defendants continue in the employment of the complainant company, and yet refuse to perform their regular and accustomed duties as such employes; and it further shows that such refusal subjects and will continue to subject the complainant to a multiplicity of suits and to great and irreparable damage, in that there is an existing valid contract requiring complainant to attach a Pullman car or cars on all of its through trains for the carriage of passengers and the mail, and also retards and interrupts the complainant in the transmission of the United States mail and the interstate commerce aforesaid.

It is manifest that for this state of affairs the law—neither civil nor criminal—affords an adequate remedy. But the proud boast of equity is, “*Ubi jus, ibi remedium.*” It is the maxim which forms the root of all equitable decisions. Why should not men who remain in the employment of another perform the duties they contract and engage to perform? It is certainly just and right that they should do so, or else quit the employment. And where the direct result of such refusal works irreparable damage to the employer, and at the same time interferes with the transmission of the mail and with commerce between the states, equity, I think, will compel them to perform the duties pertaining to the employment so long as they continue in it. If I unlawfully obstruct by a dam a stream of flowing water, equity, at the suit of the party injured, will compel me by injunction, mandatory in character, to remove the dam, and, prohibitory in character, from further interfering with the flow of the stream; and if I unlawfully erect a wall shutting out the light from another, equity will compel me to tear it down, and to refrain from further interference with the other’s rights. It is true that such cases are not precisely like the present one, yet the principle upon which the court proceeds in such cases is not substantially different. And if it be said that there is no exact precedent for the awarding of an injunction in the present case, I respond, in the language of the court in the case of Toledo, etc., Ry. Co. v. Pennsylvania Co., 54 Fed. 751:

“Every just order or rule known to equity courts was born of some emergency, to meet some new conditions, and was therefore, in its time, without precedent. If based on sound principles, and beneficent results follow their enforcement, affording necessary relief to the one party without imposing

illegal burdens on the other, new remedies and unprecedented orders are not unwelcome aids to the chancellor to meet the constant and varying demands for equitable relief."

Moreover, the rights of the public in a case of this sort should be considered. "Railroads," said the supreme court in the case of *Joy v. St. Louis*, 138 U. S. 50, 11 Sup. Ct. 243, "are common carriers, and owe duties to the public. The rights of the public in respect to these great highways of communication should be fostered by the courts; and it is one of the most useful functions of a court of equity that its methods of procedure are capable of being made such as to accommodate themselves to the development of the interests of the public, in the progress of trade and traffic, by new methods of intercourse and transportation."

For the reasons thus hastily and briefly stated, I shall award an injunction requiring the defendants to perform all of their regular and accustomed duties so long as they remain in the employment of the complainant company, which injunction, it may be as well to state, will be strictly and rigidly enforced.

UNITED STATES v. CLUNE et al. (Nos. 640, 641.)

SAME v. BUCHANAN et al. (Nos. 642, 643.)

(District Court, S. D. California. July 16, 1894.)

SETTING ASIDE INDICTMENT--PREJUDICE OF GRAND JUROR.

Under Pen. Code Cal. § 897, providing for the setting aside of an indictment on a ground which would have been good for challenge to a grand juror, and section 896, declaring as ground for challenge to a grand juror a state of mind which will prevent him from acting impartially and without prejudice, a grand juror who joined in an indictment of strikers for obstruction of mail and commerce, though he indicated sympathy with them, will not be held to have been prejudiced, because thereafter, on the occasion of strikers destroying private property, he said they ought to be shot.

W. H. Clune, C. T. Buchanan, and others move to set aside indictments against them for obstruction of mail and commerce. Denied.

George J. Denis, U. S. Atty.

C. C. Stephens and Byron Waters, for defendants.

ROSS, District Judge. The grand jury which returned the indictments in these cases was impaneled prior to the commission of the offenses which constitute the subject of the indictments, so that the defendants could not have been held to answer for the alleged offenses prior to the impaneling of the jury. The question which they seek to raise by the motions to quash the indictments is a challenge to the personnel of the grand jury. There are no provisions of the United States statutes regulating challenges to such jurors under such circumstances, and it is therefore proper for the federal court to follow the practice of the courts of the state in which it is held with reference to such objections. *U. S. v. Egan*, 30 Fed. 608. A

motion to quash the indictment is a proper mode by which to present the question. *U. S. v. Gale*, 109 U. S. 65, 3 Sup. Ct. 1. In California it is provided by statute that a challenge to an individual grand juror may be interposed for the cause, among other causes:

"That a state of mind exists on his part in reference to the case, or to either party, which will prevent him from acting impartially and without prejudice to the substantial rights of the party challenging; but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury founded upon public rumor, statements in public journals, or common notoriety, provided it satisfactorily appear to the court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such an opinion, act impartially and fairly upon the matters submitted to him." Pen. Code, § 896.

And by section 995 of the same Code, it is provided as follows:

"The indictment or Information must be set aside by the court in which the defendant is arraigned, upon his motion in either of the following cases. If it be an indictment: * * * (4) When the defendant had not been held to answer before the finding of the indictment, on any ground which would have been good ground for challenge either to the panel or to any individual grand juror."

The meaning of this clause, taken in connection with the other provisions of the state statute referred to, is that the defendant shall have the privilege of challenge on arraignment, when, from the nature of things, he could not have had it at the impaneling of the jury. *People v. Beatty*, 14 Cal. 571. Accordingly the defendants in these cases were, by their counsel, permitted to inquire into the state of mind of the grand jurors in reference to the case alleged against the defendants, and to give evidence in respect thereto. A careful consideration of the evidence satisfies me that none of the grand jurors were in a state of mind in reference to the charges against the defendants in these cases which prevented them from acting impartially and without prejudice to the substantial rights of the parties challenging. The various opinions and impressions of the grand jurors were not of such a character as to prevent a perfectly impartial and fair consideration of the charges against the defendants, and each of them testified that his mind was in such a condition that he could, and that in fact he did, act impartially and fairly upon the matters submitted to him in respect to the charges, notwithstanding such opinions or impressions as he may have had. The remark made by the juror Sweet a day or two after the finding and presentation of the indictments, in the course of a discussion with some third parties, that "the strikers should be filled full of lead," specially relied upon by the counsel for the defendants as showing a state of mind on the part of that juror which rendered him prejudiced and unfair, while highly improper on the part of a grand juror at any time or under any circumstances, was made subsequent to the finding and presentation of the indictments in question, and after some of the men engaged in the strike had wantonly destroyed private property; and the testimony of the juror Sweet (in which he is corroborated by the witness Jeffreys) is that what he said was, in substance, that the strikers who engaged in the destruction of private property ought to be filled full of lead. It is true that two witnesses—Perkins and Hollenbeck—in effect denied that Sweet made that qualification,

but I think it very improbable that any reasonable person would say that a man should be shot for exercising his right to strike or stop work. The probabilities are all in favor of the truth of Sweet's testimony that he made the remark with reference only to those strikers who should engage in the destruction of private property. This conclusion finds strong support in the fact that pending the investigation by the grand jury of the charges, which culminated in part in the indictments in question, the juror Sweet propounded questions in writing to the court, asking its instructions in respect to the law, which questions indicated to the court a decided sympathy on the part of the juror with the strikers. This was prior to the occurrence which forms the principal ground of the motions, and is corroborative of the testimony of the juror Sweet given on the hearing of the motions, which, for the reasons stated, I find to be true. There is a marked distinction between a grand juror who merely makes an accusation of the commission of a crime and a petit juror who tries the questions of the guilt or innocence of the defendant who is so accused. It is accordingly held in many jurisdictions that it is no objection to the validity of an indictment that one or more of the grand jurors, who was otherwise qualified, had formed or expressed an opinion of the guilt of the accused. *Tucker's Case*, 8 Mass. 286; *State v. Hamlin*, 47 Conn. 95, 114; *State v. Chairs*, 9 Baxt. 196; *Musick v. People*, 40 Ill. 268; *Lee v. Georgia*, 69 Ga. 705; *U. S. v. Williams*, 1 Dill. 485, Fed. Cas. No. 16,716. In a late case in the supreme judicial court of Massachusetts (*Com. v. Woodward* [Mass.] 32 N. E. 939) it was held that the fact that a grand juror who was otherwise competent and qualified to serve had, before the meeting of the grand jury, made a personal investigation into the guilt of the accused, and had secreted himself in a room with an officer for the purpose of listening to declarations and admissions made by the accused concerning the crime, and had heard such declarations and admissions, and had listened to statements of officers to the effect that the accused was guilty, and had thereupon formed an opinion and believed him to be guilty before and at the time of the investigation of the case by the grand jury, did not constitute a legal objection to the validity of the indictment; the court saying, among other things: "This opinion is in accordance with what appears to us to be the clear weight of judicial decision elsewhere, though in some instances views to the contrary have been held." In *Rolland v. Com.*, 82 Pa. St. 306, it was held to be no ground for quashing an indictment for burglary in breaking into a bank that two of the grand jurors by whom it was found were stockholders of the bank. And in *State v. Easter*, 30 Ohio St. 542, it was held not a good plea to an indictment for murder that a member of the grand jury which found it was a nephew of the murdered man. These authorities are cited to emphasize the distinction that exists between grand and petit jurors.

For the reasons stated, the court is of the opinion that none of the grand jurors in question in these cases were in such a state of mind as prevented them from acting impartially and fairly in respect to the charges against the defendants. The motions to quash are therefore denied.

UNITED STATES v. ELLIOTT et al.

(Circuit Court, E. D. Missouri, E. D. July 6, 1894.)

COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE—INJUNCTION.

A combination whose professed object is to arrest the operation of the railroads whose lines extend from a great city into adjoining states until such roads accede to certain demands made upon them, whether such demands are in themselves reasonable or unreasonable, just or unjust, is an unlawful conspiracy in restraint of trade and commerce among the states, within the act of July 2, 1890, and acts threatened in pursuance thereof may be restrained by injunction, under section 4 of the act.

This was a suit by the United States against M. J. Elliott, George B. Kern, Eugene V. Debs, George W. Howard, L. R. Rogers, Sylvester Kelliher, the American Railway Union, and others, to restrain violations of the act of July 2, 1890 (26 Stat. 209). Complainants moved for a preliminary injunction.

William H. Clopton, U. S. Atty.

THAYER, District Judge (orally.) The unusual character of the bill filed by the government renders it proper that the court should state briefly the reasons that have influenced its action in granting a part of the relief prayed for therein.

The act of congress approved July 2, 1890 (26 Stat. 209), entitled "An act to protect trade and commerce against unlawful restraints and monopolies," declares in its first section that:

"Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by fine not exceeding five thousand dollars or by imprisonment not exceeding one year or by both said punishments, in the discretion of the court."

Ordinarily it is neither lawful nor expedient for a court of equity to award an injunction to prevent the doing of acts that are in themselves crimes. The regular course of judicial procedure requires that persons accused of crime should be prosecuted by information or indictment, and not otherwise. There are, however, well-established exceptions to this rule. When a criminal act is threatened, which is liable to occasion irreparable injury to private persons, or which would give rise to a multitude of suits at law to redress the wrong, if committed, a court of equity may issue an injunction, at the instance of an individual, against parties who threaten to commit the wrong. But the court is not called upon, in this instance, to consider whether the proceeding falls within the ordinary jurisdiction of a court of equity. By the fourth section of the act of July 2, 1890, which is above referred to, congress has declared that:

"The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States in their respective districts under the direction of the attorney general to institute proceedings in equity to prevent and restrain such violations. Such proceedings

may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed as soon as may be to the hearing and determination of the case; and pending such petition and before final decree the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises."

This section of the act makes the jurisdiction of the court clear over the parties and subject-matter, if the bill now before the court, which has been exhibited with the sanction of the attorney general, shows the existence of a conspiracy among the defendants to restrain trade or commerce among the several states, and that acts have already been done or threatened by the several defendants in furtherance of the alleged conspiracy. Congress has seen fit, on grounds of public policy, to authorize the law officers of the government to appeal to the courts of the United States by a bill in equity filed in behalf of the people of the United States, to arrest, by writ of injunction or prohibition, the commission of acts which are designed to obstruct the free flow of commerce between the states, and no one can doubt the power of congress to confer such authority. From the very foundation of the government, it has been accepted as a proposition which admitted of no controversy that the right to regulate commerce among the several states, and to pass laws to protect commerce of that character, pertained to the general government, and that its power in that respect was plenary and paramount.

An examination of the bill which has been exhibited by the United States shows that it charges, in substance, that the various defendants named therein have combined and confederated among themselves to prevent several railroads named in the bill, whose lines radiate from St. Louis, and which are engaged, among other things, in interstate commerce, from conducting their customary business of transporting passengers and freight between points in this state and points in other adjoining states to which their several lines extend. The bill further charges that the several defendants named therein have combined and conspired to induce persons in the employ of said railroad companies to leave the service of their respective companies, and to prevent them from securing other operatives, the object of such conspiracy being to prevent said railway companies from hauling certain cars which are customarily used by them in the transaction of their business as interstate carriers of freight and passengers. The bill also charges the commission of divers and sundry acts by some of the defendants in furtherance of the objects of the aforesaid confederation. Among other things, it is alleged that certain of the defendants have issued orders to persons in the employ of the several railway companies, who act subject to their direction, whereby such employés are commanded and required to cease from operating trains of the respective railroad companies in whose service they are employed. It is also alleged that certain of the defendants named in the bill have asserted and threatened that they will tie up and paralyze the operations of each of said railway companies which refuses to

accede to certain demands made upon them, and that it is the purpose and object of the defendants so conspiring, and who have made such threats, to so obstruct and cripple said railroad companies as to prevent them from performing their duties as common carriers of freight and passengers between points in the several states to which the lines of such roads extend. It is also charged in the bill, in substance, that it is the purpose and object of the defendants who are engaged in the aforesaid conspiracy to secure to themselves the entire control of interstate commerce between the city of St. Louis and points in other states to which the lines of the several railroad companies mentioned in the bill extend, and to restrain and prevent the persons owning said roads from exercising any independent control thereof in the transaction of interstate business. The court thinks it manifest that the allegations of the bill, which have thus been very imperfectly stated, show the existence of a conspiracy in restraint of trade and commerce among the several states, within the language and the fair intent and meaning of the act of July 2, 1890. A combination whose professed object is to arrest the operation of railroads whose lines extend from a great city into adjoining states, until such roads accede to certain demands made upon them, whether such demands are in themselves reasonable or unreasonable, just or unjust, is certainly an unlawful conspiracy in restraint of commerce among the states. Under the laws of the United States, as well as at common law, men may not conspire to accomplish a lawful purpose, by unlawful means. *Pettibone v. U. S.*, 148 U. S. 197, 13 Sup. Ct. 542; *Com. v. Hunt*, 4 Metc. (Mass.) 111. The construction thus given to the act of July 2, 1890, is not a new construction. It has already received the same interpretation in other circuits after full consideration,—particularly by the circuit court of the United States for the fifth circuit in the case of *U. S. v. Workingmen's Amalgamated Council of New Orleans*, 54 Fed. 994, and 6 C. C. A. 258, 57 Fed. 85.

The result is that this court, acting on the ground herein stated, will grant a preliminary injunction, restraining the defendants during the pendency of this suit, and until final hearing, from doing the acts threatened, in pursuance of the alleged conspiracy.

THOMAS v. CINCINNATI, N. O. & T. P. RY. CO.

In re PHELAN.

(Circuit Court, S. D. Ohio, W. D. July 13, 1894.)

1. CONTEMPT—INTERFERENCE WITH RECEIVER—IMPEDING OPERATION OF RAILROAD.

Any willful attempt, with knowledge that a railroad is in the hands of the court, to prevent or impede the receiver thereof appointed by the court from complying with the order of the court in running the road, which is unlawful, and which, as between private individuals, would give a right of action for damages, is a contempt of the order of the court.

2. SAME—INSTIGATING STRIKE—UNLAWFUL COMBINATION.

Maliciously inciting employes of a receiver, who is operating a railroad under order of the court, to leave his employ, in pursuance of an unlawful combination to prevent the operation of the road, thereby inflicting injuries on its business, for which damages would be recoverable if it were operated by a private corporation, is a contempt of the court.

3. SAME — CONSTITUTIONAL GUARANTY OF RIGHT OF ASSEMBLY AND FREE SPEECH.

Such inciting to carry out an unlawful conspiracy is not protected by constitutional guaranties of the right of assembly and free speech, and is not less a contempt because effected by words only, if the obstruction to the operation of the road by the receiver is unlawful and malicious.

4. CONSPIRACY—COMBINATION TO COMPEL BREACH OF CONTRACT.

A combination to inflict pecuniary injury on the owner of cars, operated by railway companies under contracts with him, by compelling them to give up using his cars, in violation of their contracts, and, on their refusal, to inflict pecuniary injury on them by inciting their employes to quit their service, and thus paralyze their business, the existence of the contracts being known to the parties so combining, is an unlawful conspiracy.

5. SAME—BOYCOTT.

A combination by employes of railway companies to injure in his business the owner of cars operated by the companies, by compelling them to cease using his cars by threats of quitting and by actually quitting their service, thereby inflicting on them great injury, where the relation between him and the companies is mutually profitable, and has no effect whatever on the character or reward of the services of the employes so combining, is a boycott, and an unlawful conspiracy at common law.

6. SAME—UNLAWFUL PURPOSE.

A combination to incite the employes of all the railways in the country to suddenly quit their service, without any dissatisfaction with the terms of their employment, thus paralyzing utterly all railway traffic, in order to starve the railroad companies and the public into compelling an owner of cars used in operating the roads to pay his employes more wages, they having no lawful right so to compel him, is an unlawful conspiracy by reason of its purpose, whether such purpose is effected by means usually lawful or otherwise.

7. SAME—RESTRAINT OF INTERSTATE COMMERCE.

Such combination, its purpose being to paralyze the interstate commerce of the country, is an unlawful conspiracy, within the act of July 2, 1890, declaring illegal every contract, combination, or conspiracy in restraint of trade or commerce among the several states. *U. S. v. Patterson*, 55 Fed. 605, disapproved.

8. SAME—OBSTRUCTING MAILS.

Such combination, where the members intend to stop all mail trains as well as other trains, and do delay many, in violation of Rev. St. § 3995, punishing any one willfully and knowingly obstructing or retarding the passage of the mails, is an unlawful conspiracy, although the obstruction is effected by merely quitting employment.

This was a suit by Samuel Thomas against the Cincinnati, New Orleans & Texas Pacific Railway Company, in which Samuel M. Felton was appointed receiver. The receiver filed a petition for the commitment of F. W. Phelan for contempt, and for an injunction against him.

Harmon, Colston, Goldsmith & Hoadly, for receiver.
Cogan & Shay, for Phelan.

TAFT, Circuit Judge. Samuel M. Felton was appointed receiver in the above-entitled cause, March 18, 1893, and has ever since been

engaged, under the order of the court, in operating the railroad of the Cincinnati, New Orleans & Texas Pacific Railway Company, which is more commonly known as the Cincinnati Southern Railroad. On Monday, July 2, 1894, he filed an intervening petition in the original action, in which he stated that during the previous week, and at the time of filing the petition, he was greatly impeded in the operation of the road by a strike of his employes, and of the employes of other railroads in the city of Cincinnati, who were prevented from receiving from him and delivering to him freight carried or to be carried over his road; that said strike was the result of a conspiracy between one F. W. Phelan, now in Cincinnati, and one Eugene V. Debs and others, to tie up the road operated, as the said conspirators well knew, by the petitioner as receiver, and other roads in the western states of the United States, until certain demands or alleged grievance of certain persons not in the employ of the receiver or of any other railroad of the United States were acceded to by persons in no manner connected with the management of any railroad of the United States; that the demand of the employes of one George M. Pullman, or the Pullman Palace Car Company, at Pullman, Ill., for higher wages was refused, whereupon said Debs, Phelan, and others, members of an organization known as the American Railway Union, combined and conspired with each other and with sundry persons, who became members of the organization for the purpose, to compel the Pullman Company to comply with the demands of its employes, and that for the purpose of injuring the Pullman Company, and of thereby forcing from it the concession demanded, Debs, Phelan, and the others named had maliciously conspired and undertaken to prevent the receiver of this court and the owners of other railroads from using Pullman cars in operating their roads, though they are under contract to do so; that in pursuance of said conspiracy Phelan, a resident of Oregon, came to Cincinnati a week before the filing of the petition, and set on foot and incited a strike among the employes of the receiver, and of other railroad companies whose lines run into Cincinnati; that on June 27th, and at other times and places, Phelan made inflammatory speeches to such employes, well knowing many of them to be employes of the receiver, in which he urged them all to quit the service of the receiver and the other railroads of the city, and to tie them all up, and to prevent others from taking their places, by persuasion if possible, by clubbing if necessary; that said Phelan was still in the city, directing and continuing the strike, and interfering with the receiver in the operation of the road; that as a result of the conspiracy and strike the receiver had been obliged at great expense to secure and maintain the protection of armed men for his employes; and that all of the foregoing constituted a contempt of this court, and a ground both for committing Phelan and for enjoining him from a continuance of said acts.

Upon the filing of the petition an attachment was issued for Phelan, the contemner, and on the morning of the 3d of July he was arrested, and brought before the court. He was admitted to bail, and at the same time was enjoined by order of the court from, either as an individual or in combination with others, inciting, encouraging, order-

ing, or in any other manner causing the employes of the receiver to leave his employ with intent to obstruct the operation of his road, and thereby to compel him not to fulfill his contract and carry Pullman cars. On Thursday, July 5th, the motion of the receiver for Phelan's commitment came on to be heard, and a week has since been taken up in the giving of testimony and argument.

I propose first to run over the evidence, as briefly as may be, and determine the facts, and then to consider the law applicable to them.

The American Railway Union is an organization of railway employes, to which are eligible as members all persons in the service of railways below a certain rank. It was organized in June, 1893. On May 11, 1894, at Pullman, Ill., the employes of the Pullman Palace Car Company, engaged in manufacturing railway cars of all kinds, including sleeping cars, left the company's employ because of its refusal to restore wages which had been reduced during the preceding year, and the works were then closed. On June 11, 1894, the general convention of the American Railway Union met at Chicago, and decided that the American Railway Union would take measures to compel the Pullman Company to resume business and to re-employ its employes who had left its service on terms to be fixed by arbitration. It does not appear that at this time the Pullman Company's employes were members of the Railway Union, or eligible as such. At the June convention of 1894 there were present representatives from 450 lodges of the union, and the number of members, as estimated at that time, was 250,000. It is said that the local unions had voted for the Pullman boycott before the convention met. The question where the boycott originated is not very material, but it may be said that, as the Pullman strike occurred but a month before the convention, and as it had been deemed necessary by the union to send men all over the country to explain to its members the merits of the Pullman controversy during the boycott, it is obvious that the boycott had its real origin in the union convention at Chicago, where the subject was brought before it, presumably by its board of directors.

The chief governing body of the union is a board of directors, which elects a president, vice president, and secretary, who are the chief executive officers of the union. Eugene V. Debs is, and has been since its organization, the president. Section 6 of the constitution of the union, as adopted in June, 1893, provides that "the board is empowered to provide such rules, issue such orders, and adopt such measures as may be required to carry out the objects of the order, provided that no action shall be taken that conflicts with this constitution." By section 11 of the same instrument the president's powers are thus described:

"It shall be the duty of the president to preside over the meetings of the board and the quadrennial meetings of the general union. He shall at each annual meeting of the board and at each quadrennial meeting of the general union submit a report of the transactions of his office, and make such recommendations as he may deem necessary to the welfare of the order. He shall enforce the laws of the order, sign all charters, circulars, reports, and other documents requiring authentication. He shall decide all questions and appeals, which decisions shall be final, unless otherwise ordered by the board. He may, with the concurrence of the board, depute any member to perform any required service, issue dispensations not inconsistent with the constitution

or regulations of the order, and perform such other duties as his office may impose; and he shall receive such compensation for his services as may be determined at the time of his election."

Phelan, when on the stand, said that these were sections of the old constitution, but that he understood the constitution had been generally changed. He would not say that extensive or material changes had been made, but simply that general changes had been effected. He was in attendance as a delegate only during the last five days of the convention, and this is his explanation for not knowing what the changes were. Phelan's answers on this subject had really no effect to show that the foregoing sections are not still in force, but simply illustrated the evasiveness and verbal quibbling to which the witness was continually willing to resort under examination. It is certainly strange that if he was here, as he says, as a representative of the union, he should not know the changes, if any really material ones had been made in the constitution, under which he was initiating men into the union, and was receiving orders from his superior officers. We shall see, as we progress, that the two sections of the old constitution are still in force, if we can judge at all from the actual authority exercised by the officers of the union during the present boycott.

The plan of the boycott, as shown by the evidence, was this: Pullman cars are used on a large majority of the railways of the country. The members of the American Railway Union whose duty it was to handle Pullman cars on such railways were to refuse to do so, with the hope that the railway companies, fearing a strike, would decline further to haul them in their trains, and inflict a great pecuniary injury upon the Pullman Company. In case the railway companies failed to yield to the demand, every effort was to be made to tie up and cripple the doing of any business whatever by them, and particular attention was to be directed to the freight traffic, which it was known was their chief source of revenue. As the lodges of the American Railway Union extended from the Allegheny mountains to the Pacific coast, it will be seen that it was contemplated by those engaged in carrying out this plan that, in case of a refusal of the railway companies to join the union in its attack upon the Pullman Company, there should be a paralysis of all railway traffic of every kind throughout that vast territory traversed by lines using Pullman cars. It was to be accomplished, not only by the then members of the union, but also by procuring, through persuasion and appeal, all employes not members either to join the union or to strike without joining, by guarantying that, if they would strike, the union would not allow one of its members to return to work until they also were restored. I shall allude again to the gigantic character of this combination. For my present purpose, it is sufficient to say that on Sunday, June 24th, Phelan came to Cincinnati as the authorized representative of the president and board of directors of the union, to enforce and carry out the contemplated boycott and paralysis of business on all railway lines running into Cincinnati which used Pullman cars until they should cease to use them.

I am aware that Phelan denies that such were his authority and instructions, but, as in the case of his answers in respect to the constitution and its provisions, his denials do not, in view of the overwhelming proof of the circumstances not denied, and his previous admissions not denied, show the fact to be otherwise, but only decrease the reliance which can be placed on any statement made by him in this case. He says that he came here with no direction except to visit the employes of the Pullman Company at a branch factory at Ludlow, to explain to them the merits of the controversy between their employer and their fellows at Chicago, and then, if they struck, to see that they appointed committees who should keep order among them, and look after the sick. At another time he says he was directed to be in Cincinnati during the boycott, but he strenuously denies he was here for the purpose of laying on the boycott or inciting a general strike. He would have the court believe that what occurred was wholly spontaneous, and not through his agency, and that his business was, if there should be such coincidental spontaneity resulting in a strike, to prevent disorder, and to look after the sick. This hardly accords with his first telegram to Debs, his chief officer, dated noon, Tuesday, June 26th, as follows: "Pay no attention to press reports. To be effective, was compelled to postpone action until seven, Wednesday morning." On Sunday, June 24th, after Phelan's explanation of the Pullman troubles, the Pullman employes at Ludlow determined to strike, and did so Monday morning at 7 o'clock. Phelan says he did not advise them to strike, but just explained the situation, and then a strike followed. When he had explained, and organized committees among the strikers, after the strike had occurred, through no agency of his, his mission was ended, so far as his instructions went. And yet we find him on Tuesday, June 26th, at 12 o'clock noon, telegraphing his chief that he was obliged to postpone action until Wednesday morning at 7, in order to be effective. Now, what action was this which he hoped to make effective? Can any one doubt for an instant that the action thus foreshadowed was that referred to in Phelan's dispatch to Debs of June 28th following, when he said, "The tie-up is successful"? On Tuesday night, June 26th, there was a meeting of all the switchmen of Cincinnati at Wuebler's Hall. There is no direct evidence how this meeting was called, but the circumstances leave no doubt. Phelan, having brought out the Pullman men, then set to work upon the railway men, and hence the meeting. The telegram of June 26th indicates that Debs expected him to have the meeting and action earlier, but that he was not able to secure an attendance at any earlier meeting sufficiently general to make the action taken effective. Indeed, when the Tuesday night meeting was held, it was found that action must be still further delayed, and a second meeting for Wednesday night was called. At both of these meetings Phelan explained and discussed the Pullman trouble, and announced the Pullman boycott. Now, what was his object? Was it for the purpose of inducing the men whom he addressed, and others not present, whom he urged them to talk to, to demand of the railway companies assistance in boycotting Pullman, and, on refusal,

to tie them up, or was it simply for their general information? He repeats upon the stand with much emphasis that he at no time advised any man to strike. What was he doing? His speeches were all directed to that end, and, even if he did not use the word "advise," his conduct was exactly the same as if he had. His trifling with the truth, and his attempt to seek shelter again behind verbal quibbles, simply disparages him as a witness, without concealing the facts. Now, what was done at these meetings of Tuesday and Wednesday night after or during Phelan's speeches? A city committee was appointed, consisting of one employé of each of the great railroads entering the city. This committee Phelan continually refers to in his testimony as "my committee," and the term was properly used, for it seems to have spent all its time in his company, and doing his bidding. On this committee was J. Madison, a switchman in the receiver's employ. The first duty of each member of the committee was on Wednesday, June 27th, or on the next day, to notify the yard master of his road that the switchmen and members of the American Railway Union would not handle Pullman cars because a boycott had been laid on them. Madison duly notified McCarty, the yard master of the receiver. The necessary result was that three switchmen on the Cincinnati, Hamilton & Dayton Railroad were discharged or relieved of duty on the afternoon of Thursday, June 28th, and within six hours a general strike of all the switchmen and yard men, including yard engineers and firemen, on all the roads coming into Cincinnati, took place. This was exactly in accordance with the plan which Phelan had outlined to Westcott, a reporter for the Enquirer, on Tuesday or Wednesday before the strike, in a conversation which he does not deny. Beginning with Tuesday night, June 26th, Phelan has made speeches every night since, in which he has continued to explain the Pullman trouble to audiences of railroad men, and has read telegrams from Debs of a character calculated to incite and encourage all railway employés to quit their places, to assist in the Pullman boycott. He says he has made as many as 20 speeches. Two, at least, were made at Ludlow, Ky., a railroad town, the inhabitants of which are, or were, many of them, employés of the receiver. It is in evidence that when the meetings began the number of the receiver's employés who were members of the American Railway Union was 150. And yet Phelan denies that he is in any sense responsible for the strike of the receiver's employés, or of those of any other road in town, or for the paralysis of business which followed.

It is marvelous that Phelan can assume such a position in view of the circumstances and his own declarations. Take the evidence of Westcott, the Enquirer reporter, a witness evidently of much experience in acquiring and detailing accurate information, who has no motive to misrepresent Phelan in any way. He was assigned to report the strike, and seems to have found Phelan his best source of information. He made notes of everything at the time, and prepared them afterwards for publication. Phelan has not attempted to deny anything he says. Westcott testifies that Phelan told him before the strike that his main object in coming here was

to enforce a boycott against Pullman cars, by tying up every road in Cincinnati for the American Railway Union; that he frequently and constantly repeated the statement that they intended to tie up every road in town, and keep them tied up until they refused to handle Pullman cars; that after the strike on Thursday he said he had most of the American Railway Union men out in Cincinnati, Ludlow, and Covington, and that those who were not out would be out the next morning; that after his arrest he explained that his course had been to tie up the freight trains, and not so much to stop passenger trains, because the money was in the freight business. Schaff, Gibson, and Bender, officers of the Big Four Railroad, testify that Phelan said to them on Thursday afternoon, when they met him for the purpose of seeing whether the "embargo," as Phelan and Debs expressed it, could not be lifted from the Big Four, because it was a Wagner sleeping car line, that he proposed to tie up every line in town, and was in a hurry, because he must go over and tie up the Pan Handle and the C. & O. before sunset; and that, just to show Schaff what he could do, he had called out some more of the Big Four employes. Phelan and those members of the city committee who accompanied him to this meeting deny that this was said, but by their denial show nothing save that their loyalty to their chief is greater than their regard for the sanctity of their oaths. Westcott, the Enquirer reporter, talked with Phelan about this Schaff interview, and Phelan said that, as Schaff tried to "bluff" him, he had called out some more of his men, to show that he had no hard feelings; and when Westcott expressed surprise at that way of showing friendliness, Phelan said that was the way the American Railway Union showed its friendliness in a fight. On June 28th, the day of the strike, Debs telegraphed Phelan to let the Big Four alone, if not handling Pullmans, to which Phelan answered: "I cannot keep others out if Big Four is excepted. The rest are emphatic on all together or none. The tie-up is successful. Once more will Big Four be let alone." If Phelan was not the chief agent and inciter of the general tie-up in Cincinnati, he has been most unfortunate in the use of the language in his telegrams. What he here said necessarily implied that he had induced all the employes to go out, and was trying to keep them out, and that they threatened to return if the Big Four line was exempted from the tie-up.

What I have said of the credibility of Phelan in reference to his agency in enforcing the boycott and tie-up applies with equal force to nearly all his witnesses, especially to those from his city committee. They would have the court believe that Phelan was merely a peacemaker in this community, with no responsibility for the strike, and no purpose to incite it or continue it. Take Bateman. He was a switchman of the receiver, and on the subcommittee of the road. Debs had been applied to by the president of the stock yards to allow the cattle cars to be unloaded, and Debs—presumably in the exercise of the dispensing power given him by the constitution—had directed Phelan to have this done if no injury to the cause resulted. Pending this matter, Westcott was inquir-

ing into the outcome, and applied to Bateman as a subcommittee for information. Westcott says Bateman told him the stock matter was in Phelan's hands, and that the cattle could not be handled without Phelan's orders; that "whatever Phelan says, goes." Phelan told Westcott substantially the same thing, and a telegram from Phelan to Debs is in evidence, in which he says, "I am having stock unloaded." And yet Bateman denies his conversation with Westcott, and another member of the city committee says that Phelan had nothing to do with it, and only applauded when it was done. Every committee man who came upon the stand (and they made the majority of contemner's witnesses) tried to give the impression that they were not acting under Phelan's orders, and so does Phelan, and yet his complete command is so apparent that it cannot escape any one. When Phelan forgot himself he used such expressions as "my committee," "I instructed them to do so and so," and occasionally such telltale words would creep into the evidence of all his witnesses. Another kind of statement indulged in by Phelan and all of the committee was to the effect that these committees were organized solely for the purpose of keeping the peace, and assisting the sick, providing for parades, and hiring halls; but not one word is said about the efforts of the committee to induce men to leave the employ of the various railroads, and yet, if Phelan's injunction was followed, persuasion, explanation, and argument were to be used with all who did not join the cause at once. The committee and subcommittees were 75 in number. Phelan told Westcott at one time that he had to visit railroad yards with his committee; at another time that his committee were out visiting the various yards, to see the day crews. Evidently they were visiting the men who remained still at work, for the purpose of inducing them to quit; and this, though not mentioned by a single witness for the defense, was doubtless one of the chief reasons for their appointment.

With the intention of showing that he has been guilty of no interference with a compliance with the orders of this court, Phelan said upon the stand that he knew the Southern Railroad was operated by a receiver appointed by this court, and was therefore anxious to avoid interference with its operation, and prevented the calling out of the coach cleaners in the Ludlow yards on this account. Moreover, Buelte, of his city committee, testifies that the Cincinnati Southern was especially excepted from the operation of the boycott notice because it was in the hands of the court. And yet Tuesday night, in the preparation for the boycott and strike which was to be put into effect on Thursday following, through the action of committees in respect to which Phelan himself admits he made suggestions, and which were appointed under his supervising eye, a switchman from the receiver's yard was made the agent of the American Railway Union and its allies to notify the receiver's yard master of the boycott. The notice was given, and the strike occurred earlier among the receiver's employés than among those on some of the other roads. Phelan told Westcott on Thursday afternoon that the men were all out on the

Southern, and yet this was the road he wished to save from the boycott, because it was in the hands of the court. What did he visit Ludlow for on Friday, and address a meeting of railway employes, if he intended to be careful about interfering with the operation of the Southern Railroad by the court? There are no railway employes in Ludlow but those of the receiver. What was Bateman, the committee man, doing in that place in attendance at two other meetings, if the respect of Phelan and his committee for the court's orders was so great? The purpose with reference to the Southern, as with respect to every other road, is so clearly shown by the telegrams between Debs and Phelan, that it could hardly be more certain if Phelan had admitted it.

Debs to Phelan:

"June 27, 1894.

"Indications are that all western lines will be tied up solidly before sunset to-day."

Phelan to Debs:

"June 28, 1894.

"I cannot keep others out if Big Four is excepted. The rest are emphatic on all together or none. The tie-up is successful."

Debs to Phelan:

"June 29, 1894.

"About 25 lines now paralyzed. More following. Tremendous blockade."

Debs to Phelan:

"July 2, 1894.

"Knock it to them hard as possible. Keep Big Four out, and help get them out at other places."

Phelan to Debs:

"July 2, 1894.

"Going out all around. Firemen a unit. Will soon be an avalanche to us. Working outside points."

Debs to Phelan:

"July 2, 1894.

"Hold Big Four solid. Going out to-day at every point. Gaining ground rapidly."

Debs to Phelan:

"July 2, 1894.

"Advices from all points show our position strengthened. Baltimore and Ohio, Pan Handle, Big Four, Lake Shore, Erie, Grand Trunk, and Mich. Central are now in fight. Take measures to paralyze all those that enter Cincinnati. Not a wheel turning on Grand Trunk between here and Canadian line."

I have now gone over, more at length than necessary, perhaps, the evidence concerning Phelan's connection with the boycott and strike, his purpose in coming to Cincinnati, and what he did here, and I find the fact to be that he came here deputed by Debs, president of the American Railway Union, and its board of directors, to enforce a boycott against the cars of the Pullman Company by inciting all the employes of the railroads running into Cincinnati to leave their employ, and thereby to tie up every road, and

paralyze all traffic of every kind until all of the railroads should consent not to carry Pullman cars in their trains; and that his plan and his actions were directed as much against the Cincinnati Southern road in the hands of the receiver of this court as against every other road in the city; and that he knew, when he inaugurated the boycott on the Southern road and incited the receiver's employes to strike, that the road was in the hands of the receiver, and was being operated under the order of this court.

We come now to consider the question of fact whether Phelan in any of his speeches advised intimidation, threats, or violence in carrying out the boycott. He is charged with having said, on Thursday night, June 28th, at the meeting at West End Turner Hall, that the strike was then declared on; that it was the duty of every A. R. U. man to quit work, to induce and coax other men to go out, and, if this was not successful, to take a club, and knock them out. He is charged with having said, on the same or another occasion during the same week, that the committees should be appointed to persuade men to go out; that, if they would not go, then the committee should get round behind, and kick them out. The meetings at which these remarks were said to have been made were behind closed doors, and no newspaper reporters were permitted to be present. Only A. R. U. men and railroad employes made up the audience. The first charge is supported by the evidence of one J. O. Sweeney, a timekeeper of the Big Four Railway, and he is, so far as the evidence shows, a wholly disinterested witness; and by the evidence of one E. W. Dormer, a witness whose credibility I shall consider later. They both say that the remark elicited much applause, and that, shortly before or after, Phelan advised them to be law-abiding citizens. To this charge Phelan makes an explanatory answer as follows:

"I told nobody to take a club, and do anything with anybody. I, upon several occasions in this city, have used about that one expression about in the same line with that, the substance of which is about this: I have told the boys—different ones—there was a good deal of demands upon me to go around and see everybody and explain this Pullman trouble. I was worried to death. * * * I said, 'You constitute yourselves a committee of one, each of you, and go to the people,—the community in which you live. Go to the boys,—I mean their acquaintances,—and explain to them this trouble. Talk to them about it. Beseech them to listen, because I want them to get the idea before they would condemn us about it; but do not take a club, and knock them in the head about it.' The peculiarity of the speech elicited applause, but I am afraid it was taken the other way."

With reference to the second charge, it is supported by the evidence of E. W. Dormer, who testifies he heard Phelan say it. An account of the speech in which it was said to have occurred was published in the Cincinnati Enquirer of June 29th, and read to Phelan by counsel for the receiver. It was as follows:

"Mr. Phelan addressed the men familiarly. 'He who is not with us in this struggle is against us, and will be so regarded.' Then he spoke in scathing tones of the Pullmans. 'We want no weak-kneed individuals with us; we want warriors.' Mr. Phelan then launched into an eloquent denunciation of Grand Master Arthur of the order of locomotive engineers. 'He has not the courage to declare a strike.' "

So far Phelan admitted the truth of the article. The article proceeded:

"When this strike is declared, as it will be before you go home to-night, the members of the American Railway Union in San Francisco, Oregon, Chicago, and all over the great west will stand by you to the bitter end."

As to this he said he did not recollect it, though he would not deny it. "It might have accidentally slipped out," he said. The article, after stating the passage of a resolution not to go back to work till the strike was declared off, which resolution Phelan said upon the stand that he never heard of, proceeded:

"Mr. Phelan then resumed: 'We must stand solidly together in this hour of trial, and, if anybody returns to work, or takes the place of strikers, seize them by the back of the neck, and throw them out.'"

Upon this passage the examination was as follows:

"Q. Did you say that? A. I don't recollect. Q. Will you swear to the court you did not say it? A. I don't recollect of saying it. Q. Will you swear you did not? A. I don't recollect of saying it. Q. That is as much as you will say? A. That is as much as I will say. I will state this, however, if you want any qualification on it. Q. I don't want any qualification. A. If I did say it, I meant to throw them out of the organization."

This was not a denial of the remark at all, but a statement that it meant something different from what it purported to mean. Phelan said several times in his examination that in a speech remarks slip out that one does not intend. Certainly, if he did not intend personal intimidation by this remark, it was an unfortunate one.

An attack is made on the credibility of Dormer. He was a detective in the employ of Field's Detective Agency of St. Louis, and in the employ of the receiver, ostensibly as a brakeman at first, and afterwards a striker, under the name of Williams. His character has not been attacked otherwise than by showing his assumption of a false appearance and name. There is evidence tending to show a willingness on his part to involve some of his fellow strikers in a trespass on the company's property, but I am bound to say that his accuracy as to everything else that occurred at the meetings which he attended has been borne out by the evidence of Phelan and his witnesses as far as they are willing to recollect. Were the charges as to Phelan's language dependent on Dormer's statement alone, I should not give them sufficient weight to overcome positive denials from Phelan; but the difficulty with Phelan's case is that he does not really and positively deny the statement of Dormer, but seeks to give the language another meaning, which it cannot bear. He contends in respect to each of the charges of inciting violence that his meaning was misunderstood. Had his evidence and that of his committee upon the main issues in this case not been most evasive and wanting in sincerity, I should still be inclined to give Phelan's explanations credit, and give him the benefit of a doubt on this point; but his whole case breaks down with the attempt of himself and his followers to conceal and pervert the most apparent fact in the case, namely, that he instigated, engineered, and con-

trolled the boycott and strike at Cincinnati from beginning to end. After this his denials and evasions can be given little weight. It is doubtless true that Phelan did tell his men to be law-abiding, that he did tell them to stay out of saloons, and off the company's property, in public, and that he did not wish his followers to subject themselves to the punishment of the law. Westcott testifies to this, and so do Dormer and Sweeney, and this has doubtless prevented many open assaults and trespasses. But I do not doubt that at the same time he encouraged in them a vicious and malicious disposition towards those of their fellows who did not join with them in this boycott, by expressions of the kind testified to by Sweeney and Dormer, and most evasively denied by Phelan, slyly slipped in where they could be given a double meaning if questioned.

The expressions were for the purpose of bringing into operation that secret terrorism which is so effective for discouraging new men from filling the strikers' places, and which is so hard to prove in a court of justice unless it results in open assault. That Phelan openly discouraged conflict with the law is to his credit as a strike organizer, for he wished public sympathy; but that he wished the aid of that secret terrorism, which is quite as unlawful, seems to me to be established. The town of Ludlow has been in such a state that the receiver's employés who live there have been in constant fear. Two engineers have left the town, and moved their families away. The receiver has boarded employés within guarded precincts. It has been shown that storekeepers of Ludlow have refused to sell goods to the receiver's employés because they were boycotted. Threats have been made, and an assault. Insulting and aggressive language has been used to receiver's employés on both sides of the river. Threats are hard to prove. If effective, they not only keep away the employés from service, but the witness from the stand. The receiver has been obliged to keep a large force of the United States deputy marshals on both sides of the river and on his engines and trains in order to induce his employés, new and old, to remain in his service. I cannot presume that such protection was invoked by the employés because of groundless fears. The question of fact whether Phelan used expressions in his speeches behind closed doors to the employés of the receiver which were calculated to induce intimidation is not of primary importance in this case, for, as will hereafter be seen, his interference with the operation of the Southern road by the instigation and maintenance of the boycott and strike against the road was the main contempt of this court. The suggestions leading to intimidations would only be aggravations of the contempt; that is all.

Section 725, Rev. St. U. S., provides that:

"The said courts [i. e. courts of the United States] shall have power to impose and administer all necessary oaths and to punish by fine or imprisonment at the discretion of the courts contempt of their authority: provided, that such power to punish contempts shall not be construed to extend to any cases except the misbehaviour of any person in their presence, or so near thereto as to obstruct the officers of said courts in their official transactions, and the

disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts."

It has been held by Judge Drummond in *Secor v. Railroad Co.*, 7 Biss. 513, Fed. Cas. No. 12,605, that any unlawful interference with the operation of a road in the hands of a receiver is a contempt of the court, because it is a disobedience or resistance by a person to a lawful order of the court. This view has been taken by Judges Brewer and Treat in *U. S. v. Kane*, 23 Fed. 748; and in *Re Doolittle*, Id. 544; and by Judge Pardee in *Re Higgins*, 27 Fed. 443. These authorities show that any willful attempt by any one, with knowledge that the road is in the hands of the court, to prevent or impede the receiver from complying with the order of the court in running the road, when the attempt is unlawful, and as between private individuals, would give a right of action for damages, is a contempt of the order of the court. The rights of the receiver with reference to his business in conducting the railroad under order of the court are not different in any respect from those of a private railway corporation. The only difference is in the remedy which the courts will apply to prevent or to punish a violation of them when such a violation prevents or impedes the operation of the road, and is intended to do so.

There is no doubt that Phelan intended to prevent utterly the operation of the Southern road by calling out the receiver's employés. He wished thus to paralyze his business. He did the trust a very substantial injury by stopping all traffic for a time, by making it necessary for the receiver to pay heavy expenses for unusual police protection, and by putting him to much trouble and expense in securing new employés. Now, if the receiver were a private corporation, could he recover damages for the injury thus inflicted on the business of the road? A malicious or unlawful interference with the business of another by inducing his employés to leave his service is an actionable wrong, and subjects the offender to liability for the loss occasioned. In *Walker v. Cronin*, 107 Mass. 555, it was held that a count in a declaration which alleged that a plaintiff was a manufacturer of shoes, and for the prosecution of his business it was necessary for him to employ many shoemakers; that the defendants, well knowing this, did maliciously and without justifiable cause molest him in carrying on said business, with the unlawful purpose of preventing him from carrying it on, and willfully induced many shoemakers who were in his employment, and others who were about to enter it, to abandon it without his consent and against his will; and that thereby the plaintiff lost their services and profits and advantages, and was put to great expense to procure other suitable workmen, and was otherwise injured in his business,—stated a good cause of action. See, also, *Sherry v. Perkins*, 147 Mass. 212, 17 N. E. 307.

The real question, therefore, is whether the act of Phelan in instigating and inciting the employés of the receiver to leave his employ was without lawful excuse, and therefore malicious. The question is not whether such an act would subject Phelan to punishment

by indictment and trial under the criminal laws, but whether the act was unlawful in the sense that he could be made to pay damages for the loss occasioned. Of course, if the act would subject him to punishment for an indictable misdemeanor and crime, a fortiori would the act be unlawful; but his act may be a contempt without being a crime.

Now, it may be conceded in the outset that the employes of the receiver had the right to organize into or to join a labor union which should take joint action as to their terms of employment. It is of benefit to them and to the public that laborers should unite in their common interest and for lawful purposes. They have labor to sell. If they stand together, they are often able, all of them, to command better prices for their labor than when dealing singly with rich employers, because the necessities of the single employe may compel him to accept any terms offered him. The accumulation of a fund for the support of those who feel that the wages offered are below market prices is one of the legitimate objects of such an organization. They have the right to appoint officers who shall advise them as to the course to be taken by them in their relations with their employer. They may unite with other unions. The officers they appoint, or any other person to whom they choose to listen, may advise them as to the proper course to be taken by them in regard to their employment, or, if they choose to repose such authority in any one, may order them, on pain of expulsion from their union, peaceably to leave the employ of their employer because any of the terms of their employment are unsatisfactory. It follows, therefore (to give an illustration which will be understood), that if Phelan had come to this city when the receiver reduced the wages of his employes by 10 per cent., and had urged a peaceable strike, and had succeeded in maintaining one, the loss to the business of the receiver would not be ground for recovering damages, and Phelan would not have been liable to contempt even if the strike much impeded the operation of the road under the order of the court. His action in giving the advice, or issuing an order based on unsatisfactory terms of employment, would have been entirely lawful. But his coming here, and his advice to the Southern Railway employes, or to the employes of other roads, to quit, had nothing to do with their terms of employment. They were not dissatisfied with their service or their pay. Phelan came to Cincinnati to carry out the purpose of a combination of men, and his act in inciting the employes of all Cincinnati roads to quit service was part of that combination. If the combination was unlawful, then every act in pursuance of it was unlawful, and his instigation of the strike would be an unlawful wrong done by him to every railway company in the city, for which they can recover damages, and for which, so far as his acts affected the Southern Railway, he is in contempt of this court.

Now, what was the combination and its legal character? Was it an unlawful conspiracy? I do not mean by this an indictable conspiracy, because that depends on the statute; but was it a conspiracy

at common law? If it was, then injury inflicted would be without legal justification, and malicious. A conspiracy is a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means. *Pettibone v. U. S.*, 148 U. S. 197, 13 Sup. Ct. 542. What were the purposes of this combination of Debs, Phelan, and the American Railway Union board of directors? They proposed to inflict pecuniary injury on Pullman by compelling the railway companies to give up using his cars, and, on the refusal of the railway companies to yield to compulsion, to inflict pecuniary injury on the railway companies by inciting their employes to quit their services, and thus paralyze their business. It could not have been unknown to the combiners that the Pullman cars were operated by the railway companies under contracts with Pullman. Such large transactions are never conducted without contracts saving the rights of both sides, and the combiners had every reason to believe that it would be a violation of those contracts for the companies to refuse further to haul Pullman cars in their trains. One purpose of the combination was to compel railway companies to injure Pullman by breaking their contracts with him. The receiver of this court is under contract to Pullman, which he would have to break were he to yield to the demand of Phelan and his associates. The breach of a contract is unlawful. A combination with that as its purpose is unlawful, and is a conspiracy. *Angle v. Railway Co.*, 151 U. S. 1, 14 Sup. Ct. 240.

But the combination was unlawful without respect to the contract feature. It was a boycott. The employes of the railway companies had no grievance against their employers. Handling and hauling Pullman cars did not render their services any more burdensome. They had no complaint against the use of Pullman cars as cars. They came into no natural relation with Pullman in handling the cars. He paid them no wages. He did not regulate their hours, or in any way determine their services. Simply to injure him in his business, they were incited and encouraged to compel the railway companies to withdraw custom from him by threats of quitting their service, and actually quitting their service. This inflicted an injury on the companies that was very great, and it was unlawful, because it was without lawful excuse. All the employes had the right to quit their employment, but they had no right to combine to quit in order thereby to compel their employer to withdraw from a mutually profitable relation with a third person for the purpose of injuring that third person, when the relation thus sought to be broken had no effect whatever on the character or reward of their service. It is the motive for quitting, and the end sought thereby, that make the injury inflicted unlawful, and the combination by which it is effected, an unlawful conspiracy. The distinction between an ordinary lawful and peaceable strike entered upon to obtain concessions in the terms of the strikers' employment and a boycott is not a fanciful one, or one which needs the power of fine distinction to determine which is which. Every laboring man recognizes the one or the other as quick-

ly as the lawyer or the judge. The combination under discussion was a boycott. It was so termed by Debs, Phelan, and all engaged in it. Boycotts, though unaccompanied by violence or intimidation, have been pronounced unlawful in every state of the United States where the question has arisen, unless it be in Minnesota; and they are held to be unlawful in England.

In *Moore v. Bricklayers' Union*, 23 Wkly. Cin. Law Bull. 48, a union which embraces 95 per cent. of the bricklayers of Cincinnati got into a controversy with Parker, a boss bricklayer, concerning apprentices and other matters. The union boycotted Parker, and notified all material men that any one selling him material would themselves be boycotted. Moores & Co. continued to sell Parker lime. Thereupon the union notified all of plaintiffs' customers and probable customers that none of its members would work Moores & Co.'s materials, and seriously damaged the business of Moores & Co. There was no violence, actual or threatened, in the case. Moores & Co. sued the Bricklayers' Union and some of its prominent members for the damages caused by the boycott. This case was tried before a jury in the superior court of Cincinnati, and resulted in a verdict for the plaintiffs of \$2,500. The motion for new trial was reserved to the general term, where the case was fully considered, and the conclusion reached that the verdict must stand, because the combination to injure Moores & Co. was an unlawful conspiracy. The case was then carried by writ of error to the supreme court of Ohio, and the judgment of the superior court was affirmed, without opinion. By the common law of Ohio, therefore, boycotts are illegal conspiracies. I quote from the opinion of the superior court in that case two passages, which seem to me to state the ground for holding boycotts illegal:

"We are dealing in this case with common rights. Every man, be he capitalist, merchant, employer, laborer, or professional man, is entitled to invest his capital, to carry on his business, to bestow his labor, or to exercise his calling, if within the law, according to his pleasure. Generally speaking, if, in the exercise of such a right by one, another suffers a loss, he has no ground of action. Thus, if two merchants are in the same business in the same place, and the business of the one is injured by the competition, the loss is caused by the other's pursuing his lawful right to carry on business as seems best to him. In this legitimate clash of common rights the loss which is suffered is *damnum absque injuria*. So it may reduce the employer's profits that his workmen will not work at former prices, and that he is obliged to pay on a higher scale of wages. The loss which he sustains, if it can be called such, arises merely from the exercise of the workman's lawful right to work for such wages as he chooses, and to get as high rate as he can. It is caused by the workman, but it gives no right of action. Again, if a workman is called upon to work with the material of a certain dealer, and it is of such a character as either to make his labor greater than that sold by another, or is hurtful to the person using it, or for any other reason is not satisfactory to the workman, he may lawfully notify his employers of his objection, and refuse to work it. The loss of the material man in his sales caused by such action of the workman is not a legal injury, and not the subject of action. And so it may be said that in these respects what one workman may do, many may do, and many may combine to do without giving the sufferer any right of action against those who cause his loss. But on this common ground of common rights, where every one is lawfully struggling for the

mastery, and where losses suffered must be borne, there are losses willfully caused to one by another in the exercise of what otherwise would be a lawful right, from simple motives of malice.

* * * * *

"The normal operation of competition in trade is the keeping away or getting away patronage from rivals by inducements offered to the trading public. The normal operation of the right to labor is the securing of better terms by refusing to contract to labor except on such terms. * * * If the workmen of an employer refuse to work for him except on better terms, at a time when their withdrawal will cause great loss to him, and they intentionally inflict such loss to coerce him to come to their terms, they are bona fide exercising their lawful rights to dispose of their labor for the purpose of lawful gain. But the dealings between Parker Bros. and their material men, or between such material men and their customers, had not the remotest natural connection either with defendants' wages or their other terms of employment. There was no competition or possible contractual relation between plaintiffs and defendants where their interests were naturally opposed. The right of the plaintiffs to sell their material was not one which, in its exercise, brought them into legitimate conflict with the rights of defendants to dispose of their labor as they chose. The conflict was brought about by the effort of defendants to use plaintiffs' right of trade to injure Parker Bros., and, upon failure of this, to use plaintiffs' customers' right of trade to injure plaintiffs. Such effort cannot be in the bona fide exercise of trade, is without just cause, and is, therefore, malicious. The immediate motive of defendants here was to show to the building world what punishment and disaster necessarily followed a defiance of their demands. The remote motive of wishing to better their condition by the power so acquired will not, as we think we have shown, make any legal justification for defendants' acts."

And so here there was no natural relation between Pullman and the railway employes, and their attempt to injure the companies because they would not injure him is without cause, and malicious, and is unlawful, even though the injury is inflicted merely by quitting employment.

Temperton v. Russell (1893) 1 Q. B. 715, was a case quite like the case just cited. There a firm of builders refused to obey certain rules laid down by three trades unions connected with the building trade at Hull. Thereupon a joint committee of the unions boycotted the building firm; that is, they attempted to prevent it from procuring any materials by notifying material men not to furnish them, on pain of being themselves boycotted. The plaintiff, a material man, refused to comply with its demand, and the unions then demanded of his material men not to furnish him any material, with the threat that, if they did so, their workmen would quit. The result of this was that contracts for supplies to the plaintiff were broken, and others who, but for the threats, would have made contracts, were deterred from doing so. It was held that the boycott was an unlawful conspiracy, and that the joint committee of the unions who were sued were liable in damages for a malicious interference with the plaintiff's business. There was no violence or threatened violence in this case. The case was decided by the court of appeal of England, consisting of Lord Ester, master of rolls, and Lopes and A. L. Smith, lord justices.

In *Carew v. Rutherford*, 106 Mass. 1, a contracting stone mason, contrary to the rules of the union, sent some of his material out of the state to be dressed, and his men, members of the union, re-

fused to work for him any longer unless he paid a fine to the union, and did not return until he paid the fine. This was held to be illegal conspiracy for the purpose of extortion and mischief, and the employer was given a judgment for the recovery of the fine and damages.

Boycotts have been declared illegal conspiracies in *State v. Glidden*, 55 Conn. 46, 8 Atl. 890; in *State v. Stewart*, 59 Vt. 273, 9 Atl. 559; *Steamship Co. v. McKenna*, 30 Fed. 48; *Casey v. Typographical Union*, 45 Fed. 135; *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.*, 54 Fed. 730, 738; and in other cases.

But the illegal character of this combination with Debs at its head and Phelan as an associate does not depend alone on the general law of boycotts. The gigantic character of the conspiracy of the American Railway Union staggers the imagination. The railroads have become as necessary to life and health and comfort of the people of this country as are the arteries on the human body, and yet Debs and Phelan and their associates proposed, by inciting the employes of all the railways in the country to suddenly quit their service without any dissatisfaction with the terms of their own employment, to paralyze utterly all the traffic by which the people live, and in this way to compel Pullman, for whose acts neither the public nor the railway companies are in the slightest degree responsible, and over whose acts they can lawfully exercise no control, to pay more wages to his employes. The merits of the controversy between Pullman and his employes have no bearing whatever on the legality of the combination effected through the American Railway Union. The purpose, shortly stated, was to starve the railroad companies and the public into compelling Pullman to do something which they had no lawful right to compel him to do. Certainly the starvation of a nation cannot be a lawful purpose of a combination, and it is utterly immaterial whether the purpose is effected by means usually lawful or otherwise.

More that this, the combination is in the teeth of the act of July 2, 1890, which provides that:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or both said punishments, in the discretion of the court."

That such a combination as the one under discussion is within the statute just quoted has been decided by Judge Billings of Louisiana in *U. S. v. Workingmen's Amalgamated Council of New Orleans*, 54 Fed. 994. His view has been followed by the circuit judges of this circuit within the past 10 days, by Judges Woods, Allen, and Grosscup of the seventh circuit, and by Judge Woolson of the eighth circuit. A different view has been taken by Judge Putnam in *U. S. v. Patterson*, 55 Fed. 605, but, after consideration, Judge Lurton and I cannot concur with the reasoning of that learned

judge. The fact that it was the purpose of Debs, Phelan, and their associates to paralyze the interstate commerce of this country is shown conclusively in this case, and is known of all men. Therefore their combination was for an unlawful purpose, and is a conspiracy, within the statute cited.

It could also be shown, if it were necessary, that this combination was an unlawful conspiracy because its members intended to stop all mail trains as well as other trains, and did delay and retard many, in violation of section 3995, Rev. St. U. S., which imposes a penalty on any one willfully and knowingly obstructing or retarding the passage of the mail. It would be no defense, under that statute, that the obstruction was effected by merely quitting employment, where the motive of quitting was to retard the mails, and had nothing to do with the terms of employment.

Something has been said about the right of assembly and free speech secured by the constitution of Ohio. It would be strange, indeed, if that right could be used to sustain the carrying out of such an unlawful and criminal conspiracy as we have seen this to be. It never has been supposed to protect one from prosecution or suits for slander, or for any of the many malicious and tortious injuries which the agency of the tongue has been so often employed to inflict. If the obstruction to the operation of the road by the receiver was unlawful and malicious, it is not less a contempt because the instrument which he used to effect it was his tongue, rather than his hand.

But it is unnecessary to consider the question further. It is very clear that Phelan came here to carry out an illegal conspiracy, in the course of which, and in pursuance of which, he attempted, and partially succeeded in tying up the Southern Railroad, operated by a receiver under an order of this court, as he well knew. His purpose in calling out the employés of the Southern Railroad was unlawful by the law of Ohio and the laws of the United States. He intended to prevent entirely its operation. He partially succeeded, and he subjected the receiver to great expense in reducing the loss occasioned by his acts.

It follows that the contemnor is guilty as charged, and it only remains to impose the sentence of the court. This is in the discretion of the court, to be exercised on any information in reference to the convicted person which the court believes to be reliable. The court would be much more disposed to leniency in this case if the contemnor, after his arrest, had shown the slightest regard for the order of the court which the receiver was attempting to comply with in the operation of the road. Even if he did not fully realize the position in which he had put himself with respect to the order of the court to the receiver to operate the Southern Railroad, his arrest, and the service of the intervening petition, together with the restraining order, should have quickened his conscience and his perceptions of his duty in this regard. It was his duty, therefore, to cease all his operations with reference to the strike in this city which could in any way affect the operation of the Southern Railway, whether by inciting employés to leave the receiver or by preventing

his employment of others. What did he do? Instead of ceasing to incite the receiver's employés to leave his employ in pursuance of his unlawful conspiracy, there has been no change whatever in his course from that pursued by him before his arrest. By speeches every night since the arrest he has aggravated his contempt. On the night of July 4th, it is in evidence, the contemnor said, in a speech to railroad employés of the city, referring to this trial:

"I don't care if I am violating injunctions. No matter what the result may be to-morrow, if I go to jail for sixteen generations, I want you to do as you have done. Stand pat to a man. No man go back unless all go, and all stay out unless Phelan says go back."

It was a direct invitation to continue the course already taken under his direction of preventing the return of employés to the receiver, and of persuading the striking of others, and an avowed intention of disregarding the order of the court.

The punishment for a contempt is the most disagreeable duty a court has to perform, but it is one from which the court cannot shrink. If orders of the court are not obeyed, the next step is unto anarchy. It is absolutely essential to the administration of justice that courts should have the power to punish contempts, and that they should use it when the enforcement of their orders is flagrantly defied. But it is only to secure present and future compliance with its orders that the power is given, and not to impose punishment commensurate with crimes or misdemeanors committed in the course of the contempt, which are cognizable in a different tribunal or in this court by indictment and trial by jury. I have no right, and do not wish, to punish the contemnor for the havoc which he and his associates have wrought to the business of this country, and the injuries they have done to labor and capital alike, or for the privations and sufferings to which they have subjected innocent people, even if they may not be amenable to the criminal laws therefor. I can only inflict a penalty which may have some effect to secure future compliance with the orders of this court and to prevent willful and unlawful obstructions thereof.

After much consideration, I do not think I should be doing my duty as a judicial officer of the United States without imposing upon the contemnor the penalty of imprisonment. The sentence of the court is that Frank W. Phelan be confined in the county jail of Warren county, Ohio, for a term of six months. The marshal will take the prisoner into custody, and safely convey him to the place of imprisonment.

UNITED STATES v. AGLER.

(Circuit Court, D. Indiana. July 12, 1894.)

1. INJUNCTION AGAINST COMBINATIONS IN RESTRAINT OF INTERSTATE COMMERCE—JURISDICTION.

Under Act July 2, 1890, declaring illegal and punishing combinations in restraint of commerce among the states, and conferring jurisdiction on United States circuit courts to prevent and restrain violations of the act, the court has jurisdiction to issue an injunction to restrain such violation.

2. SAME—TECHNICAL DEFECTS IN BILL.

That a bill for such injunction contains no prayer for process, this being a mere technical defect, although it renders the bill demurrable, does not affect the jurisdiction of the court or render the injunction issued thereon void.

3. SAME—DEFENDANTS NOT NAMED IN BILL, NOR SERVED WITH SUBPOENA.

An injunction for such purpose becomes binding, as against one not named in the bill, and not served with subpoena, when the injunction order is served on him as one of the unknown defendants referred to in the bill.

4. SAME—PROCEEDINGS TO PUNISH VIOLATION.

An information to punish violation of such an injunction order which falls to allege that the order was a lawful one, in the language of the statute, or that the person charged, not named in the order, was one of the unknown parties referred to therein, or that, either by his words or his acts, he was engaged in aiding the common object with other members of the alleged combination, lacks the necessary certainty.

This was an information against Hiram Agler for contempt of court in disobeying an injunction. Defendant moved to quash the information.

F. B. Burke and Edwin Corr, for the United States.
McCullough & Spaan, for defendant.

BAKER, District Judge (orally). It is well settled that a restraining order or injunction issued by a judicial tribunal without jurisdiction of the subject-matter is coram non judice and void. That is affirmed in all the books, and affirmed in the judgments of the supreme court of the United States that the counsel for the defendant has called the attention of the court to. Now, the question whether or not the circuit court of the United States had jurisdiction requires an examination of the statute, for the purpose of determining whether or not there is any law that authorized the court judicially to take cognizance of the sort of action that is set forth in the petition or bill.

Prior to the 2d day of July, 1890, it is entirely clear that the United States, as a municipal corporation, had no power, either by petition or bill, to go into the courts of equity of the United States, and invoke the aid of those courts, by their restraining power, to prevent interference with the carriage of the mails or with the carriage of interstate commerce. Prior to that time the sole remedy was on the criminal side of the court. The sole method in which the United States, as a government, could prosecute violators of the law who interfered with the carriage of mails or inter-

ferred with the instrumentalities used in the conduct of interstate commerce, was by indictment or information on the criminal side of the court; but the growth of railways in this country, and the combinations of laborers employed on those roads for the purpose of enforcing, by strikes or otherwise, what they conceived to be their just rights, had led to a condition of things that, in the judgment of congress, made it imperative that the courts of the United States,—in other words, that the nation itself,—for the purpose of protecting the mails of the country, and for the purpose of protecting the passenger and freight traffic on interstate railroads, should have the right to invoke not only the criminal jurisdiction of the court by fines, or by sending to the penitentiary those who were guilty of violations of those laws, but that the government should also be clothed with the power—or rather the courts of the United States should be clothed with the power—of laying their strong hands on these men, and not waiting until crimes had been committed, but restraining, not for the purpose of preventing people from doing what is lawful, or to prevent their getting better wages, but for the purpose of saying to everybody that civil liberty cannot exist where combinations of men undertake by force and violence to arrest the peaceable and orderly conduct of business among the states. With that view of national duty, on July 2, 1890, congress enacted a law that enlarged the jurisdiction of the federal courts, and authorized them to apply the restraining power of the law for the purpose of checking and arresting all lawless interference with the peaceable and orderly carriage of mails, and with the peaceable and orderly conduct of railroad business between the states. This law was intended to lay its strong hand, not only upon the capitalists or monopolists who, by combinations, undertook to interfere with the business and commerce of the country, and subject them to punishment, but, on the other hand, it also undertook to say to the laboring men of the country that “you shall not enforce your rights, however just they may be, by violence and by lawlessness.”

Civil order cannot exist where men undertake by strong hand to enforce rights, whatever their rights may be. In civilized and organized society there is only one avenue that is alike open to the rich and the poor—that is, the avenue of the courts—for the purpose of settling disputes between men. No man has a right, even though he has been wronged, even though he may have been oppressed, to take the law into his own hands, and, by force and terrorism or threats, redress his wrongs. It means a condition of things that would be absolutely intolerable in civilized society, and it was in order that the peaceable and quiet and orderly processes of the law might be applied to men who are thus engaged, whether they were monopolists, on the one side, or laboring men, on the other, that the law was enacted for the purpose of arresting lawlessness, composing these disturbances, and bringing about that orderly and peaceful condition of affairs that is essential to the life and happiness of the community.

Now, there is no doubt, in my judgment, that this act of July 2, 1890, did clothe the circuit court of the United States with this new and enlarged power. That, however, does not answer the entire contention of the counsel for the defense. He insists that the affidavit and information filed in this case does not reach and bind the defendant as charged, because, as he alleges, the bill does not contain a prayer for process; and he reads from an authority which is undoubtedly sound that a bill in equity without containing a prayer for process which shall embody the names of the defendants against whom process is prayed would be demurrable. That is undoubtedly the law. That, however, does not settle the question that is before the court. The question is whether or not if an injunction is issued by a court which has power to issue the injunction upon a bill, provided the bill is not demurrable, is the injunction void because, on investigation, the court believes that a demurrer might have been sustained to the bill if it had been interposed? In other words, does a mere defect that could be reached by demurrer, in a bill of which the court has jurisdiction,—over which the court has been given jurisdiction by the express terms of the statute,—is the injunction order a nullity, and can it be treated with contempt because the bill is defective, so that a demurrer might be sustained to it? On that proposition the court entertains no doubt. There is not an authority, in the judgment of the court, that can be found in the books—certainly the court is aware of none—in which it has ever been held that a man who was enjoined and had violated the injunction could escape punishment by alleging that, at the time the writ of injunction was issued, the bill was demurrable.

There is no doubt but what a number of men are named expressly by name. Eugene V. Debs, Howard, and some men here in this state are named by name. If, in the prayer for process, their names had been repeated, or if it had been simply stated in the prayer for process that the complainant, the United States, prays process against the parties above named, the bill would have been technically sufficient. Now, then, I assume that process of subpoena was issued against these men by order of Judge Woods, without their having been named in the prayer for process. It is a mere technical defect. It is one that does not, in the language of the supreme court, go to the jurisdiction of the court. The jurisdiction of the court depends upon the law of the land. Nor do I think it is necessary in this sort of cases for the government to file what is technically known as a "bill in equity" on the chancery side of this court as in a civil case. The right at all to file this sort of a proceeding is a new statutory right, and courts cannot—they would be derelict in the discharge of their duty if they did—disregard the purpose and object of the enactment of the law. I do not undertake to sit in judgment on either capitalists or laboring men. I have, as a magistrate, nothing to do with that. I am simply bound as a judge to take notice that a condition of things had grown up in this country of strikes, of interruption of mails, and interruption

and interferences with interstate commerce; that it provoked comment, and had created feeling; and, in order that labor troubles should be settled without interfering with the commerce and the happiness of millions of innocent people, it was determined that the national government should clothe its courts with power on the civil side to stop these things without waiting until crimes had been committed, and then send men to the penitentiary for the crimes so committed. That is the reason of it. It was intended to be a preventive remedy. That was the sole purpose of it. So far as this phase of it is concerned, it is true there are other sections that authorize men who do these things to be punished by fine of not more than \$5,000, and imprisonment for a year in state prison; but, so far as the civil side of it is concerned, it was intended to meet an emergency and a public exigency. It could not sue until the mails had been interfered with, or until the commerce of the country had been lawlessly stopped, but it was not intended, in my judgment, in order to invoke the judgment and jurisdiction of the court that all of the old nicety of pleading and practice of the English chancery courts should apply. The courts would be powerless if that were the case, to accomplish the beneficent purpose of the law, because it is a beneficent purpose. It is a praiseworthy purpose, in the midst of tumult and excitement, when lawlessness seizes upon the arteries of the commerce of the nation, for the courts of the land, in their peaceable and orderly way, to lay their hands on these men, and bid them cease. It is a lawful thing,—a commendable thing. The law gives them that power. So much, then, on the question of jurisdiction.

I think that in this proceeding the court (Judge Woods, as judge of the circuit court) had jurisdiction to issue this writ. Now, this party defendant is not named, and to say now that process of injunction may not be issued, to be binding upon men who are not named, or shall not be binding until they are actually served with subpoena, as they are on the civil side, on the equity side, of the court, it would defeat the purpose of the law. It is not within the language of the statute itself. I think the injunction as against unknown defendants is valid and binding when the injunction order is served upon them, although they are not at the time parties to the suit. Indeed, I think an injunction that is issued against one man enjoining or restraining him, and all that give aid and comfort to him, or all that aid and abet him, is valid against everybody that aids or gives countenance to the man to whom it is addressed. I do not entertain any doubt about that.

Now, then, the court having decided that it thinks the injunction was properly issued, and that, if it was actually served on this man as one of the unknown defendants, the injunction would be good, that brings us to the question of the technical sufficiency of the affidavit, because in this sort of proceeding, in my judgment, it is not essential that an information shall be filed, although there is no harm in doing that. The essential thing is the filing of a statement or charge that shall show clearly and distinctly that the

restraining order has been served on the defendant, or, if it has not been served on him, that he had notice or knowledge of its contents. Now, in this case, the information, I think, lacks considerable of having the certainty and precision that is essential. It is not alleged that this man was one of the unknown parties that are referred to in the injunction. It is not alleged that the restraining order was a lawful one, in the language of the statute. It does not allege,—and that is the most serious thing, to my mind,—that either by his words or his acts he was engaged in aiding the common object with other members of the American Railway Union. If what this man did was not done to give aid or comfort or encouragement to the object of arresting the mails, if it was an independent crime the man was committing, if he wanted to commit arson or robbery, without having any connection with these men that were engaged in the interruption of commerce, then he would not be within the terms of the restraining order, nor within the law, which has been read here,—the law of July 2, 1890. Now, it is not charged, although it has been assumed all the way through,—I suppose the proof adduced would go to show that,—that he was connected with the railway union, and that his acts were acts that were calculated in their nature to give aid and comfort to the strike that has been carried on. If those facts were proved, why they would be sufficient to satisfy the court that his mind was acting in combination with the minds of Debs and others, or that they were engaged in the common purpose, and hence that they were in the conspiracy that is mentioned in the statute, provided the things that they were trying to do would naturally result in delaying or interrupting the mails, or in delaying or interrupting the carriage of passengers and freight from one state to another. I think that in these particulars the affidavit is insufficient. I think the charge is sufficient, so far as showing that the court has jurisdiction to issue the writ, when it is shown by an affidavit that this man was engaged in the combination or conspiracy with other railroad men in aiding and assisting to arrest the mails and interstate commerce. I think the affidavit would show a cause of action against him, and then it would depend upon the proof whether or not the offense was made out.

In re CHARGE TO GRAND JURY.

(District Court, N. D. Illinois. July 10, 1894.)

1. INSURRECTION—WHAT CONSTITUTES.

The open and active opposition of a number of persons to the execution of the laws of the United States, of so formidable a nature as to defy for the time being the authority of the government, constitutes an insurrection, even though not accompanied by bloodshed, and not of sufficient magnitude to render success probable.

2. CRIMINAL CONSPIRACY—OBSTRUCTING MAILS AND INTERSTATE COMMERCE.

A corrupt or wrongful agreement between two or more persons that the employes of railroads carrying the mails and conducting interstate commerce should quit, and that all others should, by threats or violence, be prevented from taking their places, constitutes a criminal conspiracy to hinder or obstruct the mails and interstate commerce.

8. SAME—LABOR ORGANIZATION.

Where two or more leaders of a labor association, for the purpose of advancing personal ambition or satisfying private malice, by concert, insist or demand, under effective penalties and threats, upon the members of the association quitting their employment, to the obstruction of the mails or of interstate commerce, they are guilty of criminal conspiracy.

A grand jury, having been called to consider the offenses alleged to have been committed during the strike of the American Railway Union against the railroads hauling Pullman cars, was instructed by the court as follows:

GROSSCUP, District Judge. Gentlemen of the Grand Jury: You have been summoned here to inquire whether any of the laws of the United States within this judicial district have been violated. You have come in an atmosphere and amid occurrences that may well cause reasonable men to question whether the government and laws of the United States are yet supreme. Thanks to resolute manhood, and to that enlightened intelligence which perceives the necessity of a vindication of law before any other adjustments are possible, the government of the United States is still supreme.

You doubtless feel, as I do, that the opportunities of life, under present conditions, are not entirely equal, and that changes are needed to forestall some of the dangerous tendencies of current industrial tendencies. But neither the torch of the incendiary, nor the weapon of the insurrectionist, nor the inflamed tongue of him who incites to fire and sword is the instrument to bring about reforms. To the mind of the American people; to the calm, dispassionate sympathetic judgment of a race that is not afraid to face deep changes and responsibilities, there has, as yet, been no appeal. Men who appear as the champions of great changes must first submit them to discussion, discussion that reaches, not simply the parties interested, but the outer circles of society, and must be patient as well as persevering until the public intelligence has been reached, and a public judgment made up. An appeal to force before that hour is a crime, not only against government of existing laws, but against the cause itself; for what man of any intelligence supposes that any settlement will abide which is induced under the light of the torch or the shadow of an overpowering threat?

With the questions behind present occurrences, therefore, we have, as ministers of the law and citizens of the republic, nothing now to do. The law as it is must first be vindicated before we turn aside to inquire how law or practice, as it ought to be, can be effectually brought about. Government by law is imperiled, and that issue is paramount.

The government of the United States has enacted laws designed, first, to protect itself and its authority as a government, and, secondly, its control over those agencies to which, under the constitution and laws, it extends governmental regulation. For the former purpose,—namely, to protect itself and its authority as a government,—it has enacted that every person who incites, sets on foot, assists, or engages in, any rebellion or insurrection against the

authority of the United States or the laws thereof, or gives aid or comfort thereto, "and any two or more persons in any state or territory who conspire to overthrow, put down, or destroy by force the government of the United States, or to levy war against them, or to oppose by force the authority thereof; or by force to prevent, hinder or delay the execution of any law of the United States contrary to the authority thereof," shall be visited with certain penalties therein named.

Insurrection is a rising against civil or political authority,—the open and active opposition of a number of persons to the execution of law in a city or state. Now, the laws of the United States forbid, under penalty, any person from obstructing or retarding the passage of the mail, and make it the duty of the officers to arrest such offenders, and bring them before the court. If, therefore, it shall appear to you that any person or persons have willfully obstructed or retarded the mails, and that their attempted arrest for such offense has been opposed by such a number of persons as would constitute a general uprising in that particular locality, and as threatens for the time being the civil and political authority, then the fact of an insurrection, within the meaning of the law, has been established; and he who by speech, writing, or other inducement assists in setting it on foot, or carrying it along, or gives it aid or comfort, is guilty of a violation of law. It is not necessary that there should be bloodshed; it is not necessary that its dimensions should be so portentous as to insure probable success, to constitute an insurrection. It is necessary, however, that the rising should be in opposition to the execution of the laws of the United States, and should be so formidable as for the time being to defy the authority of the United States. When men gather to resist the civil or political power of the United States, or to oppose the execution of its laws, and are in such force that the civil authorities are inadequate to put them down, and a considerable military force is needed to accomplish that result, they become insurgents; and every person who knowingly incites, aids, or abets them, no matter what his motives may be, is likewise an insurgent. The penalty for the offense is severe, and, as I have said, is designed to protect the government and its authority against direct attack. There are other provisions of law designed to protect those particular agencies which come within governmental control. To these I will now call your attention.

The mails are in the special keeping of the government and laws of the United States. To insure their unhindered transmission, it is made an offense to knowingly and willfully obstruct or retard the passage of the mail, or any carriage, horse, driver, or carrier carrying the same. It is also provided that "if two or more persons conspire together to commit any offense against the United States and one or more of such parties do any act to effect the object of the conspiracy," all the parties thereto shall be subject to a penalty. Any person knowingly and willfully doing any act which contributes, or is calculated to contribute, to obstructing or hindering the mails, or who knowingly and willfully takes a part in such

acts, no matter how trivial, if intentional, is guilty of violating the first of these provisions; and any person who conspires with one or more persons, one of whom subsequently commits the offense, is likewise guilty of an offense against the United States. What constitutes conspiracy to hinder or obstruct the mails will be touched upon in connection with the subject to which I now call your attention.

The constitution places the regulation of commerce between the several states, and between the states and foreign nations, within the keeping of the United States government. Anything which is designed to be transported for commercial purposes from one state to another, and is actually in transit, and any passenger who is actually engaged in any such interstate commercial transaction, and any car or carriage actually transporting or engaged in transporting such passenger or thing, are the agencies and subject-matter of interstate commerce, and any conspiracy in restraint of such trade or commerce is an offense against the United States. To restrain is to prohibit, limit, confine, or abridge a thing. The restraint may be permanent or temporary. It may be intended to prohibit, limit, or abridge for all time, or for a day only. The law draws no distinction in this respect. Commerce of this character is intended to be free, except subject to regulation by law, at all times, and for all periods. Temporary restraint is therefore as intolerable as permanent, and practical restraint by actual physical interference, as criminal as that which flows from the arrangements of business and organization. Any physical interference, therefore, which has the effect of restraining any passenger, car, or thing constituting an element of interstate commerce, forms the foundation for this offense. But to complete this offense, as also that of conspiracy to obstruct the mails, there must exist, in addition to the overt act and purpose, the element of criminal conspiracy.

What is criminal conspiracy? If it shall appear to you that any two or more persons corruptly or wrongfully agreed with each other that the trains carrying the mails and interstate commerce should be forcibly arrested, obstructed, and restrained, such would clearly constitute a conspiracy. If it shall appear to you that two or more persons corruptly or wrongfully agreed with each other that the employes of the several railroads carrying the mails and interstate commerce should quit, and that successors should, by threats, intimidation, or violence, be prevented from taking their places, such would constitute a conspiracy.

I recognize, however, the right of labor to organize. Each man in America is a freeman, and, so long as he does not interfere with the rights of others, has the right to do with that which is his what he pleases. In the highest sense, a man's arm is his own, and, aside from contract relations, no one but he can direct when it shall be raised to work, or shall be dropped to rest. The individual option to work or to quit is the imperishable right of a freeman. But the raising and dropping of the arm is the result of a will that resides in the brain, and, much as we may desire that such wills

should remain entirely independent, there is no mandate of law which prevents their association with others, and response to a higher will. The individual may feel himself, alone, unequal to cope with the conditions that confront him, or unable to comprehend the myriad of considerations that ought to control his conduct. He is entitled to the highest wage that the strategy of work or cessation from work may bring, and the limitations upon his intelligence and opportunities may be such that he does not choose to stand upon his own perception of strategic or other conditions. His right to choose a leader, one who observes, thinks, and wills for him,—a brain skilled to observe his interest,—is no greater pretension than that which is recognized in every other department of industry. So far, and within reasonable limits, associations of this character are not only not unlawful, but are, in my judgment, beneficial, when they do not restrain individual liberty, and are under enlightened and conscientious leadership.

But they are subject to the same laws as other associations. The leaders to whom are given the vast power of judging and acting for the members are simply, in that respect, their trustees. Their conduct must be judged, like that of other trustees, by the extent of their lawful authority, and the good faith with which they have executed it. No man, in his individual right, can lawfully demand and insist upon conduct by others which will lead to an injury to a third person's lawful rights. The railroads carrying the mails and interstate commerce have a right to the service of each of their employes until each lawfully chooses to quit; and any concerted action upon the part of others to demand or insist, under any effective penalty or threat, upon their quitting, to the injury of the mail service or the prompt transportation of interstate commerce, is a conspiracy, unless such demand or insistence is in pursuance of a lawful authority conferred upon them by the employes themselves, and is made in good faith in the execution of such authority. The demand and insistence under effective penalty or threat, and injury to the transportation of the mails or interstate commerce being proven, the burden falls upon those making the demand or insistence to show lawful authority and good faith in its execution.

Let me illustrate: Twelve carpenters are engaged in building a house. Aside from contract regulations, they each can quit at pleasure. A thirteenth and fourteenth man, strangers to them, by concerted threats of holding them up to public odium or private malice, induce them to quit, and leave the house unfinished. The latter in no sense represent the former or their wishes, but are simply interlopers for mischief, and are guilty of conspiracy against the employers of the carpenters. But if, upon a trial for such, it results that, instead of being strangers, they are the trustees, agents, or leaders of the twelve, with full power to determine for them whether their wage is such that they ought to continue or quit, and that they have in good faith determined that question, they are not then, so far as the law goes, conspirators. But if it should further appear that the supposed authority was used, not in the in-

terests of the twelve, but to further a personal ambition or malice of the two, it would no longer justify their conduct. Doing a thing under cloak of authority is not doing it with authority. The injury of the two to the employer, in such an instance, would only be aggravated by their treachery to the associated twelve, and both the employer and employés should, with equal insistence, ask for the visitation of the law.

If it appears to you, therefore,—applying the illustration to the occurrences that will be brought to your attention,—that any two or more persons, by concert, insisted or demanded, under effective penalties and threats, upon men quitting the employment of the railways, to the obstruction of the mails or interstate commerce, you may inquire whether they did these acts as strangers to these men, or whether they did them under the pretension of trustees or leaders of an association to which these men belong. And, if the latter appears, you may inquire whether their acts and conduct in that respect were in faithful and conscientious execution of their supposed authority, or were simply a use of that authority as a guise to advance personal ambition or satisfy private malice. There is honest leadership among these, our laboring fellow citizens, and there is doubtless dishonest leadership. You should not brand any act of leadership as done dishonestly or in bad faith unless it clearly so appears. But if it does so appear,—if any person is shown to have betrayed the trust of these toiling men, and their acts fall within the definition of crime, as I have given it to you,—it is alike the interest, the pleasure, and the duty of every citizen to bring them to swift and heavy punishment.

I wish again, in conclusion, to impress upon you the fact that the present emergency is to vindicate law. If no one has violated the law, under the rules I have laid down, it needs no vindication; but, if there has been such violation, there should be quick, prompt, and adequate indictment. I confess that the problems which are made the occasion or pretext for our present disturbances have not received the consideration they deserve. It is our duty, as citizens, to take them up, and, by candid and courageous discussion, ascertain what wrongs exist, and what remedies can be applied. But neither the existence of such problems, nor the neglect of the public hitherto to adequately consider them, justify the violation of law, or the bringing on of general lawlessness. Let us first restore peace, and punish the offenders of the law, and then the atmosphere will be clear to think over the claims of those who have real grievances. First vindicate the law. Until that is done, no other questions are in order.

In re GRAND JURY.

(District Court, S. D. California. June 29, 1894.)

1. CONSPIRACY—OBSTRUCTION OF INTERSTATE COMMERCE.

A railroad which is a link in a through line of road by which passengers and freight are carried into a state from other states and thence to other states, is engaged in interstate commerce, within the statute declaring every combination or conspiracy in restraint of such commerce to be an offense.

2. SAME—RUNNING OF TRAINS.

Though a railroad company engaged in interstate commerce must, unless prevented by circumstances beyond its control, run trains in a reasonable manner, and as often as the ordinary business of commerce requires, yet, where the composition of its trains, as ordinarily made up, is reasonable and appropriate to the service required, it is not obliged, on the refusal of its employes to move the trains so long as certain cars are thereon, to leave off such cars, and run the rest of the train.

3. MAIL—DUTY OF RAILROAD COMPANY.

Where the regular passenger trains of a railroad have been designated for the carrying of mail, failure of the railroad to run other trains for that purpose is not in violation of the statute against obstruction and interruption of the mail.

Instructions given to the grand jury by ROSS, District Judge:

(June 29, 1894.)

Gentlemen of the Grand Jury: Under and by virtue of provisions of the statutes of the United States all railroads or parts of railroads which are now in operation are post roads, and every railroad company in the United States whose road is operated by steam is authorized to carry upon and over its road, boats, bridges, and ferries all passengers, troops, government supplies, mails, freight, and property on their way from any state to another state, and to connect with roads of other states so as to form continuous lines for the transportation of the same to the place of destination. A railroad which is a link in a through line of road by which passengers and freight are carried into a state from other states, and from that state to other states, is engaged in the business of interstate commerce, and every combination or conspiracy in restraint of such trade or commerce is by statute declared to be illegal, and the persons so combining or conspiring are by law guilty of the commission of a crime. Congress has passed laws to regulate such commerce, and has provided, among other things, that any common carrier subject to the provisions of the interstate commerce act, or, whenever any such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully omit or fail to do any act, matter, or thing required to be done by the act, or shall cause or willfully suffer or permit any act, matter, or thing so directed or required by the act to be done, not to be done, or shall aid or abet such omission or failure, shall be deemed guilty of a misdemeanor, and punished in a certain prescribed way. It is also declared by a statute of the

United States that any person who shall knowingly and willfully obstruct or retard the passage of the mail is guilty of a crime, and shall be punished. It is further declared by a United States statute that, "if two or more persons conspire * * * to commit any offense against the United States, * * * and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not more than \$10,000 or to imprisonment for not more than 2 years, or to both fine and imprisonment, in the discretion of the court." Rev. St. § 5440. I charge you, gentlemen of the jury, to forthwith diligently inquire whether any of the laws of the United States to which I have specially called your attention have been violated by any person or persons within this judicial district. You must, in the language of the oath which you and each of you took when impaneled as grand jurors, "present no person from envy, hatred, or malice; neither shall you leave any person unrepresented from fear, favor, affection, gain, reward, or the hope thereof, but you shall present all things truly as they come to your knowledge, according to the best of your understanding." It is of the first importance that the law be in all things and at all times maintained. This is especially true in times like the present, when there seems to be abroad in the land a spirit of unrest, and, in many instances, a defiance of law and order. Every man should know, and must be made to know, that whatever wrongs and grievances exist, no matter in what quarter, can only be corrected through lawful means; for the great mass of the American people are law-loving and law-abiding, and will never tolerate any high-handed or unlawful attempt to correct wrongs, whether they be real or imaginary. It is true that ordinarily every man has the legal right to stop work and quit his employment whenever he chooses to do so, unless there be a contract that obliges him to continue for a definite time; but no man has a legal or moral right, while continuing in the employment of another, to refuse to do the work he is employed and engages to do; and where such refusal goes to the extent of violating a law of the United States it is the solemn duty of those charged with its administration to take every step requisite and necessary to its complete vindication.

(July 2, 1894, Morning Session.)

Gentlemen of the Grand Jury: I understand, through the district attorney, that you desire some further instructions in regard to the mail. Congress has provided by statute that the postmaster general shall in all cases decide upon what trains and in what manner the mails shall be conveyed, and that officer has, through his subordinates, designated for the Southern California Railway Company and the Southern Pacific Railroad Company in this judicial district the regular passenger trains of those roads for the carrying of the United States mails. Neither of those companies is by the law required to run any other trains than their regular passenger trains for the carrying of the mails, and their failure to do so is not a violation of any law of the United States to which my attention has been called,

or that I have been able to find. As I told you the other day, in effect, any and every person who shall knowingly and willfully obstruct or retard the passage of the mail is guilty of a crime against the laws of the United States, and, if two or more persons conspire to commit that or any other offense against the United States, and one or more of such parties do any act to effect the object of the conspiracy, all of the parties to such conspiracy are guilty of a crime; and, if you find from your investigations, which I charged you, and again charge you, diligently to pursue, that any such offense has been committed within this judicial district against the laws of the United States, it is your imperative and solemn duty to find an indictment or indictments against any and every such offending person. Using the substance of the language of Judge Jackson in a somewhat similar case that arose in West Virginia in 1893, it is proper for me to say that exactly what is involved in the strike which has brought about all of the trouble here and elsewhere is not for you or me to investigate. At this time it is not necessary to say which side is in the right nor which side is in the wrong, or whether, in fact, either side is in the wrong upon the merits of that question. It may be well to again say that there is but one way to redress a wrong known in this country, and that is through the regularly constituted tribunals of the country. No man, no set of men, no communistic combination of men, can lawfully undertake to redress a wrong except in the way pointed out by law. Whenever men attempt to unlawfully combine themselves together for the purpose of redressing a wrong, they strike at the very foundation of those laws which give them the right of a citizen,—the protection of life, of liberty, and the pursuit of happiness. It is the solemn duty of all good citizens to ponder and think of these things, and be sure that their acts, whatever they are, be within, and not contrary to, the laws of the country; and it is the sworn and imperative duty of those charged with the administration of the laws to take prompt and vigorous measures to bring to the bar of justice any and every infraction of them.

(July 2, 1894, Afternoon Session.)

Gentlemen of the Grand Jury: Most of the questions propounded by some of your members are answered in substance by the instructions already given to you by the court. The court has already told you that it is provided by a statute of the United States that the postmaster general shall in all cases decide upon what trains and in what manner the mails shall be conveyed, and that that officer has, through his subordinates, designated for the Southern California Railway Company and the Southern Pacific Railroad Company in this judicial district the regular passenger trains of those roads for the carrying of the United States mails; and, further, that neither of those companies is by the law required to run any other trains than their regular passenger trains for the carrying of the mails, and that their failure to do so is not a violation of any law of the United States. The court has further instructed you, and

again repeats, that any and every person who shall knowingly and willfully obstruct or retard the passage of the mail is guilty of a crime against the United States, and that any and every person who knowingly and willfully interferes with or obstructs any interstate commerce is guilty of an offense against a law of the United States; and that, if any two or more persons—it makes no difference who they are—conspire to commit either of those offenses against the United States, and one or more of such parties do any act to effect the object of the conspiracy, all of the parties to such conspiracy are guilty of a crime. Whenever such acts are of a character to prevent and obstruct the carrying of the mails, or to interfere with or obstruct any interstate commerce, and are done for the purpose and with the intent to prevent or obstruct the same, a crime is committed.

(July 3, 1894.)

Gentlemen of the Grand Jury: I especially call your attention this morning to the report of certain acts and declarations of a Doctor Ravlin at a public meeting reported to have been held at Hazard's Pavilion in this city last night, and in connection therewith I instruct you that it is declared by the statutes of the United States that "every person who incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States, or the laws thereof, or gives aid or comfort thereto, shall be punished by imprisonment not more than ten years, or by a fine of not more than \$10,000, or by both of such punishments; and shall, moreover, be incapable of holding any office under the United States" (Rev. St. § 5334); and, further, that, "if two or more persons in any state or territory conspire to overthrow, put down, or to destroy by force the government of the United States; or to levy war against them; or to oppose by force the authority thereof; or by force to prevent, hinder, or delay the execution of any law of the United States; or by force to seize, take, or possess any property of the United States contrary to the authority thereof; each of them shall be punished by a fine of not less than \$500 and not more than \$5,000; or by imprisonment, with or without hard labor, for a period not less than six months, nor more than six years, or by both such fine and imprisonment." Id. § 5336. You will forthwith diligently inquire whether at the time and place mentioned, or at any other time or place within this judicial district, any person or persons have violated either of these provisions of law, or any other provision of law of the United States; and, in the event you find that any such offense or offenses have been committed, you should forthwith find and return to the court an indictment or indictments against the person or persons so offending, to the end that he or they may be dealt with as law and justice demand. And I charge you that, in the event you find that any such offense or offenses have been committed, the very man or men first to be proceeded against should be the prime movers and controllers in such unlawful acts, and the very man or men who should first be arrested and imprisoned are the ones who declare they will not be ar-

rested, if any such there be. For, gentlemen of the grand jury, it is well to repeat, and have it fully understood in times like the present, that this is a government of law and order, and that the majesty of the law must and surely will prevail. You and I are its ministers now, and not one single duty or responsibility ought to be shirked, evaded, or postponed. The situation of affairs demands prompt and vigorous action on the part of each and every officer of the law, which it should be not only the wish, but the pleasure, of every good citizen to obey.

The questions with which we have to deal are wholly apart from any of the alleged grievances between the employes of the Pullman and railroad companies and their employers; but the overshadowing question here is whether the laws of the United States shall be permitted to be trampled under foot with impunity; and as to that there can be but one answer, and that is in the negative.

(July 11, 1894)

Gentlemen of the Grand Jury: One of your number has asked for further instructions respecting the law bearing upon the subject under your investigation. You have already been informed by the court that under and by virtue of provisions of the statutes of the United States all railroads or parts of railroads which are now in operation are post roads, and that every railroad company in the United States whose road is operated by steam is authorized to carry upon and over its road, boats, bridges, and ferries, all passengers, troops, government supplies, mails, freight, and property on their way from any state to another state, and to connect with roads of other states so as to form continuous lines for the transportation of the same to the place of destination; and that a railroad which is a link in a through line of road by which passengers and freight are carried into a state from other states, and from that state to other states, is engaged in the business of interstate commerce, and that every combination or conspiracy in restraint of such trade or commerce is by statute declared to be illegal, and the persons so combining or conspiring are by law guilty of the commission of a crime, whether they be railroad presidents, managers, superintendents, conductors, engineers, brakemen, or firemen. "Commerce with foreign countries and among the states, strictly considered," said the supreme court of the United States in *County of Mobile v. Kimball*, 102 U. S. 691-702, "consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities." And Mr. Pomeroy, in his work on *Constitutional Law* (section 378), referring to the signification of the word "commerce," says: "It includes the fact of intercourse and of traffic and the subject-matter of intercourse and traffic. The fact of intercourse and traffic, again, embraces all the means, instruments, and places by and in which intercourse and traffic are carried on, and, further still, comprehends the act of carrying them on at these places and by and with these means. The subject-matter of inter-

course or traffic may be either things, goods, chattels, merchandise, or persons. All these may therefore be regulated." Congress has passed laws to regulate such commerce, thereby requiring carriers engaged in such transportation of persons and property to transport them in accordance with and subject to the provisions of the act, and has provided, among other things, that any common carrier subject to the provisions of the interstate commerce act, or, whenever any such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who alone or with any other corporation, company, person, or party shall willfully omit or fail to do any act, matter, or thing required to be done by the act, or shall cause or willfully suffer or permit any act, matter, or thing so directed or required by the act to be done, not to be done, or shall aid or abet such omission or failure, shall be deemed guilty of a misdemeanor, and punished in a certain prescribed way.

In respect to the mails of the United States, it is declared by statute that any person who shall knowingly and willfully obstruct or retard the passage of the mail, is guilty of a crime, and shall be punished. It is further provided by statute of the United States that the postmaster general shall in all cases decide upon what trains and in what manner the mails shall be conveyed, and that officer has, through his subordinates, designated for the Southern California Railway Company and the Southern Pacific Railroad Company in this judicial district the regular passenger trains of those roads for the carrying of the United States mails. Neither of these companies is by the law required to run any other trains than their regular passenger trains for the carrying of the mails, and their failure to do so is not a violation of any law of the United States. But on all of their regular passenger trains, whether they be local or through trains, they are required to carry the mails, and their failure or refusal to do so is unlawful. As respects interstate commerce, railroad companies engaged in such commerce should, unless prevented by circumstances beyond their control, run their trains in a reasonable manner, and as often as the ordinary business of commerce requires. At the same time, as owners of the property, they are legally and justly entitled to determine how many and what cars and engines shall constitute their trains; and, when the composition of trains as usually and ordinarily made up by them is reasonable and appropriate to the services required of them, the law does not, upon the refusal of their employes to move the usual and customary trains, require of such companies to divide the train, and run a less number of cars. The court has further instructed you, and again repeats, that any and every person, whether an employe of a railroad company in high or low position or not employed at all, who shall knowingly and willfully obstruct or retard the passage of the mail, is guilty of a crime against the United States, and that any and every person, whether an officer or employe of a railroad company or not, who knowingly and willfully interferes with or obstructs any interstate commerce is guilty of an

offense against a law of the United States; and that, if any two or more persons, it makes no difference who they are, conspire to commit either of those offenses against the United States, and one or more of such parties do any act to effect the object of the conspiracy, all of the parties to such conspiracy are guilty of a crime. Whenever such acts are of a character to prevent and obstruct the carrying of the mails, or to interfere with or obstruct any interstate commerce, and are done for the purpose and with the intent to prevent or obstruct the same, a crime is committed. When the acts which create the obstruction are in themselves unlawful, the intention to obstruct will be imputed to their author, although the attainment of other ends may have been his primary object.

Since preparing the foregoing instructions, the court is informed that certain lawless and criminal acts were committed in this city last night, and you are instructed to forthwith inquire whether any of such acts fall within the criminal statutes of the United States as heretofore pointed out and explained to you by the court, and, if you find that any of the laws of the United States were thereby violated, you should forthwith indict the offending persons.

In re GRAND JURY.

(District Court, N. D. California. July 13, 1894.)

1. CONSPIRACY—OBSTRUCTION OF INTERSTATE COMMERCE.

Any combination or conspiracy on the part of any class of men who by violence and intimidation prevent the passage of railroad trains engaged in interstate commerce is in violation of Act July 2, 1890, declaring illegal every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the states.

2. MAIL—OBSTRUCTING PASSAGE.

It is a violation of Rev. St. § 995, declaring it an offense to knowingly and willfully obstruct or retard the passage of the mail, for one to prevent the running of a mail train as made up, though he is willing that the mail car shall go on, and his purpose is other than to retard the mails.

3. SAME.

The railway is a great public highway, and the duty of the railroad company as a common carrier is first to the public. The road must be kept in operation for the accommodation of the public, if it is possible to do so with the force and appliances within reach. Any negligence in this respect is not excused by temporary difficulties capable of being promptly removed.

4. SAME.

Where the transportation of the mails and interstate commerce has long been interrupted by the refusal of the employes of the railway company to move trains carrying Pullman cars, it is the duty of the railway company to use every effort to move the mails and interstate commerce, without regard to the make-up of regular trains; and any willful failure to perform this duty is a violation of the statute.

5. GRAND JURY—FINDING—INDICTMENT.

An indictment should only be found where the grand jury believe that the evidence before them would warrant a conviction.

Charge to the grand jury by MORROW, District Judge:

Gentlemen of the Grand Jury: You have been summoned and sworn as grand jurors of the district court of the United States for the northern district of California. It now becomes my duty to instruct you concerning the duties you will be called upon to perform under the laws of the United States.

The extraordinary occurrences in this state during the past two weeks require your immediate attention, and call for a thorough and sweeping investigation. It is a matter of public notoriety that during this time a great railroad strike has prevailed; that the most important channels of trade and commerce carried by railway service have been closed, the business operations of the state paralyzed, and the passage of the mails seriously retarded and obstructed at several points in the state. The constitution of the United States provides that congress shall have power to regulate commerce among the states and establish post offices and post roads. Pursuant to the first of these provisions, congress has provided by the Act of July 2, 1890, that

"Every contract, combination in the form of trust or otherwise or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by fine not exceeding \$5,000 or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court."

"Trade" has been defined as "the exchange of commodities for other commodities or for money; the business of buying and selling; dealing by way of sale or exchange." The word "commerce," as used in the statute and under the terms of the constitution, has, however, a broader meaning than the word "trade." Commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale, and exchange of commodities. *County of Mobile v. Kimball*, 102 U. S. 702; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 203, 5 Sup. Ct. 826. The primary object of the statute was undoubtedly to prevent the destruction of legitimate and healthy competition in interstate commerce by individuals, corporations, and trusts, grasping, engrossing, and monopolizing the markets for commodities. *U. S. v. Patterson*, 55 Fed. 605. But its provisions are broad enough to reach a combination or conspiracy that would interrupt the transportation of such commodities from one state to another, and in this view the scope and purpose of the statute have been the subject of consideration in the courts, notably in the case of *U. S. v. Workingmen's Amalgamated Council*, 54 Fed. 995. That action was brought by the United States in the eastern district of Louisiana against the Workingmen's Amalgamated Council of New Orleans, La., and others, to restrain the defendants from interfering with interstate and foreign commerce. The facts were that a disagreement had arisen between the warehousemen and their employés and the principal draymen

and their subordinates concerning the recognition that should be accorded by the employers to the demands of certain labor organizations in New Orleans, and it was threatened that unless there was an acquiescence in these demands all the labor organizations would leave work, and would allow no work in any department of business, and violence was threatened in support of the demands. In some branches of business the effort was made to replace the union men by other workmen. This was resisted by the intimidation springing from vast throngs of the union men assembling in the street, and in some instances by violence, so that the result was that by the intended effects of the doings of the defendants not a bale of goods constituting the commerce of the country could be moved. It was held by the court that the facts of that case brought it within the provisions of the statute. In other words, it was determined that a combination of men who by violence and intimidation restrained trade and commerce among the several states or with foreign nations were acting in violation of this law, notwithstanding they may have had in view some other purpose in relation to their employment. You will observe that in this case the elements of intimidation and violence were present. It was not a case where the men merely quit work, putting their employers to no other inconvenience than of securing other men to fill their places, but it was a case where force and intimidation were used to prevent any one in that locality from engaging in the lawful and necessary business of moving the commerce of the country. The order granting an injunction in that case was affirmed by the circuit court of appeals in the fifth circuit. 6 C. C. A. 258, 57 Fed. 85. The law as thus declared by a court of recognized ability and authority was recently applied by Judge McKenna of the circuit court of this district in like manner to one feature of the state of affairs to which I am now directing your attention. This law determines that any combination or conspiracy on the part of any class of men who by violence and intimidation prevent the passage of railroad trains engaged in transporting the interstate commerce of the country is a violation of the act of July 2, 1890.

Another agency of the government is involved in the transportation of the mails, and to protect and secure the efficiency of that branch of the service it has been enacted that all railroads or parts of railroads which are now or hereafter may be in operation are established as post roads (Rev. St. § 3964); that the postmaster general shall in all cases decide upon what trains and in what manner the mails shall be conveyed (section 3, Act March 3, 1879; 20 Stat. 358); and every railway company conveying the mails shall carry on any train which may run over its road, and without extra charge therefor, all mailable matter directed to be carried thereon, with the person in charge of the same (Rev. St. § 4000). It is further provided in section 3995 of the Revised Statutes that "any person who shall knowingly and willfully obstruct or retard the passage of the mail, or any carriage, horse, driver or carrier carrying the same, shall for every such offense be punished by a fine of not

more than \$100." This statute has also been before the courts in cases where bodies of men operating as labor organizations have prevented the passage of trains carrying the mails. In the case of *U. S. v. Clark*, in the district court of the United States for the eastern district of Pennsylvania (23 Int. Rev. Rec. 306, Fed. Cas. No. 14,805), the defendant was one of a number of persons who assembled at the depot of the Lehigh Valley Railroad at South Easton, Pa. On the arrival of the mail train at the depot, the defendant, who had no connection with the train, said to persons having charge of it that the mail car could go on, but not the rest of the train. The defendant afterwards got on the train, and, with others, placed it on a siding, where it remained for several days. Judge Cadwallader, in charging the jury upon these facts, said:

"The defendant is charged with retarding the transportation of the mail.
* * * The mail, in point of fact, was retarded, as the postmaster testifies, two or three days. The occurrence which retarded it, according to the tendency of the proofs, was that several persons were assembled at the depot at Easton for no lawful purpose, and that one or more of them declared that the mail might go on, but the passenger train should not. They uncoupled the mail, and afterwards coupled it for the purpose of carrying it, as they did, to a siding. If that was the fact, and their purpose was to retard the train which transported the mail, it matters not, in point of law, whether they were or were not willing that the mail car or baggage car or the particular vehicle carrying the mail should go on."

The learned judge then quotes with approval the opinion of Judge Drummond of Chicago upon the subject, as follows:

"In relation to the transportation of the mails by means of railroads it is true that it appears by the evidence in this case that these defendants were willing that the mail car should go, but it must be borne in mind that the mail car can only go in such a way as to enable the railroad to transport the mail where there are other cars accompanying it. It is not practicable, as a general thing, for a railroad to transport a mail car by itself, because that would be attended by serious loss; so that while nominally they permit the mail car to go, they really, by preventing the transit of other passengers cars, interfere with the transportation of the mails."

You will observe that the law is applicable to the case of an obstruction interposed for a purpose other than that of retarding the mails. This was decided to be the law by the supreme court of the United States as long ago as 1868 in the case of *U. S. v. Kirby*, where it was said:

"When the acts which create the obstruction are in themselves unlawful, the intention to obstruct will be imputed to their author, although the attainment of other ends may have been his primary object." 7 Wall. 486.

In the case of *U. S. v. Thomas*, 55 Fed. 381, the transportation of the mails had been obstructed by some persons acting under the influence of a strike. Judge Jackson, in addressing the jury, submitted observations intended for the strikers. He said:

"You have no right to go into a strike and undertake to stop the transportation of the mails of the United States, undertake to stop the running of the cars of the country, or undertake to stop the business which is carried on the great highways of the country, and which is the mainspring to the success of a country like ours. If all this is done, then you step upon a right which you have no right to interfere with. I make these general remarks on

this occasion with a hope that I may reach the ear of the intelligent masses, that they may see at once the error they have fallen into. Rely not upon combination and strikes to protect your interests. They are disastrous, stopping your mills, and stopping the enterprises and business of the community which furnish the wage-earner the means to support his home. Do not resort to such measures to stop our manufactures, our mills, or the transportation of the mails of the United States, which is so great and important an element of our country for the comfort and welfare of society. If you take this thing up and look at it, and ponder over it, and see the result that must necessarily follow such a course of action, and the train of circumstances that must necessarily accompany it, you would refuse to enter into these combinations and strikes."

That the passage of the mails over certain lines of railroad in this state has been retarded and obstructed there is no question. The regular receipt and dispatch of mails over the roads of the Southern Pacific Company have in fact been suspended at the San Francisco post office for a period of about two weeks. Who is responsible for this state of affairs? The strikers, the railroad company, or both? The railway is a great public highway, and the duty of the railroad company as a common carrier is first to the public. The road must be kept in operation for the accommodation of the public, if it is possible to do so with the force and appliances within-reach. Any negligence in this respect is not excused by temporary difficulties capable of being promptly removed. The damage and interruption caused by the elements usually receive prompt attention, that traffic may not be suspended longer than is absolutely necessary. The same energy and good faith should be observed with respect to the removal of labor and other difficulties. *Railroad Co. v. Hazen*, 84 Ill. 36. The present controversy between the Southern Pacific and its employes appears to be in relation to the movement of Pullman cars. Both parties to this controversy have announced in the public press that they have been ready and willing from the first to move freight cars and passenger trains without Pullman cars. In my opinion, the situation has been of such an extraordinary character, and the interruption to commerce and the transportation of the mails so serious and long-continued, as to have required of the railroad company to temporarily waive questions concerning the make-up of regular trains (as the officers of the company claim to have done), and employ such resources as the company had in the movement of other trains in an effort to relieve the prevailing congestion and distress. This obligation I believe to have been a public duty, and a willful failure to perform this duty with respect to the movement of the mails and interstate commerce is therefore, in my judgment, within the purview of the statute.

It is your duty to determine this question under the law as I have stated it to you, and present the guilty parties to the court for prosecution. In this inquiry you will not limit your examination to the conduct of any particular class of persons, but carefully scrutinize the acts of all parties concerned, whether they are officers of the railroad company or employes, and without fear or favor or influence of any kind point out in the proper manner the persons who have transgressed the law and imperiled the best interests of this state.

It is our duty to uphold the authority and majesty of the law, and see to it that those who have violated its provisions, whoever they may be, are brought to the bar of justice.

In your inquiry you may find that parties have so associated themselves together in their conduct as to bring them within the law of conspiracy. The statute of the United States upon that subject is as follows:

Section 5440, Rev. St.: "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner, or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years, or to both fine and imprisonment, in the discretion of the court."

The elements of this offense are the combination or conspiracy to violate the law, and the overt act or acts to carry the conspiracy into effect. Where several persons are proved to have combined together for the same illegal purpose, any act done by one of the parties in pursuance of the original concerted plan, and with reference to the common object, is, in the contemplation of the law, the act of the whole party, and therefore the proof of such act will be evidence against any of the others who were engaged in the same conspiracy.

It is also true that any declaration made by one of the parties during the pendency of the illegal enterprise is not only evidence against himself, but is evidence against the other parties, who, as we have seen, when the combination is proved, are as much responsible as if they had done the act themselves. You will observe in this connection that the act of combination to violate the statute is the important element in the crime of conspiracy. The law regards the act of unlawful combination and confederacy as dangerous to the peace of society, and declares that such combination and confederation of several persons to commit crime requires an additional restraint to those provided for the commission of the crime, and makes criminal the conspiracy, with penalties and punishments, distinctive from those prescribed for the crime the subject of the conspiracy. You can readily appreciate why this is true. A conspiracy becomes powerful and effective in the accomplishment of its illegal purpose in proportion to the numbers, power, and strength of the combination to effect it. It is also true that, as it involves a number in a lawless enterprise, it is proportionally demoralizing to the well-being and character of the men engaged in it, and, as a consequence, to the safety of the community to which they belong. The statutes I have cited indicate the general character of the investigation you will be required to make concerning the affairs of the railroad company in the transportation of the mails and in the movement of interstate commerce. With the merits of the controversy between the railroad company and its employes you have nothing to do, except in so far as the facts relating thereto may furnish evidence as to the actual parties engaged in violating the laws of the United

States. The right of labor to organize for its own benefit and protection is not questioned. It has the same right in this respect as any other association, and, perhaps, in some respects, its freedom is properly greater. The laboring man is entitled to the highest wages and the best conditions he can command, but he is not entitled to interfere with the rights and property of others, and by force or other unlawful means seize upon the appliances of organized industry, and set at defiance the laws of the government. The right of workmen to quit work, either singly or in a body (subject only to the civil obligations of contracts), is not denied, provided that the abandonment of service is accomplished in a peaceful and orderly manner; and here again the privilege or freedom must be exercised without interfering with the rights and property of others. It may be said that this freedom or privilege accorded to the laboring men, with the restrictions named, is of no great value, since he is thereby prevented from securing the protection he ought to have for his labor, and the power to redress his grievances. This may be true, and it may be conceded that the relations of labor to capital present a difficult problem for solution, but it seems to me that the intelligence of the people ought to solve this question in a peaceful and proper manner. It certainly cannot, with the consent of the courts, be settled by violence or any unlawful means.

It will appear to you from what I have said that a very serious and important duty devolves upon you as grand jurors of this court. Your oath requires you to diligently inquire and true presentments make "of such articles, matters, and things as shall be given you in charge or otherwise come to your knowledge touching the present service." The oath indicates the impartial spirit with which your duties should be performed. You are to present no one from envy, hatred, or malice, nor should you leave any one unrepresented for fear, favor, affection, hope of reward or gain, but should present all things truly as they come to your knowledge, according to the best of your understanding. In each judicial district there is a United States attorney, appointed by the president to represent the interests of the government in the prosecution of parties charged with the commission of public offenses against the laws of the United States. The United States attorney for this district will therefore appear before you, and present the accusations which the government may desire to have considered by you. He will point out to you the laws other than those I have mentioned which the government deems to have been violated, and will subpoena for your examination such witnesses as he may consider important, and also such other witnesses as you may direct. In your investigations you will receive only legal evidence, to the exclusion of mere reports, suspicions, and hearsay evidence. Subject to this qualification, you will receive all the evidence presented which may throw light upon the matter under consideration, whether it tend to establish the innocence or the guilt of the accused. And more, if in the course of your inquiries you have reason to believe that there is other evidence not presented to you within your reach, which would qualify or

explain away the charge under investigation, it will be your duty to order such evidence to be produced. Formerly it was held that an indictment might be found if evidence were produced sufficient to render the truth of the charge probable. But a different and a more just and merciful rule now prevails. To justify the finding of an indictment you must be convinced, so far as the evidence before you goes, that the accused is guilty; in other words, you ought not to find an indictment unless, in your judgment, the evidence before you, unexplained and uncontradicted, would warrant a conviction by a petit jury. To authorize you to find an indictment or presentment, there must be a concurrence of at least 12 of your number,—a mere majority will not suffice. You are to keep your deliberations secret, and allow no one to question you as to your own action, or the action of your associates on the grand jury. In the progress of your examinations, should questions arise concerning which you may desire further instructions from the court, you may come into court for that purpose, and the law will be further explained to you with respect to such questions.

THE NUTMEG STATE.

THE MONITOR.

HARRIS et al. v. THE NUTMEG STATE.

TRACY et al. v. THE NUTMEG STATE et al.

(District Court, S. D. New York. June 20, 1894.)

COLLISION—STEAM VESSELS CROSSING—DUTY TO MAINTAIN SPEED.

A steamtug gave two whistles to a steamboat on her starboard hand, and on a crossing course, and then slowed her engines. *Held* in fault for the collision which ensued, because of such slowing; it being directly contrary to the meaning of her signal, and a thwarting of the other vessel's attempt to obey.

Libel against the steamer Nutmeg State for damages to certain barges in the tow of the steamtug Monitor. The damages were caused by a collision between the Monitor and the Nutmeg State. The Monitor was made a defendant upon the petition of the Nutmeg State.

Stewart & Macklin, for Tracy and others.

Carpenter & Mosher, for the Nutmeg State.

James Armstrong, for the Monitor.

BROWN, District Judge. On the 26th of December, 1893, at about half past 2 in the afternoon, as the steamtug Monitor, with barges belonging to libelants in tow on each side of her, was coming down about the middle of the East river, in the ebb tide, she saw, when about off pier 49, the steamer Nutmeg State coming out of her slip at pier 35, on the New York side. When the latter had cleared her slip, the Monitor gave her a signal of two whistles, to which the Nutmeg State answered with two, signifying that

she would go astern of the Monitor. The pilot of the Monitor starboarded his wheel, but soon after slowed his engine, because, as he says, he did not see the Nutmeg State rounding to port as much as he expected, and he wished to have his engine in condition to back immediately, if necessary, without liability to catch on the center. Soon afterwards the Nutmeg State struck the side of the barge which was on the starboard side of the Monitor, and the shock damaged two boats on the Monitor's port side also. The above libels were filed against the Nutmeg State to recover the damages; and the Monitor was brought in as defendant upon the petition of the latter.

I am satisfied upon the evidence that this collision was brought about by the act of the Monitor in slowing her speed, after she had given a signal of two whistles to the Nutmeg State, thereby, in effect, agreeing that she would go ahead of her. The evidence leaves no doubt that but for this slowing the Nutmeg State would have passed clear astern. The slowing of the Monitor was directly contrary to the meaning of her signal, that she would go ahead. It was essentially a thwarting maneuver, which places upon her the fault for the collision. The Monitor was tardy in giving her signal; for though her pilot saw the Nutmeg State coming out before she was out of her slip, he delayed his whistle till she was well outside of it. The *St. Johns*, 34 Fed. 763, affirmed 42 Fed. 75; The *Britannia*, 34 Fed. 546, 556, affirmed 153 U. S. 130, 14 Sup. Ct. 795.

I do not perceive that the Nutmeg State was to blame. The contrary maneuver of the Monitor in slowing was the last thing that the Nutmeg State was to expect. She had come out of her slip under a hard-a-starboard wheel, and kept it until collision. The river there being only about 1,300 feet wide, and the Monitor near the middle, there was very little space for the Nutmeg State to maneuver after she came out. She could not by reversing have stopped in time after the slowing of the Monitor was perceived; only 250 to 300 feet distant, she was already in extremis, and reversing would have brought her head to starboard and made a worse collision probable. I think under the special circumstances the master's judgment was correct; that his only chance of escape was to continue on with a hard-a-starboard wheel. That he did not escape was not his fault, but the Monitor's.

The libelants are, therefore, entitled to judgment against the Monitor; and the Nutmeg State is discharged.

Decree accordingly.

CAMPBELL et al. v. COLLINS.

(Circuit Court, D. Rhode Island. August 3, 1894.)

No. 2,507.

REMOVAL OF CAUSES—LOCAL PREJUDICE—REMOVAL BY PLAINTIFFS.

The clause in the act of August 13, 1888 (section 2), relating to the remand of any suit "which is now pending in any circuit court, or may hereafter be entered therein," and which has been removed by the plaintiff on the ground of local prejudice, relates only to causes already removed under the act of 1875, and does not, by implication, authorize further removals by plaintiffs on that ground. *Fisk v. Henarie*, 32 Fed. 417, approved.

This was an action in a state court by Campbell & Macomber against John E. Collins. Petition for a removal of the cause to this court, on the ground of prejudice and local influence.

James E. Denison, for petitioner.

CARPENTER, District Judge. This is a petition brought by one of the plaintiffs in an action at law now pending in the appellate division of the supreme court of Rhode Island to remove the same into this court. The petition alleges that the plaintiff, at the beginning of the suit, were, and still are, citizens of the state of Maine, and that the defendant, at the beginning of the suit, was, and still is, a citizen of the state of Rhode Island, and further alleges that, from prejudice and local influence, the petitioner will not be able to obtain justice in the said state court, or in any other state court to which he may, under the laws of the state, have the right to remove said cause. On this petition a citation to show cause was issued and served. The defendant has made no appearance.

This petition is filed on the theory that the words in the removal act of August 13, 1888, "at any time before the trial of any suit which is now pending in any circuit court or may hereafter be entered therein, and which has been removed to said court from a state court on the affidavit of any party plaintiff that he had reason to believe," etc. (25 Stat. 435), amount to a grant by implication to the plaintiff in a cause to remove the same for prejudice or local influence in the same way in which it may be removed by the defendant under the provisions of the next preceding paragraph of the same act.

This whole statute came under the consideration of Judge Deady in the circuit court for the district of Oregon in October, 1887, at which time the act of March 3, 1887, was in force (24 Stat. 552). In the language of the clauses here referred to, the act of March 3, 1887, is identical with the act now in force. The construction of the clause here relied on was perhaps not specifically necessary to the determination of the question there pending, but to the determination of that question it was necessary to bring a comprehensive construction of the whole of the amendatory act of 1887; and the decision may therefore well be held to be an authority

on the question here raised. The conclusion in that case was that the clause here relied on is "an independent temporary provision, intended to apply to suits which had then been removed" under a former act, and "has no application to a removal had under the act, and which did not take place before the passage of the same," under the act formerly in force which gave the right of removal to the plaintiff. *Fisk v. Henarie*, 32 Fed. 417. Independently of the weight of authority, this construction seems to me to be clearly correct. The clause in question otherwise would serve no purpose. It cannot be intended to give jurisdiction to examine into the grounds on which the allegations of the petition are founded, for the reason that it would thus, by implication, restrict the power of the court to inquire into the grounds of the petition to cases in which the plaintiff had removed the cause. Such a construction, being a derogation of the right to inquire into the substance of an allegation, should be adopted only in case of absolute necessity. The interpretation of the words by Judge Deady shows that here is no such necessity. The power to inquire into the merits of the application under the act now in force doubtless exists by virtue of the general power of the court, on proper application or pleading, and is extended, and not curtailed, by the proviso that the cause may be remanded in proper cases as to defendants not affected by prejudice or local influence.

The petitioner cites the case of *Hills v. Railroad Co.*, 33 Fed. 81, in which it is said that, "even as to plaintiffs, the right to remove by affidavit, as formerly practiced, still exists." This case, however, does not decide that the right exists, but rather assumes that it exists, and refers to the practice thereunder for purposes of comparison with the practice in case of removal by a defendant.

The petition will therefore be denied and dismissed.

COLLINS v. CAMPBELL.

(Circuit Court, D. Rhode Island. August 3, 1894.)

No. 2,506.

REMOVAL OF CAUSES—LOCAL PREJUDICE — SUFFICIENCY OF PETITION AND AFFIDAVIT.

It is not sufficient to merely allege in the petition and affidavit that petitioner "has reason to believe, and does believe," that, from prejudice and local influence, he will be unable to obtain justice in the state courts. The existence of prejudice and local influence must be alleged as matter of fact. *Short v. Railway Co.*, 33 Fed. 114, followed.

This was an action at law, brought in a state court by John E. Collins against Edward T. Campbell. Defendant petitioned for a removal of the cause to this court, on the ground of prejudice and local influence.

James E. Denison, for petitioner.

CARPENTER, District Judge. This is a petition by the defendant, in an action at law now pending in the common pleas division

of the supreme court of Rhode Island, to remove the same into this court. The petition alleges that the plaintiff, at the beginning of the suit, was, and still is, a citizen of the state of Rhode Island, and that the defendant and petitioner here, at the beginning of the suit, was, and still is, a citizen of the state of Maine, and further alleges that he has filed an affidavit from which he asks the court to find that, from prejudice and local influence, the petitioner will not be able to obtain justice in the said state court, or in any other state court to which he may, under the laws of the state, have the right, on account of such prejudice or local influence, to remove said cause. The petition is accompanied by the affidavit of the petitioner's counsel that the statements and allegations of the petition are true, as he verily believes, and by the affidavit of the petitioner that he has reason to believe, and does believe, that, from prejudice and local influence, he will not be able to obtain justice in the state court. On this petition a citation to show cause was issued and served. The plaintiff has made no appearance.

The question which arises is as to the sufficiency of this petition to remove the cause. It may perhaps be taken as well settled for the present that the petition and affidavit need not set out the facts and circumstances from which the existence of the prejudice may be inferred, or on which the belief in the existence of the prejudice is founded (*Fisk v. Henarie*, 32 Fed. 417; *Short v. Railway Co.*, 33 Fed. 114); but upon the question whether the existence of the prejudice must be alleged as matter of fact I agree with the opinion in *Short v. Railway Co.*, rather than with that in *Fisk v. Henarie*. Indeed, in the latter-named case the distinction here adverted to does not seem to have been suggested to the court in argument. The opinion says that "it is sufficient that they have made oath that they so believe, without setting forth the facts or circumstances on which such belief is founded." The stress of the question seems to have been whether a general allegation be sufficient, and not as to the proper and necessary form of that general allegation. On the other hand, in the case decided by Mr. Justice Brewer (then circuit judge) the question of the form of the averment came up for decision, and it is therein plainly pointed out, as it seems to me, that, in the absence of a specific averment of the prejudice, there is no evidence whatever in the papers to bring the case within the act providing for removal. In other words, it does not appear on the face of these papers that there is any case for removal.

The petition will therefore be denied and dismissed.

THE LINDRUP.

INMAN v. THE LINDRUP.

(District Court, D. Minnesota, Fifth Division. August 14, 1894.)

JURISDICTION OF FEDERAL COURTS—WATERS OF LAKE SUPERIOR—SEIZURE OF VESSEL.

The marshal of the district court for the district of Minnesota has authority, under proper process, to arrest a vessel on the open waters of

Lake Superior; for by section 1 of the act of February 26, 1857, that lake is made the common boundary between Minnesota and the states of Wisconsin and Michigan, and by section 2 the former state is given concurrent jurisdiction over all waters which form a common boundary between itself and any other state or states.

This was a libel by B. B. Inman against the steam tug Lindrup. The claimants of the tug moved to quash the proceedings for want of jurisdiction.

White & McKeon, for libellant.
John Jenswold, for respondent.

WILLIAMS, District Judge. As appears from the pleadings and affidavits and the return of the marshal, the steam tug Lindrup was seized by the marshal of this district by virtue of a warrant of arrest or monition duly issued and placed in his hands, commanding him to seize or arrest the steam tug Lindrup, her boilers, engines, machinery, etc., if found in his district; and the return of the marshal upon the warrant of arrest states that he did seize and arrest that boat in the open waters of Lake Superior. The owners of the steam tug filed their motion to have the proceedings herein quashed and set aside for want of jurisdiction in this court, alleging that the seizure and arrest were made outside of the court's jurisdiction.

The question to be determined then is, what is the extent of the jurisdiction of the United States district court for the district of Minnesota, in admiralty?

The act of congress passed February 26, 1857, described the boundaries of the state of Minnesota as follows:

"Beginning at the point in the centre of the main channel of the Red River of the North, where the boundary line between the United States and the British possessions crosses the same; thence up the main channel of said river to that of Bois des Sioux river; thence up the main channel of said river to Lake Traverse; thence up the centre of said lake to the southern extremity thereof; thence in a direct line to the head of Big Stone lake; thence through its centre to its outlet; thence by a due south line to the north line of the state of Iowa; thence along the northern boundary of said state to the main channel of the Mississippi river; thence up the main channel of said river, and following the boundary line of the state of Wisconsin until the same intersects the Saint Louis river; thence down the said river to and through Lake Superior on the boundary line of Wisconsin and Michigan, until it intersects the dividing line between the United States and the British possessions; thence up Pigeon river, and following said dividing line to the place of beginning."

Section 2 of the act of congress above cited contains the provision—

"That the state of Minnesota shall have concurrent jurisdiction on the Mississippi, and all other rivers and waters bordering on the said state of Minnesota, so far as the same shall form a common boundary to said state, and any state or states now or hereafter to be formed or bounded by the same."

There is no question but that the jurisdiction of this court is co-extensive with the boundaries of the state of Minnesota, and, by the language of the second section of the act of congress above

cited, it is clear that such jurisdiction extends over all the rivers and waters bordering on the state of Minnesota, so far as the same shall form a common boundary to that state, and any state or states now or hereafter to be formed or bounded by the same. The waters of Lake Superior form a common boundary between the state of Minnesota and the states of Michigan and Wisconsin. So the contention of counsel for respondent, it seems to me, must fall to the ground, because the very language of section 2 of the act of congress fixes the jurisdiction of the state of Minnesota; and it is unnecessary to cite authorities that the jurisdiction of the United States court for the district of Minnesota, in admiralty, is coextensive with the boundaries of that state. To hold otherwise would leave a large portion of the open waters of Lake Superior outside of the admiralty district of any court, because there is nothing in the act defining the boundaries of the states of Michigan or Wisconsin bordering upon Lake Superior that would give the United States courts in those districts any exclusive jurisdiction over the waters of Lake Superior.

It follows that the motion of respondent must be overruled, with costs.

NATIONAL WATERWORKS CO. v. KANSAS CITY.

KANSAS CITY v. NATIONAL WATERWORKS CO.

(Circuit Court of Appeals, Eighth Circuit. July 2, 1894.)

Nos. 469, 470.

1. MUNICIPAL CORPORATIONS—CONTRACTS—MANDATORY STATUTE—PURCHASE OF WORKS OF WATER COMPANY.

An act empowering a city to grant by ordinance the right to erect and operate waterworks for the use of the city, for a period of 20 years, and to renew the grant for another such term, reserving the right to acquire the works (Act Mo. March 24, 1873), provided that at the expiration of the 20 years, if the grant should not be renewed, the city should purchase the works, and, if the price could not be fixed by agreement, pay therefor the fair and equitable value. The ordinance passed by the city pursuant to the act, and in effect the contract under which the works were erected by a water company, provided that on a failure to renew the grant at the expiration of 20 years the city should then be required to purchase the works. *Held*, that the provision for purchase was mandatory, vital, and controlling, and, on the expiration of the 20 years without renewal of the grant, pending a suit by the company against the city for performance of the contract, compelled a decree therein that the company should sell and the city buy.

2. SAME—SPECIFIC PERFORMANCE — DECREE RESPONSIVE TO ALLEGATIONS AND PRAYER.

The bill in such suit, filed by the company nearly 2 years before expiration of the 20 years, alleged performance on the part of the company of the terms of the contract, and a threatened violation of its obligations on the part of the city, and prayed a decree that the contract was binding on both parties, and that the city should perform it, so far as executory and unperformed. *Held*, that after the obligation of the city to purchase had arisen, on the expiration of the 20 years, this was sufficient foundation to decree completion of the sale and purchase, although the cross bill of the city, and amendments thereto, were inharmonious, and, if the only affirmative pleadings, might not have sustained such a decree, and although the

company preferred not to sell, but to continue the franchise; it being then too late for the company to oppose such decree as not responsive to the pleadings.

3. SAME—INCAPACITY TO TAKE TITLE.

The company could not object to such decree that the city, by amendments to its charter and acts of the legislature subsequent to the contract, had become disabled to take title to all the property making up the waterworks system, as, if the company was paid the fair and equitable value of its property, its rights would cease.

4. SAME—TITLE TO PROPERTY ON EXPIRATION OF FRANCHISE.

The act authorizing such grant by the city provided that no grant so made should confer the right to operate the waterworks for any period beyond 20 years, but that it might be renewed for another term. *Held* that, on the expiration of the 20 years without renewal of the grant, the title to the property and the right of possession did not pass to the city without payment, or tender of payment, therefor.

5. SAME—VALUE OF PROPERTY AFTER EXPIRATION OF FRANCHISE.

The "fair and equitable value" of the works, to be paid therefor by the city under such act, should not be determined by capitalization of the earnings,—thereby, in effect, valuing the franchise, which no longer existed,—nor should such value be limited to the cost of reproducing the plant, but allowance should be made for the additional value created by the fact of connections with and supply of buildings, although the company did not own the connections.

6. SAME—DAMAGES FOR DEFECTS IN CONSTRUCTION OF WORKS—ESTOPPEL.

The city's cross bill claimed damages on the ground that the waterworks system did not meet the requirements of the contract, in efficiency and completeness. *Held*, that the city, having for many years recognized and accepted the system as constructed in full compliance with the contract, could not maintain this claim.

Appeal from the Circuit Court of the United States for the Western District of Missouri.

This was a suit by the National Waterworks Company of New York against Kansas City, Mo., to enforce a contract for the construction and operation of waterworks for that city. The circuit court rendered a decree for performance of the contract. Both parties appealed.

The contract sought to be enforced was created under an ordinance of the defendant city passed pursuant to provisions of an act of the general assembly of Missouri approved March 24, 1873 (Laws Mo. 1873, p. 286, §§ 1, 22), as follows:

"Section 1. The city of Kansas is hereby empowered to construct water works, to take and convey into and throughout the city, for the use of the same and others therein, water of the Missouri river, Blue river or Kaw river, or all, from any point or points, and to that end to acquire, hold, use, control and dispose of real estate and personal property within and without the corporate limits of the city, and also in the state of Kansas, necessary for laying pipes, constructing reservoirs, aqueducts, appliances and means, and erecting buildings and machinery proper and convenient for such water works, and for operating and repairing the same; to receive, take, purify, store, conduct and distribute in and throughout the city such water, and in general to do all things necessary and proper to carry this act into effect and accomplish the object thereof."

"Sec. 22. The city of Kansas is hereby empowered to grant to any person or persons, or any corporation, the right to erect and operate such water works as the first section of this act provides for, and to accomplish the purpose therein mentioned on such terms and conditions as may be agreed on in a contract therefor: provided, that such grant shall only be made by or in all respects pursuant to ordinance, which shall not be valid till the same be

approved by two-thirds of the qualified electors of the city voting on the matter at a general election, or special election ordered and held for the purpose, when the matter of the approval of such ordinance shall be submitted to such electors; the power to order, hold and declare the result of any election requisite being hereby conferred on the city, to be exercised by or pursuant to ordinance; and, provided further, that no grant so made shall confer the right to operate the water works for any period beyond twenty years from the time of approval of the ordinance as aforesaid; but the grant may be renewed by or pursuant to ordinance, approved as aforesaid, during the last of such twenty years, for another term not exceeding twenty years, on terms and conditions specified in the ordinance for the renewal of the grant; and, provided further, that in making such grant or renewing the same, the city shall reserve to itself the right, at its option, and at any time, to acquire and become sole owner of such water works, including all extensions and enlargements thereof, and everything of every nature and description belonging and pertaining thereto, on such terms as may be provided and agreed on between the parties at the time the grant is made; or if no right is expressly reserved, or the city cannot, according to any reservation, purchase and become sole owner as aforesaid, then the city may, at any time, at its option, acquire and become sole owner of such water works, including all enlargements and extensions thereof, and everything of every nature and description belonging or pertaining thereto, on paying therefor the fair and equitable value thereof, to be ascertained, if the parties cannot agree thereon, by the circuit court of said county, on the petition of the city; the property and subject of purchase to be transferred and belong to the city on payment therefor; and, provided further, that at the expiration of the twenty years, if the grant be not renewed, the city shall purchase and become sole owner of such water works as aforesaid, and pay therefor a price agreed upon by the parties or ascertained as they may agree, or, if the price cannot be thus fixed, then the city shall pay the fair and equitable value of the whole works, to be ascertained by said court on the petition of either party filed for the purpose; and, provided further, that the city may furnish any party to whom such grant may be made real estate and right of way for use in constructing and operating such water works, according to such agreements as may be made in the premises, and guarantee that the works shall earn a certain amount annually, to be specified in the grant, and guarantee, clear over and above current expenses, taxes and assessments; and may secure by a proper deed or agreement for the purpose, to the party to whom such grant is made, the control and possession of any real estate and right of any [way] condemned or acquired in the exercise of the right of eminent domain, for use during the time such party may need the same under any such grant."

Under authority granted by this law, the city, by an ordinance approved October 27, 1873, and ratified by a vote of the people on November 15, 1873, and taking effect on the latter date, granted to the National Waterworks Company a right to erect and operate waterworks. The ordinance contained the following provisions:

"Section 1. That the National Water Works Company of New York, a corporation duly organized under the laws of the state of New York, be and it is hereby authorized, subject to the limitations hereinafter or by law provided, to establish, construct, maintain and operate water works, in or adjacent to the city of Kansas, in the state of Missouri, to receive, take, purify, store, conduct, and distribute in and throughout the said city of Kansas, pure, well-settled, and wholesome water; to lay down pipes and extend aqueducts and conductors through the streets, avenues, lanes, alleys or public grounds of the said city of Kansas; to erect and maintain all necessary buildings, machinery and attachments, of any description, necessary and proper and suitable for such works, and to supply to said city and the inhabitants thereof such water by said water works. * * * The rights hereby granted to continue for twenty years from the date of the approval of this ordinance by a vote of the qualified voters of the city of Kansas. * * *

"Sec. 4. The city of Kansas hereby reserves to itself the right at its option,

and at any time, to acquire and become sole owner of said water works, including all extensions and enlargements thereof and everything of every nature and description belonging and pertaining thereto, on paying therefor the fair and equitable value thereof, to be ascertained, if the parties cannot agree thereon, by the circuit court, or other court of record of the county of Jackson, at Kansas City, upon the petition of the city, and in such manner as the court may determine; provided, that a copy of such petition shall be served upon said company, at least fifteen days before the same shall be presented to said court. If, at the expiration of twenty years from the time this grant shall take effect the same shall not have been renewed, or the city shall not have become owner of said works, the city shall then be required to purchase and become sole owner of said water works as aforesaid, and pay therefor a price agreed upon by the parties, or ascertained as they may agree; or, if the price cannot be thus agreed upon, then the city shall pay the fair and equitable value of the whole works, to be ascertained by said circuit or other court of record as aforesaid, in such manner as said court shall determine on the petition of either party for the purpose; provided, that the party presenting such petition shall have served a copy thereof upon the other party, at least fifteen days before the day of presentation; and, provided also, that if upon examination it be found that such works are not in all respects in good condition, and of first-class and sound materials, and in every way efficient, then the city shall not be required to purchase the same at any time nor at any price."

The company's bill, filed December 26, 1891, recited said act and ordinance, and alleged that under the contract thereby created the company completed the works for operation as required, and that they were duly accepted by the city; that the city adopted another ordinance in February, 1877, whereby certain litigation between it and the company was settled, and certain changes were made in the original ordinance; that on the 25th day of May, 1878, the city, by a certificate signed by its mayor and the president of the common council, did certify that said company was operating its works to the satisfaction of the city; that the city adopted another ordinance in August, 1881, whereby the contract was further changed; that the company had kept and performed all the conditions, covenants, premises, and agreements on its part, and that it would at all times be ready, able, and willing to do so; that the company had expended large sums of money in building the works; and that in order to do so it has issued its bonds in the aggregate of \$3,000,000, secured by mortgages covering the waterworks plant; that the defendant city, disregarding its duty and obligations to the company under the ordinances aforesaid, and contrary to equity and good conscience, and with the intent and purpose to wreck the company's said waterworks in said city, to destroy the value thereof, and to render valueless to the bondholders of said bonds the security therefor mentioned in the mortgages referred to, and to impair the obligations of said city under said several contracts so entered into by it as aforesaid, and that with this intent and purpose, the said city falsely pretended that the ordinances aforesaid and the contract embodied therein, were not in force, and were no longer binding and obligatory upon said defendant, and particularly that said defendant was not and would not be bound either to purchase said waterworks, as by said ordinance was provided and agreed, or to renew the company's said grant; that the mayor and common council, law officers, and legal advisers of the city had publicly declared and represented that said ordinances and contract were not binding and obligatory upon the city, and had threatened and did threaten and intend to repudiate the same, and refuse to keep and perform the covenants, agreements, and promises therein contained and expressed to be kept and performed on the part of the city with respect to the renewal of said contract, and the purchase of and payment for said waterworks; that in furtherance of said unlawful intent, purpose, and threats, the city had adopted certain charter amendments, and had passed ordinances providing for constructing and operating waterworks in the city, and for issuing bonds for the purpose, and authorizing plans, specifications, and details for the work to be prepared, and had publicly advertised for sealed bids for the purchase of said bonds. The bill prayed a decree "that the several ordinances accepted

by your orator, hereinbefore set forth, as they are taken together, are in full force and effect, and that the contract embodied therein is a valid and subsisting contract, binding and obligatory upon your orator and the defendant, and that the defendant keep and abide by the same; and that, upon your orator's duly and faithfully doing and performing all things yet remaining to be done upon its part, the defendant, its officers and agents, keep and perform the covenants, promises, and agreements on its part, so far as they are executory and unperformed; and that your orator may have such other and further relief as the case may require, and as may be conformable to equity, and to your honors may seem meet, and the defendant, its mayor, common council, officers, and agents, may be perpetually enjoined and restrained by the decree of this court from proceeding to construct and maintain said separate and distinct system of waterworks, and from taking or appropriating to its own use, except under and in pursuance of its contract with your orator, any portion of your orator's said system of waterworks; and that your orator may have such other and further relief as the equity of the case may require, and as to the court may seem meet."

The answer of the city, filed December 6, 1892, admitted the act of the general assembly and the ordinances referred to, the construction and operation of the waterworks by the company, and the fact, as alleged, that the city had availed itself of the rights and privileges stipulated for under the contract, so far as the company had been able to furnish them, but denied that the company had complied with its contract by making a complete and sufficient system of waterworks for the city, as provided for in the ordinance. The answer set up the provision of the contract which required the company, during the year 1874, to construct such a complete and efficient system, and to have and to hold the same, at all times during the period of the franchise, subject to the option and right of the city to purchase and become the sole owner of the works, in the manner therein provided; and alleged a breach on the part of the company of that provision, in that in many respects the company had failed to construct and have the kind of waterworks required by the contract, or to have any complete system of waterworks, specifying various particulars in which the company's system was alleged to be inefficient and incomplete; alleged that by reason of such failure on the company's part the city was relieved from any obligation to purchase the company's system, or any part thereof; and admitted the purpose and intent of the city, in the immediate future, to acquire the ownership and control of a system of waterworks of its own. The company filed a reply specially denying all the substantial allegations of the answer, and alleging the company's readiness and willingness, when required, to convey its complete system of works to the city. The city, also, at the time of filing its answer, December 6, 1892, filed a cross bill which set up the various breaches of the contract on the part of the company alleged in the answer, and alleged that the city had been and was by those breaches released from all obligations to the company; that the company, by its proceeding in this case, and by many other means and practices, was preventing the city from exercising its unquestioned right to provide itself with a new system of waterworks; and that the company had threatened, and was then threatening, to cut off the water supply from the city and its inhabitants, as an illegitimate means of forcing the city to comply with its demands, and to desist from its purpose of building its own waterworks,—and accordingly prayed a decree the opposite of that prayed for by the company, declaring the city released and absolved from all obligations under the contract to purchase its system of waterworks, or any part thereof, and enjoining and restraining the company from interfering in any way with the city's proceedings to sell its bonds and construct its own waterworks, and also for the payment of damages on account of the failure of the company to furnish the degree of fire pressure stipulated for in the contract, which had been paid for for years at the contract rates, and further restraining the company from carrying out its threat of cutting off the water supply pending the suit, and also that a receiver be appointed for the company.

The answer of the company to this cross bill, filed February 28, 1892, contained, in addition to some of the matters stated in its original bill, the same

denials and allegations contained in its reply to the answer, and asserted its complete and perfect ownership of its plant, and its ability to convey and deliver the same to the city whenever required, and its readiness to do so on the 15th day of November, 1893, "when the obligation of said city to purchase shall become absolute."

To this answer the city filed a replication.

After the expiration of the franchise, on the 15th day of November, 1893, the city, on the 29th day of November, 1893, filed a supplemental cross bill setting up the expiration of the contract on the preceding 15th day of November; that the city had not renewed its grant to the company; that no terms of agreement could be entered into between the city and the company with reference to the matter; and that the company had failed to have such works as the city was bound to purchase. It alleged that since November 15, 1893, the time of the expiration of said grant, the company had had no interest in or title to that portion of the plant within the limits of the city, and was wrongfully claiming to own the same, and to use the water mains, pipes, and works for the purpose of furnishing water to private consumers in the city, and had already acted and coerced private consumers into paying water rentals in advance up to the 1st day of April, 1894, and had succeeded in collecting from such private customers an amount of money equal to at least \$200,000; that the collection of such rental was to cover the use of water after the expiration of the franchise aforesaid, and that the company proposed to continue in the future to make such exactions from such private consumers without making any allowance to the city for the use of its streets and property; that the city was desirous of having its rights in the premises ascertained and determined; that, if the company had any interest in the pipes and works within the city, the city desired to have such interest ascertained and determined and adjudicated by the court, and that the city be permitted to acquire that interest by the exercise of the right of eminent domain. It further alleged that under the contract the necessary real estate and rights of way for the erection of the works was purchased and had been paid for by the city, but that the company was wrongfully withholding the title to the same from the city, and keeping it in itself, subject to its mortgages; that the city had been largely damaged by the want of the fire pressure guarantied by the contract,—and asked that those damages might be ascertained and determined. It further alleged great damages by reason of the failure of the company to construct and have for its use, at the termination of the franchise, a complete system of waterworks, and asked damages in that respect. It also alleged the threat of the company to cut off the supply of water to the city for public purposes, and the great danger that would arise in case this threat should be executed, and offered to pay, if required, a reasonable sum for water furnished for public purposes. It therefore prayed a decree declaring that the company's right and title to the works, within the limits of the city, had expired, and that the same belong to the city; that the court ascertain and determine the interest of the company in the works described by the pleadings, and that the city be permitted to obtain the same upon making just compensation, to be determined by the court in such manner as the court may provide; that the company be required to convey the real estate standing in its name to the city; that the damages which the city had suffered by reason of the failure of the company to furnish the required fire pressure in the past be determined and adjudged in favor of the city; that the sum, if anything, which the city ought to pay to the company for furnishing water for public use, pending the litigation, be determined; that the company be enjoined from cutting off the supply of water to the city for public purposes; that, if necessary, a receiver be appointed to take and operate the works.

The answer of the company to the supplemental cross bill set up:

"That the said city is without authority or power to purchase said system of waterworks for the following reasons and because of the following facts, to-wit:

"(a) The constitution of the state of Missouri, of 1875, withdrew from said city the power to become indebted to an amount sufficiently large to purchase said system of waterworks, and said city has no means to apply to

such purpose, and could only accomplish the same by becoming indebted to an amount which would make its indebtedness exceed the limitations in said constitution contained, and the annual interest on such indebtedness larger than could be paid out of the taxes authorized to be levied for that purpose.

"(b) By section 17 of article 13 of the charter of said city, adopted in 1889, it is expressly provided, referring to the contract with this defendant embodied in said Ordinances Nos. 10,524 and 14,776, that 'the city can purchase such works, or renew the franchise thereof only by ordinance passed by a majority vote of the members elect of each house of the common council; and only then in the event that said ordinance shall be approved by a vote of two-thirds of the qualified voters of the city voting at an election held for such purpose.' And the defendant states that no such ordinance has been passed, nor has any election been held, as provided in said charter.

"(c) Under Ordinance No. 2,263 of said city, approved August 21, 1890, an amendment to the charter of said city was adopted, the same being mentioned in the seventeenth paragraph of the original bill of complaint, and a copy thereof annexed to said bill as Schedule E; and in and by such amendment the said city expressly, and for the precise purpose of disabling itself from carrying out its contractual obligations to this defendant, limited its power to hold property for waterworks purposes to such property as might be located in the state of Missouri.

"(d) Questions having been made as to the validity of said charter amendments, the complainant caused the general assembly of the state of Missouri to enact 'An act concerning waterworks, and a supply of water for cities now having or that may hereafter have a population of more than one hundred thousand (100,000) and less than three hundred thousand (300,000) inhabitants, whether organized under general law or special charters, or under section sixteen (16) of article nine (9) of the constitution of this state, and to issue bonds for acquiring waterworks, and to make contracts for supplying water to such cities, approved March 6, 1893, which is in substance the same, and contains the same limitations and restrictions upon the powers of the complainant as it imposed upon itself by its charter amendment, namely, to acquire only such property as is situated within the state of Missouri. The complainant is the only city to which said act has or can have application, and the same was caused to be enacted by said complainant for the same purpose which moved the adoption of said charter amendments, as hereinbefore stated.

"(e) Under section four of said Contract Ordinance No. 10,524, the said city could only become the owner of said system of waterworks by exercising its option to purchase the same on or before November 15, 1893; and the said city, until long after that date, adhered to the election made and purposes expressed in its original cross bill herein. And the defendant shows that under the charter of said city the authority to act for said complainant in the premises is vested in its common council by the passage of a proper ordinance; that no action whatever has been taken by such body, or by an officer or person authorized to act for said city, relative to the matter; and that the only step taken in the premises has been through the solicitors in this cause, upon their own motion, by the filing of the so-called 'Supplementary Cross Bill' herein.

"(f) For more than four years prior to the filing of the said supplementary cross bill, the city has claimed and contended that it was absolved and released from the contract with this defendant, and that it did not propose to, and would not, purchase the defendant's system of waterworks, or any part thereof, although said company has always denied, and does still deny, said claim.

"By reason of which facts this defendant avers that said city is disabled, debarred, and prohibited from purchasing its said system of waterworks, and that said city waived any and all right to do so."

The answer also contained allegations as to the title to the property constituting the company's system, and the company's ability to convey, and denied the allegations of the supplemental cross bill as to insufficiency of the company's system, and damages to the city therefrom.

On the hearing of the cause, on March 22, 1894, the city filed an amendment to its supplementary cross bill, as follows:

"If, as defendant in its various pleadings avers, it now has such a system of waterworks as by the act of March 24, 1873, and Ordinance 10,524, provided for, then your orator is ready and willing, and now offers, to pay for same a fair and equitable value thereof. Your orator has at all times performed all the duties and obligations on its part, and is ready and willing to abide by and perform all obligations still remaining, if any, including the payment of any money that ought to be paid by virtue of said law and ordinance; but it respectfully shows that, if the court should decree that the contract be specifically enforced, such decree ought to be accompanied with conditions requiring the company to furnish a complete, efficient, and unincumbered supply and distribution system, and requiring the company, until possession is obtained by your orator, to furnish water free of charge, and to account and pay over to your orator all income received since November 15, 1893. Your orator therefore asks the court to ascertain and determine the rights of the parties under and by virtue of the said law and ordinance, and as they existed on and after November 15, 1893, and, when so ascertained and determined, to enforce the same by a proper decree in the premises."

The answer of the company to this amendment was as follows:

"Answering the amendment made to the supplementary cross bill on March 22, 1894, and numbered paragraph 12 thereof, the defendant says that it is not true that the said Kansas City has at all times, or at any time, performed its duties or obligations in the premises, or that it can or will do so in the future. A distinct breach of duty is the wrongful refusal to pay to this defendant money earned by it under the contract, and adjudged to it by this court. The defendant adopts its answer heretofore filed to the supplementary cross bill as an answer to said amended pleading, and prays as in said answer it has already prayed."

After the testimony in the case was taken, the court appointed two commissioners to make personal inspection of the system of waterworks, and to estimate and fix the value of the works and system as a whole, to be predicated on the actual value of the works, and not upon the stock of the company, and to be the fair and equitable value of the whole works at the time; to estimate and fix, also, in like manner, the proportionate value of that part of the system lying in the state of Missouri; and to inquire and report on other matters. Upon the pleadings, the evidence in the case, and the report of the commissioners, the cause came on for hearing on March 23, 1894, and on April 20, 1894, a decree was rendered, by which it was ordered, adjudged, and decreed as follows:

"First. That under the act of the legislature and the contract between the National Waterworks Company of New York and the city of Kansas City, set out in the pleadings in this case, the said city is legally bound to purchase from said company, and said company is legally bound to sell to the said city, the full, complete, and entire waterworks plant by which the said city and its inhabitants are now supplied with water, including all portions of said plant, as well that portion in the state of Kansas, and commonly known as the 'Quindaro Supply Works and Flow Pipe' as that portion situated in the state of Missouri, together with all lots and lands belonging to or in any wise used as part of said plant, with the exceptions mentioned in the eleventh paragraph of this decree, and everything of every nature belonging or pertaining to said waterworks plant.

"Second. That said city, under the said contract, is bound to pay for said complete or whole waterworks plant, and the said company is bound to receive in full payment therefor 'the fair and equitable value of the whole works,' as provided in said contract.

"Third. The court finds that the fair and equitable value of the said complete and whole waterworks plant is two million seven hundred and fourteen thousand dollars (\$2,714,000).

"Fourth. That said city is entitled to the possession, use, and control of said whole and complete waterworks plant, and said company shall, on the 30th day of April, 1894, surrender and deliver to the said city the said whole and complete waterworks plant, and everything pertaining thereto, and all rights, leases, or contracts relating thereto, and necessary or essential to the full enjoyment of said waterworks as they are now enjoyed and operated by the said company; and the said company is hereby enjoined from using or operat-

ing said works, or retaining possession or control of any part thereof, after the said 30th day of April, 1894, and is enjoined from refusing or denying to said city the complete and peaceable possession of said works on that day; and said city is enjoined from refusing or neglecting to demand and accept the possession of said works on that day, and no appeal of this cause by either or both of the parties thereto shall operate to suspend these injunctions.

"Fifth. In the event that said company is unable to deliver the possession of the whole and complete waterworks plant, including the Quindaro Supply Works, then said company shall deliver and the city shall receive on or before said 30th day of April, 1894, that part of the plant in the state of Missouri; and said company is hereby enjoined from interfering with the possession of said city to that part of said works situated in the state of Missouri; and this injunction shall remain in force pending any appeal in this case.

"Sixth. The said company, within six months from the date of this decree, shall make, execute, and deliver to the city a good and sufficient assignment and conveyance of said whole and complete waterworks plant mentioned in the first paragraph of this decree, acceptable to the city or approved by this court, and when such conveyance is accepted by the city, or approved by this court, the city shall become bound to pay to the said company the sum of two million seven hundred and fourteen thousand dollars (\$2,714,000), being the fair and equitable value of said works in the manner following, that is to say: The city shall agree and assume to pay on the incumbrances and liens on said waterworks plant, to the holder or holders thereof, as their several rights and interests and priority thereto shall appear, an amount of said lien equal to said sum of two million seven hundred and fourteen thousand dollars (\$2,714,000), and shall become bound to save said company harmless as to that amount of said lien. When said sale and transfer of said waterworks plant is made as provided in this paragraph, the liability of the city to pay therefor as herein provided shall relate back to the 30th day of April, 1894.

"Seventh. If the waterworks company shall fail to make and tender a sufficient conveyance of said whole and complete waterworks plant within said six months from the date of this decree, then the city shall not be required to pay the price fixed for the complete and whole plant; and the question whether the city shall pay, or is liable to pay, any sum whatever, for that part or fraction of the plant in Missouri which does not include the source of supply, is reserved.

"Eighth. That said city is not entitled to recover from said company any sum for or on account of any of the several claims for damages set up in its cross bill.

"Ninth. The said city shall pay to said company the contract price for hydrant rentals down to and including the 30th day of April, 1894, amounting, principal and interest, after deducting all payments made thereon, to the sum of one hundred and thirty-nine thousand four hundred and fifty-two dollars and eighty-two cents (\$139,452.82), to be paid in the time and manner following, viz.: One-third of said sum shall be paid upon delivery by said company to the city of the possession of the whole and complete waterworks plant as required in the fourth paragraph of this decree, one-third when said company shall deliver to the city a sufficient conveyance or transfer of the whole and complete waterworks plant, and the remaining third six months thereafter; each of said installments to bear interest at 6 per centum per annum from April 30, 1894.

"Tenth. That said company shall have the right to collect and retain all water rentals which were due prior to the 30th day of April, 1894, and no claim therefor shall be made by the city against the company or the consumers; and the city shall collect and appropriate to its own use all water rentals which may accrue after the 30th day of April, 1894, and said company shall have no claim against the city or the consumers therefor.

"Eleventh. That, conformably to the consent expressed by counsel for both parties at the hearing, the property described in the pleadings as the 'Kaw Point Pumping Station,' and the six or ten acres of land, more or less, connected therewith, and now owned by said company, shall remain its property, and shall not be conveyed to said city as part of said waterworks plant. The value of said Kaw Point pumping station has been deducted from the price to be paid for the complete works.

"Twelfth. That each party shall pay one-half of the costs of these suits.
"Thirteenth. That this case is reserved for the purpose of making such other and further orders as may be found necessary to carry this decree into effect, and as may be equitable and just."

C. O. Tichenor, Gardiner Lathrop, and L. C. Krauthoff, for National Waterworks Company.

Frank Hagerman, John C. Gage, L. C. Slavens, R. W. Quarles, O. H. Dean, and F. F. Rozzelle, for Kansas City, Missouri.

Before BREWER, Circuit Justice, SANBORN, Circuit Judge, and THAYER, District Judge.

BREWER, Circuit Justice, stated the conclusions of the court as follows:

The urgency of the situation seems to forbid that this case should be retained by us for the length of time which would be required for the preparation of an opinion thoroughly and satisfactorily discussing all the difficult questions presented by counsel. All the time at our command we have given to an examination and consideration of the voluminous testimony, the elaborate briefs, and exhaustive arguments of counsel. We feel, therefore, that it is a duty to simply formulate briefly the conclusions to which we have arrived, and announce the decree which must be entered.

1. The act of 1873 provided "that at the expiration of the twenty years, if the grant be not renewed, the city shall purchase." The ordinance passed in pursuance of that act, and in effect the contract under which the works were created, provided that on a failure to renew the grant at the expiration of 20 years "the city shall then be required to purchase." There has been no renewal of the grant. The twenty years have elapsed. The imperative voice of the act and the ordinance is that the city "shall purchase." This is not an incidental, directory, or subordinate provision, but one mandatory, vital, and controlling. The thought of the legislature was that the city should own its waterworks; that, if any arrangement was made with a corporation for their construction and operation, the control and right of such company should be temporary, and the city should become, willingly or unwillingly, at a certain time the owner. The time fixed was at the expiration of 20 years, with a privilege of extension for another 20 years. This vital, mandatory, and controlling provision compels a decree that the company sell and the city buy. Such was the will of the legislature; such the terms of the act and the ordinance.

2. With reference to the matter of pleading, nearly two years before the expiration of the 20 years the company filed a bill alleging performance on its part of the terms of the contract, and also threatened action on the part of the city in violation of its obligations, and praying a decree that the contract "is a valid and subsisting contract, binding and obligatory upon your orator and the defendant, and that the defendant keep and abide by the same, and that, upon your orator's duly and faithfully doing and performing all things yet remaining to be done upon its part, the defendant, its officers and agents, keep and perform the covenants, promises, and agreements

on its part, so far as they are executory and unperformed, and that your orator may have such other and further relief as the case may require, and as may be conformable to equity, and to your honors may seem meet." At that time the obligation of the city to purchase had not yet arrived, but under such a bill a decree, after the lapse of 20 years, and when, there being no renewal of the term, the obligation of the city to purchase has arisen, may properly require the last act of compliance with the terms of that contract, to wit, purchase and payment by the city; so, notwithstanding the fact that the cross bill of the city, and the amendments thereto, may not be altogether harmonious, and might, if they stood as the only affirmative pleadings, be obnoxious to the criticisms of the counsel for the company, yet there is in the original bill, with its prayer, coupled with the changes of right brought by lapse of time, sufficient allegation and prayer upon which to rest a decree for the completion of the sale and purchase. It is true, and indeed confessed in the argument of counsel for the company, that it would now prefer not to sell, but to continue the franchise; but, nevertheless, it has for nearly three years placed itself before the court in the attitude of asking a decree for performance of this contract; and, never having dismissed its bill or withdrawn its prayer, it is now too late to say that the decree for sale and purchase is not responsive to the pleadings. If there were any formal defect,—any omission or addition of statement necessary to distinctly present the issues and uphold the decree,—an amendment would be permissible at the present time, and in the appellate court. Pleadings in equity cases may be conformed to the proofs; and we have the parties before us, the entire facts of the controversy, and the arrival of the time when a final determination of the rights between them is necessary. No technical defect in the pleadings should stay the hands of a court of equity.

3. We dissent in toto from the claim of the city that at the lapse of the 20 years the title to this property, with the right of possession, passed absolutely to it, without any payment or tender of payment, leaving only to the company the right to secure compensation by agreement or litigation, as best it could. Much was said in argument of the relative rights of lessor and lessee to buildings erected during the term of the lease. The city and the company were called licensor and licensee, and it was insisted that, as the right to operate was to cease at the expiration of 20 years, the relation was equivalent to that of lessor and lessee; that full title and right of possession passed instantly to the city, leaving all questions of amount and time and manner of payment to be subsequently determined. Much was said, too, about the rule of construction of public grants; that rule being that the grants are to be construed favorably to the public, and unfavorably to the grantee. It is unnecessary to attempt to define the peculiar quality of the title held by the company, nor do we question the rule of construction of public grants; but all contracts involving property rights and obligations between municipalities and individuals must be presumed to be based upon and to recognize the ordinary laws of business transactions, and, if any departure

therefrom is contemplated, such departure must be clearly manifested. Now, the familiar and ordinary law of business transactions is that he who parts with title receives, at the time, payment. In other words, payment of price and transfer of property are contemporaneous and concurrent acts. When it is affirmed that a contract made by a municipality contemplates that he whose money builds and constructs, and therefore establishes title to, property, shall surrender his title and possession without payment, or even the amount thereof determined, the language compelling such a construction must be clear and imperative. There is no such language in either the act or the ordinance. While it is true that the act provides that no grant so made shall confer the right to operate the waterworks for any period beyond 20 years, yet such provision is no more imperative than the one that at the expiration of the 20 years the city shall purchase and pay therefor. If the city fails to purchase and pay, it acquires no title, no right of possession, to the property of the water works. There is no language which would justify the court in saying that it is clearly expressed that the purpose of this contract and the thought of the legislature were to vest the title and right of possession in the city at the end of 20 years, leaving to future litigation the fixing of the amount and the enforcing of the fact of payment. If at the expiration of the 20 years the city had tendered to the company, in payment for the property, an amount admitted or found to be "the fair and equitable value," doubtless the right of the city to the possession and future earnings would have immediately accrued, and the present decree would have been based upon such transfer of right, but no such tender was made. In so far, therefore, as the decree of the circuit court attempted to transfer the title and the possession to the city before payment, we are constrained to hold that it was erroneous.

4. It is objected that the city, by virtue of the certain amendments to its charter and certain acts of the legislature, has become disabled from taking the title to all the property which makes up the waterworks system. This is a matter in respect to which the company need not concern itself. If it is paid the fair and equitable value of the property, as provided by the contract, then its rights have ceased, and the city can settle with other parties the matters of title and possession.

5. The difficult question, however, still remains; and that is, what is "the fair and equitable value" which, by the statute and the ordinance, the city is to pay for the waterworks? This amount was found by the circuit court to be \$2,714,000. The company insists that the test is to take the income or earnings, and capitalize them. The earnings pay 6 per cent. on four millions and a half. In other words, the company has produced a property which earns 6 per cent. on four millions and a half; and that, it is claimed, is the fair valuation of the property, 6 per cent. being ordinary interest. On the other hand, the city insists that the franchise has ceased, and that basing the value upon earnings is in effect valuing a franchise which no longer exists, and which the city is not to pay for; that the true way is to take the value of the pipe, the machinery, and real

estate, put together into a waterworks system, as a complete structure, irrespective of any franchise,—irrespective of anything which the property earns, or may earn in the future. We are not satisfied that either method, by itself, will show that which, under all the circumstances, can be adjudged “the fair and equitable value.” Capitalization of the earnings will not, because that implies a continuance of earnings, and a continuance of earnings rests upon a franchise to operate the waterworks. The original cost of the construction cannot control, for “original cost” and “present value” are not equivalent terms. Nor would the mere cost of reproducing the waterworks plant be a fair test, because that does not take into account the value which flows from the established connections between the pipes and the buildings of the city. It is obvious that the mere cost of purchasing the land, constructing the buildings, putting in the machinery, and laying the pipes in the streets—in other words, the cost of reproduction—does not give the value of the property as it is to-day. A completed system of water works, such as the company has, without a single connection between the pipes in the streets and the buildings of the city, would be a property of much less value than that system connected, as it is, with so many buildings, and earning, in consequence thereof, the money which it does earn. The fact that it is a system in operation, not only with a capacity to supply the city, but actually supplying many buildings in the city,—not only with a capacity to earn, but actually earning,—makes it true that “the fair and equitable value” is something in excess of the cost of reproduction. The fact that the company does not own the connections between the pipes in the streets and the buildings—such connections being the property of the individual property owners—does not militate against the proposition last stated, for who would care to buy, or at least give a large price for, a waterworks system without a single connection between the pipes in the streets and the buildings adjacent. Such a system would be a dead structure, rather than a living and going business. The additional value created by the fact of many connections with buildings, with actual supply and actual earnings, is not represented by the mere cost of making such connections. Such connections are not compulsory, but depend upon the will of the property owners, and are secured only by efforts on the part of the owners of the waterworks, and inducements held out therefor. The city, by this purchase, steps into possession of a waterworks plant,—not merely a completed system for bringing water to the city, and distributing it through pipes placed in the streets, but a system already earning a large income by virtue of having secured connections between the pipes in the streets and a multitude of private buildings. It steps into possession of a property which not only has the ability to earn, but is in fact earning. It should pay therefor not merely the value of a system which might be made to earn, but that of a system which does earn. Our effort has been to deduce from the volume of testimony that which, in this view of the situation, can be safely adjudged “the fair and equitable

value." The original cost of the works is not accurately and satisfactorily shown. If it would have assisted us in reaching a conclusion,—if, in consequence of our ignorance thereof, we have not placed the value upon this property which it deserves,—the company is alone to blame, for by the production of its books it could have clearly shown the actual cost of every part and of the whole of this property. There is a large amount of testimony as to the probable cost of reproducing the system, to which strenuous objection is made on the ground of an alleged temporary and extreme depression in the cost of labor and material. We have before us the estimate placed by two gentlemen of experience and capacity, appointed as commissioners, with direction to report "the fair and equitable value;" but neither by the order of the court appointing them, nor by their report, are we advised as to what they considered a criterion of the present "fair and equitable value." If they added anything beyond what in their judgment was the reasonable cost of reproduction, we are not advised as to how much they added, or what they took into consideration in making such addition. We have the fact of liens placed upon the property, to the extent of \$3,000,000, with the qualified approval of the city officials. We have also the statement of the earnings, and the estimate of the value upon the basis of a capitalization of those earnings, amounting, as stated, at six per cent., to four and one-half millions. Rejecting the latter as too high, and the cost of reproduction as too low, and taking into consideration the entire history of the transactions between the company and the city, from its commencement to the present time, we have sought to place a value upon the property as it stands, with all the connections already made between the pipes and the private and public buildings, and with the work which it is in fact doing of supplying all these buildings with water, and receiving pay therefor. That valuation, after much discussion, comparison of figures, and readjustments, we have all agreed, is three millions of dollars; and in reaching this result we have excluded from our estimate the value of the Jarboe street reservoir property, which, as we understand the testimony, has heretofore been paid for by the city.

6. In its cross bill the city has made claim for damages, and insisted that the waterworks system does not come up, in efficiency and completeness, to the requirements of the contract. We agree with the circuit court, after reviewing carefully the testimony, that the city is not entitled to maintain this claim. It has for many years recognized and accepted this waterworks system as having been constructed in full compliance with the demands of the contract, and it is now too late to repudiate such recognition.

This is perhaps all that it is necessary for us to say. We have stated our conclusions, and outlined our reasons therefor. Further than that we are unable to go, without, as stated in the opening, taking more time than the circumstances will permit. In order to close as far as possible all disputed matters, we have prepared the form of a decree which is to be entered by the circuit court.

This case is accordingly remanded to the circuit court, with directions to vacate its former decree, and in lieu thereof to enter the following decree, to wit:

First. It is ordered, adjudged, decreed, and determined that under the act of the legislature of the state of Missouri of March 24, 1873, and the contract evidenced by Ordinance No. 10,524, between the National Waterworks Company, of New York, and the city of Kansas City, Missouri, which act and ordinance are referred to in the pleadings in this case, the said city is now legally bound to purchase from said company, and said company is legally bound to sell to the said city, the full, complete, and entire waterworks plant and appurtenances by which the said city and its inhabitants are now supplied with water, including therein that portion of said plant situated in the state of Kansas, and commonly known as the "Quindaro Supply Works," and the flow pipes leading therefrom, as well as that portion of said works which is situated in the state of Missouri, together with all lots of land, buildings, and reservoirs belonging to, or in any wise used as a part of, said plant, with the exception mentioned in the eleventh paragraph of this decree, and everything of every nature pertaining to said waterworks plant.

Second. That said city, under the said contract, is bound to pay for said complete waterworks plant aforesaid, and the said company is bound to receive in full payment therefor, "the fair and equitable value of the whole works," as provided in said contract evidenced by Ordinance No. 10,524.

Third. The court finds, adjudges, and decrees, that the fair and equitable value of said complete and whole waterworks plant, excluding the Jarboe street tract, which belongs to the city, is three million dollars, and that said city is legally obligated to pay that sum therefor.

Fourth. That said company is entitled to retain the possession, use, and control of the whole and complete waterworks system and plant aforesaid until final payment therefor shall be made by said city as hereinafter provided; and said city is hereby enjoined from interfering with such possession, use, or control until such payment is made; and said company, on its part, is hereby enjoined from refusing or neglecting to supply water to the city, and from refusing or neglecting to provide private consumers with water, as heretofore during such period.

Fifth. It is further ordered and decreed that on or before the 1st day of December, A. D. 1894, the said company shall cause to be executed, and shall deliver to the clerk of this court, who shall hold the same in escrow, good and sufficient deeds, assignments, releases, bills of sale, and other conveyances whereby the whole and complete waterworks system and plant aforesaid, including that portion thereof which is situated in the state of Kansas, may be transferred to said city free and clear of all burdens, obligations, liens, and incumbrances of every kind, save the lien created by the two mortgages executed by the waterworks company, respectively, on August 1, 1883, and June 1, 1885, each of which mortgages secures bonds of said company, said to be now outstanding in the sum of one million five hundred thousand dollars; that said deeds, releases, assignments, bills of sale, or other conveyances shall be retained by said clerk, but said clerk shall furnish full and complete copies of all such instruments to the city or its attorneys of record, for their inspection.

Sixth. It is further ordered and adjudged that after the execution and delivery to the clerk of the deeds, assignments, releases, and bills of sale aforesaid, the said city shall be entitled to thirty days in which to except to the sufficiency of such conveyances; and power is hereby reserved to hear and determine such exceptions, and to make all needful orders in relation thereto. When such deeds, assignments, releases, and bills of sale shall have been executed and filed as aforesaid, and after the approval thereof by the court, if the same shall be excepted to by the city, said city shall thereupon pay to the clerk of this court the said sum of three million dollars, being the fair and equitable value of said waterworks plant as heretofore assessed, or it shall cause the same to be so paid. Said payment shall be made to said

clerk for the benefit of whom it may concern, and power is hereby reserved to the court to determine who are entitled to said fund after the same shall have been so paid into the court; and power is also reserved to permit any person or persons or corporation who may hereafter claim to have a legal or equitable lien upon said fund to intervene for the protection of his or their interest.

Seventh. It is further ordered and adjudged that upon payment being made by said city as aforesaid of said sum of three million dollars, and of the hydrant rentals mentioned in paragraph nine, said clerk shall deliver to said city or its authorized representatives all deeds, assignments, releases, bills of sale, and other muniments of title then held by him in escrow; and thereupon said city shall become vested with the title to said waterworks, and it shall forthwith be entitled to the exclusive possession, control, use, and enjoyment of said entire waterworks system and plant, and to all revenues, of whatsoever nature, thereafter resulting therefrom; and said waterworks company shall forthwith surrender the possession and control thereof to said city, and the interest of said company therein shall thenceforth cease and determine.

Eighth. It is further ordered, adjudged, and decreed that said city shall have the right to enter into any agreement which it may deem proper for the assumption, continuation of the lien, payment, or cancellation of any of the outstanding mortgage bonds, aggregating three million dollars, which are referred to in paragraph five of this decree, and that any arrangement which said city may so enter into with the owners and holders of said bonds, which shall result in the cancellation or payment of any thereof, or in the continuation of the lien, or in the assumption of any thereof by the city, and in the release of the waterworks company from its obligations thereon, shall operate pro tanto to discharge said city from its obligation to pay the three million dollars as provided in the sixth paragraph of this decree; and, for the purpose of enabling said city to avail itself of the provisions of this paragraph of the decree, power is hereby reserved to the court to ascertain hereafter to what extent, if any, said bonds have been canceled, paid, continued, assumed, or otherwise discharged by agreement between said bondholders and the city, and to make all needful orders in that behalf.

Ninth. It is further ordered, adjudged, and decreed that in addition to the value of said waterworks plant, fixed and to be paid as aforesaid, the said city shall also pay all unpaid hydrant rentals which accrued prior to November 15, 1893, and all subsequently accruing hydrant rentals, according to the rate heretofore fixed by agreement between said city and company until such time as the said city shall become entitled to the possession and use of said waterworks by virtue of compliance on its part with the previous provisions of this decree. Until the last-mentioned date, said waterworks company shall be entitled to all the earnings and revenues of said plant, whether derived from individual or public consumers; but said company, on its part, shall be compelled, during said period, to keep said waterworks plant in good repair, and shall also pay, as and when the same shall mature, the several interest installments that may accrue on the mortgage bonds mentioned in paragraph five of this decree. Said payment of hydrant rentals, as well as the assessed value of the works, shall be made before said city shall assume possession and control of said waterworks; and power is hereby reserved to the court to hereafter state an account, if necessary, for the sum due for hydrant rentals, and to make all needful orders necessary and proper to enforce this paragraph of the decree.

Tenth. It is further ordered, adjudged, and decreed that the city is not entitled to recover from said company any sum for or on account of any of the several claims for damages set up in its cross bill, and as to said claims for damages said cross bill is hereby dismissed.

Eleventh. That, conformably to the consent expressed by counsel for both parties at the hearing, the property described in the pleadings at "Kaw Point Pumping Station," and the six or ten acres of land, more or less, connected therewith, now owned by said company, shall remain its property, and shall

not be conveyed to said city as part of said waterworks plant. The value of said Kaw Point pumping station has been deducted from the price to be paid for the complete works.

Twelfth. It is further adjudged that each party shall pay one-half of the costs that have accrued in these suits up to the entry of this decree.

Thirteenth. That the court doth now reserve to itself the power to make any further order or orders that may hereafter be found necessary to carry this decree into full effect, and as may be deemed equitable and just.

KROHN v. WILLIAMSON et al.

(Circuit Court, D. Kentucky. June 12, 1894.)

No. 1,841.

1. CORPORATIONS — PROFITS OF CONTRACTS BY OFFICERS — RIGHTS OF STOCK-HOLDERS.

Promoters of a bridge company, the only subscribers to its stock, agreed to assign to complainant a certain interest therein. Thereafter two of them, officers of the company, made on its behalf a contract with a construction company, whereby that company, for \$1,000,000 in bonds of the bridge company and the entire \$1,500,000 of bridge company's stock subscribed, agreed to construct the bridge, furnish money to acquire land for approaches, and return to the subscribers to the stock \$200,000 thereof, the contract reciting that the \$1,500,000 stock was used by the bridge company with the consent of the subscribers. At the same time, said two officers agreed with the construction company, for \$300,000 in bridge company's bonds and \$600,000 in bridge company's stock, to procure and convey title to said lands needed for right of way. They reported the construction contract to their board of directors, but said nothing about the right of way contract. They afterwards procured the necessary lands, using only the bonds for that purpose, and making a substantial profit in the transaction, as they had expected to do. *Held*, that the \$600,000 of stock was not a part of the real consideration for the right of way contract, but was a profit on the construction contract, in which complainant was entitled to share, as against said officers, and they held his share thereof as trustees for him.

2. SAME—AGENCY OF OFFICERS—ACTION BY STOCKHOLDERS.

As said officers, in so disposing of the stock, held the direct relation of agents to the stockholders, including complainant, they were directly accountable to the stockholders for the stock improperly diverted to their own benefit, and complainant might maintain an action for his share thereof without showing a refusal of the company to sue.

3. SAME—PAID-UP STOCK.

The subscribers to stock of a bridge company agreed that it might use so much of the stock subscribed as might be necessary to construct the bridge, returning the remainder to be divided among them. The company made a contract with a construction company by which the latter, in consideration of the transfer to it of all the stock subscribed, agreed to construct the bridge, and to return to the subscribers a certain quantity of the stock; and it was agreed that the whole issue of stock should be treated as paid up by the acquisition of the franchises and the erection of the bridge. *Held* that, as between the bridge company and its subscribers, this agreement was valid, and the stock returned to them must be treated as paid up.

4. RELEASE—IGNORANCE OF FACTS—TRUSTS.

The subscribers to stock of a bridge company agreed that it might use so much of the stock subscribed as might be necessary for the construction of the bridge, the remainder to be returned to be divided among them. Two officers of the company, duly authorized, made a contract on its behalf with a construction company, by which the latter was to construct the bridge, receive a transfer of all the stock, and return a part of

it to the subscribers. By another contract, the same officers agreed to procure for the construction company necessary rights of way, in consideration of the transfer to them of certain bonds and a part of the stock. Complainant, one of the parties entitled to share in the distribution under the original agreement, received his portion of the stock returned under the construction contract, and gave the officers a full release of all claims against them, having at that time no knowledge of the right of way contract. *Held*, that the release did not prevent him from subsequently claiming his share of the stock received by the officers under the right of way contract, on the ground that such stock was a profit under the construction contract, and should be divided among the stockholders.

5. LACHES—FAILURE TO MAKE INQUIRY.

The defense of laches, on the ground that complainant, by inquiry, might have learned the facts relied on, and filed his bill earlier, is not available to defendants, who were under obligation to disclose to him such facts without inquiry; especially where the delay has worked no inequity to them.

6. SPECIFIC PERFORMANCE—JURISDICTION—TRANSFER OF STOCK.

Where jurisdiction is acquired on the ground that the suit is to enforce a trust, the court may compel performance of an obligation to transfer stock, the subject of such trust, the value of which is uncertain.

7. CORPORATIONS—CONSOLIDATION—STOCK—REGISTRY OF TRANSFERS.

Two corporations, severally chartered by Kentucky and by Ohio for the purpose of building a bridge across the Ohio river, were consolidated under laws of both states. Plaintiff, in a suit against stockholders to recover stock of the consolidated company, prayed that the transfer to him, if decreed, might be registered, and to that end made the Kentucky corporation a party. *Held*, that the bill must be dismissed as to it, for it had no authority to register transfers of the consolidated stock.

This is a bill in equity brought by Louis Krohn, a citizen of Ohio, to compel R. W. Nelson and John A. Williamson, citizens of Kentucky, to assign to him \$48,000 of the capital stock of the Central Railway & Bridge Company. The Central Railway & Bridge Company, averred to be a citizen of Kentucky, is made a party to the bill, for the purpose of securing a register by it of the transfer of the stock.

The action is based on the following facts: Nelson and Williamson, together with one Kirk and one Hawthorn, procured from the Kentucky legislature a charter for a corporation, with power to erect a toll highway bridge from Newport, Ky., to Cincinnati, Ohio. The company was organized, and the four promoters subscribed to \$1,500,000 of the capital stock. An Ohio corporation for the same purpose was organized, and the two companies were then consolidated, under the laws of both states. The needed federal, state, and municipal franchises and privileges were obtained in both states; so that nothing remained to be done but the purchase of land for the approaches, and the construction of the bridge. Louis Krohn and C. B. Simrall were interested in the Ohio River Construction Company, organized to float the bridge company's bonds and to build the bridge. A contract was entered into with the bridge company for this purpose. Subsequently, in October, 1889, it was deemed best to abandon the contract, after the partial erection of one pier, begun to prevent the lapse of rights secured to the bridge company by an ordinance of the city of Newport. Krohn contributed to the erection of the pier \$336. When the contract between the construction company and the bridge company was abandoned, the promoters of the bridge company, who were also largely interested in the construction company, executed the following agreement:

"We, the undersigned, hereby agree to assign to Louis Krohn the same interest in the Central Railway & Bridge Company that said Krohn now holds in the Ohio River Construction Company, which it is agreed is eight per cent.; the said Krohn to bear his proportion of future expenses incurred by

the Central Railway & Bridge Company whenever the other holders of stock in said bridge company contribute to said expenses their proportion; the consideration hereof being the cancellation of the contract between the Ohio River Construction Company and the Central Railway & Bridge Company, in which said Krohn is interested.

"[Signed]

R. W. Nelson.
"Jno. W. Kirk.
"Jno. A. Williamson.
"L. R. Hawthorn.

"Newport, Ky., Oct. 23, 1889."

By a similar contract, Simrall was given a 5 per cent. interest in the bridge company. By resolution of October 24, 1889, Williamson, as president of the bridge company, was authorized to make a contract for the construction of the bridge. After various negotiations with different bridge construction companies, Williamson and Nelson, who was vice president, director, and attorney of the Central Bridge Company, went to Cleveland, and made two contracts, of date March 31, 1890, with the King Iron Bridge & Manufacturing Company, of that city. One was a contract between the King Company and the bridge company, by which, for \$1,000,000 of the bonds of the latter company and \$1,500,000 of its stock, the King Company agreed to completely construct and equip the bridge by January 1, 1891; to furnish the money necessary to acquire the title to lands needed for the approaches to the bridge on both sides of the river; to return to the promoters of the enterprise and the subscribers to the stock \$200,000 of the capital stock; to treat the entire \$1,500,000 of stock as paid up by the acquisition of the franchises and privileges and the erection of the bridge; and to pay to the Central Bridge Company daily interest on \$1,000,000 for every day's delay in the completion of the bridge beyond January 1, 1891, except for such delays as might be occasioned by the failure of the Central Bridge Company promptly to procure land for the approaches at reasonable terms. The contract recited that the \$1,500,000 of stock conveyed to the King Company by the contract had been subscribed for by the four directors and stockholders of the company, but was used by the bridge company, with their assent, to secure the construction of the bridge. The second contract was made by the King Company with Williamson, Nelson, and D. P. Eels, a banker of Cleveland. By this contract the King Company agreed to give Williamson, Nelson, and Eels \$300,000 in money or bridge bonds, and \$600,000 in bridge stock, in consideration of their procuring a title to the land necessary for the bridge approaches, and conveying the same to the bridge company; the three individuals agreeing that, if the cost of the land and expenses of purchase and condemnation should exceed \$300,000, they would pay the excess. Without such an assurance of the cost of the rights of way, signed by Eels, the King Company would not have entered into the first contract. Eels' interest in the contract grew out of the fact that he had agreed to float the bonds for the compensation usually paid for such services. By a writing of the same date with the contracts just described, Eels stipulated that he was to have no interest or part whatever in the \$600,000 of stock, "in consideration of Williamson and Nelson giving their personal attention and service to the purchase and appropriation of the rights of way" necessary to the completion of the bridge. Williamson reported to the board of directors of the bridge company the execution of the construction contract between the two companies, but he said nothing of the right of way contract.

Shortly before the execution of these contracts, Williamson induced Simrall to assign to him his 5 per cent. interest in the bridge enterprise for about \$200; and, a few days or weeks thereafter, made several efforts to procure an assignment to him of Krohn's interest in the company, but Krohn declined his offer.

The bridge was constructed, and the necessary rights of way for the approaches were procured. The land cost about \$250,000. The expenses and lawyer's fees amounted to \$30,000. It was necessary in buying the land to purchase more than enough for the approaches, because the approach on each side ran diagonally across many of the lots. The land was taken in the name of Williamson, and then there was conveyed to the bridge company

only what was required for the approaches. The remnants were kept by Williamson, for the benefit of himself, Nelson, and Eels. Three such lots have been sold for \$15,000. On the whole, the profit of the right of way contract, exclusive of the \$600,000 of stock, ranged from thirty-five to fifty thousand dollars. Neither Williamson nor Nelson was satisfactorily definite on that subject. In the settlement between Eels, Williamson, and Nelson, Williamson took \$5,000, to pay for his services in superintending the purchase and condemnation of the right of way; while Nelson, as counsel in the transaction, had received \$6,250. After the completion of the bridge, Krohn applied to Williamson and Nelson for his share of whatever was due to the projectors of the enterprise. He was informed by Nelson, speaking for himself and Williamson, that his interest was limited to 8 per cent. of \$200,000 of bridge stock. Krohn was suspicious that this did not include everything he was entitled to, whereupon Nelson exhibited to him the original contract for the construction of the bridge. Krohn insisted that he was also entitled to the \$336, which he had advanced to the first construction company, with interest. After correspondence and much delay, upon threat by Krohn of a suit, Nelson and Krohn settled for \$16,000 of the stock and \$1,050 in money, and Krohn signed the following receipt:

"Received of R. W. Nelson, John W. Kirk, John A. Williamson, L. R. Hawthorn, and the Central Railway & Bridge Co., sixteen thousand dollars of the capital stock of the Central Railway & Bridge Co., in full satisfaction and discharge of all obligations against them, and each of them, and especially as regards an obligation dated October 23d, 1889, of which the paper on the face of which this is written is a true copy; and also the \$1,050.00, —in full of all claims whatsoever to date.

"[Signed]

Louis Krohn.

"March 16, 1892."

Nelson says that he told Krohn that Williamson and he would not make anything except their share of the \$200,000 and whatever they might make out of the right of way. Krohn denies that Nelson ever said anything about the right of way. Neither Nelson nor Williamson exhibited the right of way contract to Krohn, and Krohn denies all knowledge of it or its contents until shortly before bringing this action, when he learned of it from a published account of a suit brought by C. B. Simrall against Williamson, in which the fact and contents of the right of way contract were stated. Krohn thereupon tendered back the \$1,050 received at the settlement, and demanded \$48,000 of the bridge stock, as 8 per cent. of the \$600,000 received by Nelson and Williamson in addition to the \$200,000 mentioned in the construction contract.

Wm. Goebel, for complainant.

Paxton, Warrington & Boutet, George Washington, and W. W. Cleary, for defendants.

TAFT, Circuit Judge (after stating the facts as above). Were this proceeding an attempt by Krohn to obtain from Williamson and Nelson the profits received by them from the \$300,000 in money or bonds, paid by the King Company for the right of way, or from the remnants of land bought, but not used, for the bridge approaches, the objection made by defendants' counsel that Krohn is here seeking to assert the rights of the bridge company, without showing a refusal of that company to act in its own behalf, would be well taken, and the bill would have to be dismissed on that ground; for it is undoubtedly the law that a stockholder cannot be permitted to institute litigation on behalf of the corporation until he has made every effort to induce the corporation to appear and maintain its rights in its own person, and unless its failure or refusal to do so is something like a fraud upon the complain-

ant. *Porter v. Sabin*, 149 U. S. 473, 13 Sup. Ct. 1008; *Dimpfell v. Railway Co.*, 110 U. S. 209, 3 Sup. Ct. 573; *Hawes v. Oakland*, 104 U. S. 450; *Macdougall v. Gardiner*, 1 Ch. Div. 13. But in the case at bar the stock which Krohn seeks to recover never was the property of the bridge company. It belonged to the original subscribers, who, as the construction contract shows, permitted the corporation to use the same as part consideration for the work of building the bridge. The real agreement between the four promoters and the corporation was that the bridge should be built for the bonds and as much less than the \$1,500,000 of subscribed stock as possible, and whatever was left of the stock should be divided among the promoters and subscribers, in proportion to their interests in the enterprise. The original promoters gave Krohn an interest of 8 per cent. When Williamson and Nelson went to Cleveland to make the contract, they not only were acting for the company, but, in the disposition of the stock, they held the direct relation of agents to the stockholders, including Krohn, because it was the stockholders' property they were proposing to deliver; and they owed a duty, not to the company only, but directly to the stock subscribers, to save as much of the stock as possible for division among them. If it turns out that Williamson and Nelson have so arranged the contracts that they have secured for their individual benefit \$600,000 of the stock, as an apparent profit of the right of way contract, when, in fairness, it should have been added to the \$200,000 returned to the original stock subscribers in the construction contract, I can see no difficulty at all in holding that there was such a direct trust relation between Williamson and Nelson, on the one hand, and the stock subscribers, on the other, in the use of the stock to secure the erection of the bridge, that the former are directly accountable to the latter for the \$600,000 stock thus improperly diverted to the individual benefit of the trustees.

It will be observed that the net result to the King Company of the construction and right of way contract was that it should build the bridge for the proceeds of \$1,000,000 of bonds and \$700,000 of stock, less \$300,000 in cash,—the fixed cost of the right of way. It was entirely immaterial to the King Company how the remaining \$800,000 of bridge stock was disposed of. It was of no concern to that company whether it was all returned to the stock subscribers in the construction contract, or that some of it was made to constitute part of the consideration for the right of way contract. Nor had Eels any interest in the mode of distributing this \$800,000 of stock between the two contracts. In other words, Williamson and Nelson, as trustees, undertook to decide that, of the \$800,000 of stock which the King Bridge Company was willing to give back, out of the total issue, the subscribing stockholders should receive but \$200,000; and they, in their individual capacity, as additional compensation for entering into the right of way contract, should receive the remaining \$600,000. The equity and fairness of this arrangement and division they never submitted to those for whom

they were acting, but they regarded the right of way contract as "a private matter" (to use Nelson's language), with which the other stockholders had no concern. Under these circumstances, there is a heavy burden upon Nelson and Williamson to clearly establish that it was fair and entirely just for them to make the \$600,000 of stock part of the consideration for the right of way contract, instead of returning it to the stockholders in the construction contract. The writing by which Eels agrees that he has no interest in the \$600,000 of stock imports that he relinquished his interest to Williamson and Nelson in consideration of their giving their personal attention to the purchase of the right of way. But I cannot give this recital any weight. When Eels, Williamson, and Nelson came to divide the profit of the right of way contract, Williamson took \$5,000 for his personal attention to the purchase of the right of way, and Nelson's services had been fully paid for by a counsel fee of \$6,250. When the three men made the right of way contract, they believed they could secure the necessary land for less than \$300,000. Eels expressly so states. Their judgment was vindicated, and they made a handsome profit out of it. Whether Nelson and Williamson can be called to account for that profit by the bridge company need not be here considered. Suffice it to say that, with the burden on them to show that the \$600,000 of stock was a reasonable addition to the consideration for the right of way contract, they have not sustained it. If it had been, why should Eels not share it? The explanation that it was used as a consideration for personal services of Nelson and Williamson is shown to be unfounded by the subsequent settlement between the parties. The stock of the bridge company had no determined value. It was wholly speculative. The division of the \$800,000 between the two contracts was, in effect, a decision by Nelson and Williamson that, in consideration of the right of way contract, they were entitled to three shares in the profits of the enterprise, while all the stockholders, including themselves, should have but one; and this, without consulting those most interested. Now, was the agreement to furnish the right of way contract for \$300,000 burdensome? The circumstances show that it was not. Williamson and Nelson may be presumed to have been quite familiar with the land to be bought and its probable cost, and they do not show any reason whatever for thinking that the contract was a hazardous one. Eels went into it on their assurance, without any indemnity from them, because he and they thought it a profitable speculation. They were right. They cannot complain, now that they are called to account by their principal, who was given no option to approve or disapprove the arrangement before it was executed, if the fairness of it is judged somewhat by its results. On the whole, I am convinced that the \$600,000 of stock was no part of the real consideration in the right of way contract, but that it should have been included in the construction contract. It is probable that Nelson and Williamson considered that Krohn's contribution of money and labor to the enterprise was so small, as compared with their own, that

they were justified in thus reducing the value of his interest. But they had given him an 8 per cent. interest in the whole enterprise, and no such plan as this was, to deprive him of the full benefit of it, can stand for a minute when challenged in a tribunal administering equity. This is not the first time that men of good repute and character have deceived themselves into regarding as shrewd business strategy that which, in a court of equity, is wholly indefensible. The conclusion I reach is not based on the comparative credibility of the parties and their witnesses. It rests on the admitted circumstances, from which the inferences I have drawn seem to me to be necessary. Finding, as I do, that the \$600,000 was really a profit of the construction contract, and not of the right of way contract, I must hold that Krohn is entitled, as against Nelson and Williamson, to 8 per cent. thereof. *Kimber v. Barber*, 8 Ch. App. 56; *Tyrrell v. Bank*, 10 H. L. Cas. 26; *Parker v. Nickerson*, 112 Mass. 195.

We come next to the objection, urged on behalf of defendants, that, if this \$600,000 is to be treated as belonging to the original stock subscribers, then nothing has been paid in on it by them, and its issue as paid-up stock is a fraud upon the company, which a court of equity will not countenance, by compelling its transfer from one subscriber to another. It might be difficult to support such a defense, even if the original issue of the stock were fraudulent as against the company; but it is entirely unnecessary to consider it in this light, for there was no fraud upon the company in the issue of the stock. It was an express agreement between the King Bridge Company and the Central Bridge Company, acting for itself and its other stockholders, that the completion of the bridge, the acquisition of the right of way, and the possession and enjoyment of the franchises and privileges, should be considered a full payment of the \$1,500,000 of the capital stock, justifying its issue as full paid-up stock. Such an agreement, as between the company and its stockholders, was entirely valid, however subject to attack by creditors it might be. *Scovill v. Thayer*, 105 U. S. 143, 153.

The next defense is that Krohn is prevented from recovering herein by the settlement made between him and Nelson, March 16, 1892, when Krohn, in consideration of \$16,000 of the stock and \$1,050, gave a receipt in full of all claims. It is manifest from what has been already said that the relation between Nelson and Williamson, on the one hand, and Krohn, on the other, was that of trustees and cestui qui trust, or of agents and principal. Before any binding settlement could be made between them, it was necessary for Nelson and Williamson to make a full disclosure of what had been done by them as trustees. *Farnam v. Brooks*, 9 Pick. 212, 232; 1 Story, Eq. Jur. §§ 315, 316, 316a; *Kimber v. Barber*, 8 Ch. App. 56; *Tyrrell v. Bank*, 10 H. L. Cas. 26; *Parker v. Nickerson*, 112 Mass. 195. It is not claimed that they did this. Nelson says that he told Krohn that he and Williamson would receive nothing except their share of the \$200,000 of stock and what they might

make out of the right of way proceedings. Simrall and Krohn deny that Nelson alluded to the right of way matter. But it is not important, for, even if Nelson's account is accurate, this was by no means a full disclosure of the facts. Krohn might fairly have inferred that Nelson was alluding only to reasonable and ordinary compensation for his services as attorney in the condemnation proceedings, and for Williamson's services in securing evidence, etc., for the same purpose. We can be very certain that, if Krohn had known the full truth (which it was Nelson's duty to tell him), Krohn would never have made the settlement. It is quite true that Krohn suspected that he was not being fairly dealt with, and that he therefore insisted that he should be paid an additional amount in cash over and above that which under Nelson's statement of the facts he was entitled to; but I do not see that Krohn's suspicions of Nelson's fair dealing, and a settlement based on them, at all relieved Nelson of the duty to disclose everything. It did not put the parties at arm's length. The trust relation continued in existence so long as the proceeds of the transaction in which it had its inception remained undistributed. For these reasons, Krohn is entitled to have the contract of settlement rescinded, he having tendered back that which he received under it.

It is urged that Krohn cannot have a rescission because he was guilty of laches in not filing his bill earlier. The settlement was made in March, 1892, and this bill was filed a year later. There is no evidence at all to show that Krohn knew of the right of way contract until just before he filed his bill. It is said that he might have learned the facts by inquiry. His inquiries of Nelson, who owed him the duty to tell him, were not productive of much information. Nelson says that he considered the right of way contract a private matter, and so did not think it necessary to tell, even to C. B. Simrall, his fellow attorney in the condemnation proceedings, the particulars of it. It does not lie in the mouth of either Nelson or Williamson, with the obligation on them to tell Krohn everything without inquiry, to complain that he did not go to the King Bridge Company or Eels to learn the facts. Certainly, Krohn has not been supine or slow to assert his rights since he did learn the facts. It is not in evidence that between March, 1892, and a year later, there was such a change in the circumstances, in the market value of the stock or otherwise, that a year's delay in asking rescission, even with full knowledge, would work any inequity to defendants. *Mining Co. v. Watrous*, 9 C. C. A. 415, 61 Fed. 163, 186.

We have thus far in the case proceeded on the theory that by the paper of October 23, 1889, signed by Nelson, Williamson, Hawthorn, and Kirk, Krohn took a present interest in the enterprise. The language of the paper seems to be, at first sight, that of an executory contract, not giving Krohn any present interest in the enterprise, but only a right to the conveyance of an interest at some time in the future. Taking the whole instrument together, in the light of the surrounding circumstances, however, I think it may be fairly construed to convey a present interest. Under it, Krohn

could be compelled to contribute his proportionate share to any expenses thereafter to be incurred when "the other stockholders" should do so. This certainly implies that, as between the parties to the instrument, Krohn was then a stockholder. Of course, the stock subscriptions were in the names of the four signers of the writing of October 23, 1889, and the legal title to the stock, if it could be properly said to have any existence at all, remained in the four subscribers; but an equitable interest in the enterprise certainly vested in Krohn from the delivery of that writing. The fact is that these projectors were like partners, and, by this writing, they let Krohn in as a partner to share to the extent of 8 per cent. in any stock which after the construction of the bridge might remain for distribution among them. When, therefore, the four stock subscribers received the paid-up stock under the construction contract from the King Bridge Company, they held 8 per cent. of it as trustees for Krohn. This equitable ownership of the stock entitles him to the form of relief he here asks.

It is true that the relief asked is in the nature of a decree for the specific performance of an obligation to transfer personal property, and that, ordinarily, courts of equity will not afford such a remedy. The modern tendency of courts, however, is towards a much more liberal rule in this regard; and, if any good reason appears why damages for conversion will not be adequate remedy for the injury, a decree will be granted. Here the stock has no market value. The damage from conversion would be wholly speculative and uncertain. But the controlling reason why, in this case, the delivery of the stock in specie should be decreed, is that the defendants hold it in trust for the complainant. The confidential relation, in violation of which defendants seek to retain its possession, gives the complainant the option either to have the stock or its value. The court, as a court of equity, acquires jurisdiction of the action, not because damages at law would be inadequate, but because it is an action to enforce a trust, and, having jurisdiction on this ground, may give such full relief as the nature of the case requires. *Johnson v. Brooks*, 93 N. Y. 337; *Stanton v. Percival*, 5 H. L. Cas. 257; *Cowles v. Whitman*, 10 Conn. 121; *Kimball v. Morton*, 6 N. J. Law, 26; *Pom. Eq. Jur.* § 14.

The result is that Krohn is entitled to a decree against Nelson and Williamson, finding the ownership of \$48,000 of the stock standing in their name to be in Krohn, and ordering them to assign the same to him. The defendant company, the Central Railway & Bridge Company, is a Kentucky corporation, because the bill so avers. If it were the consolidated company, it would be a citizen of both Kentucky and Ohio; and then, the plaintiff being a citizen of Ohio, and one of the defendants being a citizen of the same state, the jurisdiction of this court would be ousted. The stock which Krohn seeks here to recover is stock in the consolidated company, for it was with that company that the King Company contracted. The Kentucky corporation has no authority to transfer or register transfers of such stock. I cannot therefore make a decree against

the defendant the Kentucky company to register the transfer which Nelson and Williamson are required to execute. The bill, as against that company, will be dismissed. As against Nelson and Williamson, however, the decree will be as already stated, and for costs.

WUNSCH et al. v. NORTHERN PAC. R. CO.

(Circuit Court, N. D. California. May 14, 1894.)

No. 10,985.

CARRIERS—LOSS OF PASSENGER'S EFFECTS — MERCHANDISE CARRIED BY TRAVELING SALESMAN.

A trunk containing a stock of jewelry was received by an agent of a railway company, without knowledge as to its contents, from a traveling salesman having a ticket over the railroad, and was checked as baggage to his destination and placed in a baggage car. The train was derailed, the car took fire, and the trunk and part of its contents were destroyed or lost. The salesman delivered the jewelry saved to the conductor of the train, telling the conductor where he was going. After his arrival there he presented his check to the company's baggage-master and demanded his baggage, not explaining that it had been destroyed, nor asking for the goods saved; and a subsequent tender by the company of such goods on identification was refused, unless their acceptance should be without prejudice to a claim against the company for damages. *Held* that, as the original delivery to the company was a deception upon it, and the trunk and its contents did not become baggage thereby, there was no conversion of the rescued articles by their nondelivery on the demand made; the only duty imposed on the company with respect to them being to keep them safely and deliver them on demand and identification to their owner.

This was an action by M. Wunsch & Company against the Northern Pacific Railroad Company for the loss of certain goods delivered to defendant for transportation.

E. W. McGraw, for plaintiffs.

Joseph D. Redding and Horace G. Platt, for defendant.

MCKENNA, Circuit Judge (orally). The facts of this case are as follows: One Eisenbach, a traveling salesman for M. Wunsch & Co., the plaintiffs, took passage at Spokane for Missoula, Mont., he having a ticket over defendant's road. He checked his trunk for that town, paying for extra weight, and received a receipt for the latter, and the ordinary baggage check for the trunk. The trunk was received by the agent of the company, and put in the baggage car. It contained about \$20,000 worth of jewelry of various kinds, the property of plaintiffs. There is no evidence that the agent of the company knew its contents. On the morning of the next day the train was derailed, near a place called "Noxon," and the baggage car took fire. Mr. Eisenbach testified that he got the trunk out, but the heat drove him away, "and the fire got to the trunk, and it burst open," and its contents were scattered. Part of them only were saved, and these were put in a box obtained from the news-boy. This was taken to Noxon, and there transferred to a train sent from a place called "Hope," and from thence transported to Missoula, and, by direction of the then superintendent, turned over

to W. H. Low, the general baggage agent, and taken to St. Paul. The conductor further testified that there was no check on the original trunk (presumably it had been burned off), and that he had no means of knowing to whom it belonged, and that, when it was turned over to the general baggage agent, there was nothing to indicate to whom it belonged. Mr. Eisenbach testified that, at the time he handed the saved goods over to the conductor, he told him that he (Eisenbach) was going to Missoula. The conductor, however, testifies, to quote him, "that he paid no attention to it at all at that time; that he had other business to attend to,—had to see that the injured got back to the sleepers." The train arrived at Missoula at night. On the next day Eisenbach made a demand on Mr. Case, the baggage master, for his baggage, presenting his receipt and check; and he repeated the demand on the next day and other days afterwards. His demand, however, was for his baggage, meaning, as he said, the trunk as originally delivered at Spokane. He testifies that he would not have received the said box of jewelry. To this demand the baggage master replied that the trunk was not there, and Eisenbach says that he did not explain that it had been destroyed. On the 21st and 22d of April the plaintiffs sent to defendant the following claim and letters:

"San Francisco, Cal., April 22, 1890.

"Northern Pacific Railroad Co. (Claim Department), St. Paul, Minn.—Gentlemen: You will please find inclosed a claim and demand of M. Wunsch & Co., of this city, for \$21,674, for value of contents of commercial traveler's trunk committed to your care on March 24th, 1890, and for \$200, value of the trunk, which said trunk and contents were lost and converted by you. The contents of the trunk were insured by the Anglo-Nevada Assurance Corporation and the California Insurance Company in the sum of \$20,000. The inventory attached to the claim is that of the contents of the trunk as it was checked at Spokane Falls, all previous sales having been deducted from the original contents at San Francisco. The matter is one which merits your prompt and serious attention, and I shall expect to hear from you at a very early day. Please address your reply to me.

"Yours truly,

E. W. McGraw,

"Attorney for M. Wunsch & Co. and for Anglo-Nevada Assurance Corporation and California Insurance Company."

"San Francisco, Cal., April 21, 1890.

"Northern Pacific Railroad Company (Claim Department), St. Paul, Minn.—Gentlemen: On the twenty-fourth day of March, 1890, our traveling salesman, Mr. I. P. Eisenbach, took the midnight passenger train of the Northern Pacific Railroad at Spokane Falls, Washington, bound for Missoula, Montana. Previous to the departure of the train at midnight of above date, he had his commercial traveler's trunk checked at Spokane Falls for Missoula. The trunk was weighed, and a charge was made by the forwarding agent at Spokane Falls for excess baggage, which charge was paid by Mr. Eisenbach, who thereupon received a paper excess-baggage check, the face of which reads as follows:

"Northern Pacific Railroad Company. Local Excess-Baggage Check.

"Spokane Falls, W. Station, 3-24, 1890.

"This check calls for the following described baggage, viz.: 1 T, bearing local excess-baggage strap check No. 0251, on which excess charges have been collected. Missoula station. No. of tickets held by passenger: One. Pre-paid trunk No. —. Form No. —. Issued by — R. R. E. J. Bunce, Forwarding Agent. B. 8856."

"Mr. Eisenbach, upon his arrival at Missoula, presented the paper check above copied and the strap check 0251 to the baggage master of the Northern Pacific Railroad, and demanded the trunk to which they entitled him. The demand was not complied with, nor the trunk delivered. The trunk which was checked was a commercial traveler's trunk, easily recognizable as such by its size, shape, and construction. It, with its contents, was our property. We are informed by Mr. Eisenbach that the trunk was destroyed by fire while in possession of the N. P. R. R. Co. on the morning of March 25th, between the stations Heron and Noxon; that such of the contents as could be recovered were packed in another trunk, and taken possession of by E. C. Crandall, conductor of the train on which the fire occurred. Mr. Eisenbach saw the last-mentioned trunk on the railroad platform at Noxon as he passed through that place on his way to Missoula, on the evening of March 25th. Mr. Eisenbach was informed by the baggage master at Missoula that said last-named trunk had been forwarded to the general baggage agent of the N. P. R. R. Co. at St. Paul. Such forwarding was without the knowledge or consent of Mr. Eisenbach. Notwithstanding his demand for the trunk and his exhibition of the checks therefor, he has received no further information from the company concerning the same than is above detailed. The contents of the trunk checked were of the value of twenty-one thousand six hundred and seventy-four dollars and fifty-six cents (\$21,674.56), which sum we hereby demand of the Northern Pacific Railroad Company. A detailed inventory of the contents of said trunk, and the value thereof, is hereto appended. The trunk checked, with its leather and other telescopes and watch and jewelry trays and rolls and other fittings, cost us over \$200. The trunk was about six months old. We also demand of the N. P. R. R. Co. the sum of \$200, the value of that trunk.

"Yours truly,

M. Wunsch & Co."

Plaintiff sent this claim to the company, specifying Eisenbach's trunk, and claiming the value of trunk and jewelry to be \$21,674.56. To these the defendant replied on the 28th of April, denying liability, and stating if—

"Any portion of your client's property was saved and placed for safe-keeping in the custody of our general baggage agent, by communicating with him, and proving ownership, the same will, of course, be returned to its rightful owner."

Considerable correspondence by telegraph ensued, in which the defendant urged the plaintiffs to meet its agent in regard to the property in Montana, and in which plaintiffs expressed a willingness to do so if without expense to them, and without waiving any rights. In the correspondence the liability for the trunk and contents as originally delivered was insisted on by plaintiffs. Finally, Mr. Wunsch's expenses being paid by defendant, he met its agent, Mr. Ford, at Helena. There the agent told him, if he could identify the jewelry saved at Noxon, he was ready to tender it to him. Wunsch replied:

"I am not disposed to receive the goods until I communicate with my counsel and the insurance company."

He telegraphed to the insurance company, and received the following reply, which he showed the agent Ford:

"San Francisco, Cal., June 19th, 1890.

"M. Wunsch, Helena, Mont.: Tell Ford you will take goods, and give him receipt as follows, and not otherwise: Received from the Northern Pacific Railroad Co. the following goods, saved from fire near Noxon, occurring March 25th, 1890. [Here insert inventory.] We received said goods without prejudice to any action or right of action against Northern Pacific Railroad Co.

We agree to sell said goods at auction in San Francisco, and credit the net proceeds on any judgment we may recover against said Railroad Co. If we recover no judgment, proceeds to be ours. We accept said goods only on condition that said acceptance shall not be pleaded or considered in any action now pending or which we may hereafter bring against Railroad Co.' To be signed by M. Wunsch & Co.; Railroad Co. to sign below as follows: 'The Northern Pacific Railroad Company delivers the above-mentioned goods, and accepts the above conditions which they are received by M. Wunsch & Co.' To be signed: 'D. K. Ford, General Claim Agent, Northern Pacific Railroad Co.' If Ford consents, give receipt as above, with his consent indorsed as above in duplicate.

"[Signed]

Anglo-Nevada Assurance Corporation."

To this the agent answered that he could not recognize "any such document as that," and read to him or showed to him the kind of receipt he would sign, which was as follows:

"Received of the Northern Pacific Railroad Company the following described watches and other articles of jewelry, picked up by different persons near Noxon, Montana, at a point where a train of the said Northern Pacific Railroad Company was wrecked on the 25th day of March, A. D. 1890; said watches and articles of jewelry being part of the contents of a certain trunk checked by I. P. Eisenbach, an employe of the undersigned, on or about March 24, 1890, from Spokane Falls, Washington, to Missoula, Montana; said watches and articles of jewelry being the same described as follows in the inventory furnished by us to said Northern Pacific Railroad Company, in a claim made by us for the contents of said trunk against said Northern Pacific Company, to wit: * * *."

On the 20th, Wunsch sent Ford the following:

"Helena, Mont., June 20th, 1890.

"D. K. Ford, Esq., City—Dear Sir: My firm declines to accept goods except on terms of receipt communicated to you yesterday. The Northern Pacific R. R. Company has already converted the goods, and we decline to receive them in a damaged condition, except without prejudice to our claim against the company. I will, if you desire it, go over the inventory of such goods as you have, inspect the goods, and check such as I can identify, provided I can have a copy of the inventory.

"Yours respcy.,

M. Wunsch."

Afterwards Ford again tendered the goods, and Wunsch refused them, saying: "No; my letter is final." Wunsch was told that the goods would always be ready to be delivered to him whenever he made up his mind to accept them. The goods were put back in the trunk, and shipped again to St. Paul, and there kept until they were forwarded here. They were produced in court, and submitted to the order of the plaintiffs. There was also evidence of the value of the goods and the payment of the insurance on the entire lot of jewelry to plaintiffs.

It is evident that under the decision of the supreme court of the United States in *Humphreys v. Perry*, 148 U. S. 627, 13 Sup. Ct. 711, the plaintiff's trunk and contents did not become baggage by its delivery by Eisenbach to the company's agent at Spokane. This is conceded by plaintiffs, but it is contended that there was a conversion by the defendant of the rescued articles by their nondelivery at Missoula on the demand of Eisenbach. To sustain this contention, plaintiffs cite a number of cases. There are various illustrations of the doctrine stated, in one of them (*Rider v. Edgar*, 54 Cal. 127) as follows:

"To maintain trover or trespass de bonis asportatis, evidence of an actual forcible dispossession of the plaintiff is not necessary. Any unlawful interference with the property, or exercise of dominion over it, by which the owner is damaged, is sufficient to maintain either action."

In the case at bar there was no unlawful interference with plaintiffs' property or exercise of dominion over it. The original delivery of the jewelry to defendant was a deception upon it (*Humphreys v. Perry*, supra), and gave no rights to the trunk and its contents as baggage. The first relations of defendant to them with which we are concerned accrued at Noxon, at the time of the wreck. What duty did these relations impose on the defendant? We may assume, to keep the goods safely, and to deliver them upon demand and identification to their owner. A discharge of this duty was tendered to plaintiffs, and refused by them.

But it is claimed by plaintiffs that the goods were delivered to the conductor of the train by Eisenbach, he then saying that he was going to Missoula, and that this created a duty to deliver them at Missoula. If they had been baggage, properly accompanying a passenger whose destination was Missoula, this might be true; but they were not. They were goods brought to the attention and forced upon the care of the defendant by an accident. They were of considerable value, and the true relations of the company to them were not known. But Eisenbach did not demand them at Missoula. They were on the same train as he was, and arrived at Missoula at the same time he did. If he had immediately sought and claimed them as such, a different question might have been presented. But his demand next day was not for them, but for the trunk and its contents as delivered at Spokane. Indeed, it is evident that, when he turned them over to the conductor, it was not for the purpose of claiming and receiving them again, for he testifies that he would not have accepted them if they had been offered. The testimony shows that to the first claim which identified them the company promptly responded, and subsequently tendered them, and that the plaintiffs refused to accept them except upon such terms as they had no right to exact. Judgment for defendant.

BERLIN IRON BRIDGE CO. v. CITY OF SAN ANTONIO.

(Circuit Court, W. D. Texas, San Antonio Division. May 19, 1894.)

No. 522.

1. MUNICIPAL CORPORATIONS—CONSTITUTIONAL RESTRICTIONS ON CREATION OF DEBTS—PROVISION FOR INTEREST AND SINKING FUND.

A contract whereby a city agrees to pay a certain sum for the erection of a bridge—one-half on delivery of the material, and the remainder on completion and acceptance of the bridge—creates a debt, within the provisions of Const. Tex. art. 11, §§ 5, 7, that no city shall create any debt unless at the same time provision be made by taxation for payment of interest and creation of a sinking fund, and is therefore invalid if no such provision is made at the time of its execution, notwithstanding payment of the contract price is secured by the proceeds, paid into the city treasury, of bonds issued for the purpose, in accordance with pro-

visions of the city charter requiring creation of a fund for payment of interest and as a sinking fund, by special tax.

2. SAME—CURRENT EXPENSES.

The debt created by such contract cannot be regarded as a current expense of the city, payable out of current revenues.

3. SAME—IMPLIED CONTRACT.

Where such contract is void, as contravening the provisions of the constitution, the contractor cannot recover from the city the value of the bridge, as upon an implied contract.

This was an action by the Berlin Iron Bridge Company against the city of San Antonio on a contract for the erection of a bridge.

Plaintiff's petition contained the following allegations:

First. That plaintiff is a private corporation duly incorporated under the laws of the state of Connecticut, resident and doing business in said state of Connecticut, and a citizen of said state.

Second. That defendant, the city of San Antonio, is a municipal corporation duly incorporated by a special act of the legislature of Texas approved August 13, 1870, and which said act has been subsequently, at different times, amended by the legislature of the state of Texas, by acts passed amendatory to said act above referred to, and that said city is now, and was on the 1st day of November, 1890, and has ever since been, a city of over ten thousand (10,000) inhabitants. That its said charter, on the date last above referred to, contained, and has ever since contained, the following provisions, among others, which said provisions were on said date, and thence hitherto, in full force and effect as part of the charter of the said city, to wit:

"Section. 1. That all the inhabitants of the city of San Antonio are hereby constituted a body corporate and politic and shall have power * * * (4) to make all contracts and do all other acts in relation to the property and concerns of the city, necessary to the exercise of its corporate and administrative powers."

"Sec. 43. To borrow money on the credit of the city and issue bonds therefor to an amount not to exceed \$50,000.00, for street improvements; * * * provided, that no debt shall be contracted for the payment whereof such bonds are issued (except the sidewalk bonds) until such bonds shall have been disposed of and the proceeds thereof paid into the city treasury; and when any bonds are issued by the city, a fund shall be provided to pay the interest and two per cent. per annum on the principal as a sinking fund to redeem the bonds, which fund shall not be diverted or drawn for any other purpose, and the city treasurer shall honor no draft drawn on said fund, except to pay the interest or redeem the bonds for which it was provided; and for the payment of such loan to levy a special tax, over and above the general tax allowed by this act. * * * The sinking fund for the redemption of any loan or debt, to be invested as fast as the same accumulates, in United States interest bearing bonds, bonds of the state of Texas, or in city bonds, and such bonds and interest of such bonds to be reinvested and to be sold when necessary, to pay debts or loans. * * *

"Sec. 44. To provide by ordinance, special funds for special purposes, and to make same disburseable only for the purpose for which the fund was created.

"Sec. 45. To appropriate and provide for the payment of the debts and expenses of the city and to issue refunding bonds for the purpose of redeeming bonds bearing a higher rate of interest, or paying matured bonds."

"Sec. 60. To establish, erect, construct, regulate and keep in repair bridges, culverts and sewers, sidewalks and cross-ways, and to regulate the construction and use of same."

"Sec. 172. The city council shall have power within the city, by ordinance, to annually levy and collect taxes for general purposes, not exceeding one per cent. on the assessed value of all real and personal estate and property in the city, including all money loaned therein at interest, although the owners thereof may be nonresidents."

"Sec. 174. To levy and collect special tax for special purposes, provided such special tax shall not exceed one per cent. on the property taxed annually."

"Sec. 219. All ordinances of the city, when printed and published by authority of the city council, shall be admitted and received in all the courts and places, without further proof."

"Sec. 233. Lands, houses, moneys, debts due the city, and personal and real property and assets of every description belonging to the city, shall be exempt from execution and sale, but the city shall make provision, by taxation or otherwise, for the payment of any and all indebtedness due by the city."

"Sec. 253. This act shall be deemed a public act and may be read in evidence, without proof, and judicial notice shall be taken thereof in all courts and places."

Third. That said city has never exceeded in its tax levy for general purposes the said one per cent. on the assessed value of all real and personal estate and property in the city, specified in said section 172, and has never exceeded in its tax levy for special purposes said one per cent. on the property taxed annually, as above referred to in section 174.

Fourth. That on said 1st day of November, 1890, and thence hitherto, the San Antonio river, the San Pedro creek, and various irrigation ditches ran through the corporate limits of said city, crossing its public streets and alleys at various points and places, and necessitating, on the part of the city, for the benefit of its inhabitants, the erection of bridges over and across said creek, said river and said irrigation ditches at various places within said city as parts of its streets, and particularly at a point in said city where Crockett street extends across the San Antonio river, and that the cost of the erection and maintenance of such bridges across said streams, and particularly across the San Antonio river at the point above referred to, was on said 1st day of November, 1890, and thence hitherto, one of the necessary current expenses of said city, for which said city was fully authorized and empowered by the said provisions of its charter to annually levy and collect a tax to pay.

Fifth. Plaintiff further avers that heretofore, to wit, on or about the — day of —, 1890, the defendant, being desirous of erecting an iron bridge across the San Antonio river, where Convent street crosses said river, by ordinance duly passed by the city council, directed the mayor of said city to advertise for bids for the erection and construction of said bridge,—bids to be solicited for the iron superstructure and for the masonry separate. That in pursuance of said ordinance, and in obedience thereto, said mayor of said city gave public notice to all parties to make bids for said work; reserving, however, to said city, the right to reject any and all bids, and requiring that said bids should be submitted, sealed, at the office of the city clerk, on or before Saturday, October 4, 1890, at 12 o'clock m. That plaintiff herein submitted the following bid or proposition: "We, the undersigned, agree to erect, and put in condition for travel, the superstructure of an iron bridge, of 100-foot span, over the San Antonio river, at Convent street crossing, to be a duplicate of Crockett street bridge, in the county of Bexar, state of Texas, in accordance with the attached specifications, for the sum of thirteen thousand dollars (\$13,000.00)." That thereafter, by ordinance duly passed by the city council of said city, said bid was duly accepted by said city, and, by ordinance duly passed, the mayor of said city was directed to enter into a contract with plaintiff for the erection of the iron superstructure of said bridge, and that in conformity with said ordinance, on the 12th day of November, 1890, plaintiff and defendant entered into a contract in writing, in substance as follows, to wit:

"The State of Texas, County of Bexar.

"This agreement, made and entered into this 12th day of November, A. D. 1890, by and between the Berlin Iron Bridge Company, bridge builders, of East Berlin, state of Connecticut, parties of the first part, and the city of San Antonio, of the county of Bexar, State of Texas, parties of the second part, witnesseth: That the said parties of the first part hereby agree to

furnish and erect complete, ready for travel, the superstructure of a wrought iron and steel truss bridge (98) ninety-eight feet on centers, with a roadway 26 feet, and (2) two walks of (6) six feet each, at Convent street across the San Antonio river in said county, at the site designated by the city engineer, said bridge to be a duplicate of Crockett street bridge, which is now being built, and according to the plans and specifications hereunto attached, which are made a part of this contract. And the said parties of the first part hereby agree to have said structure completed and ready for inspection on or before the thirtieth day of March, A. D. 1891, allowing a reasonable amount of time in case of unavoidable delays in shipping, by reason of high water, or accidents in construction. And the parties of the second part agree to have the abutments for said bridge completed by the first day of January, A. D. 1891. But in case said abutments are not finished in the specified time, and the parties of the first part have delivered the material for said bridge at site of same, then the parties of the second part shall pay the parties of the first part fifty per cent. of the contract price. And in consideration of the above presents the said parties of the second part contract and agree to pay the said parties of the first part the sum of thirteen thousand (\$13,000.00) dollars, payable as follows: The sum of six thousand five hundred dollars (\$6,500.00) on the delivery of the iron material at the site of the bridge on Convent street, San Antonio, Texas, and the remainder shall be paid on the completion and acceptance of the bridge. It is understood and agreed that the party of the first part is to have the use of the steam roller belonging to the city, in placing the concrete on roadway of said bridge, free of cost. This contract signed in duplicate. In witness whereof, the said parties do hereunto affix their seals and signatures the day and year first above written.

"[Seal.]

"[Seal.]

"[Seal.]

City of San Antonio,

By Chs. Guerguin, Acting Mayor.

The Berlin Iron Bridge Co.,

"By Wm. Payson, Agent."

Sixth. That thereafter the city directed that the bridge described in the contract hereinbefore fully set out should be erected on Crockett street, instead of on Convent street, as in said contract specified, and plaintiff agreed to do same under said contract in writing above set forth, and for the consideration therein specified. And said city agreed that said bridge should be erected by plaintiff on said Convent street, under the contract hereinbefore set out, and that said city would pay for the same the consideration stipulated in said contract.

Seventh. Plaintiff avers that it erected said bridge in accordance with said contract, and that upon the 5th day of June, 1892, same was duly received and accepted by the city engineer of said city, after having been thoroughly inspected and tested, and that thereafter, on the 23d day of June, 1892, said bridge was accepted by said city, and has by it been used and maintained ever since, and is still held, maintained, and being used by said city.

Eighth. That prior to the execution of said contract, and with a view of raising a fund necessary to pay for the erection of said bridge and other bridges, the said defendant, under the authority conferred upon it by its charter to borrow money and issue bonds therefor for street improvements, executed and issued its certain bridge bonds to the amount of fifty thousand dollars, which bonds were by it sold prior to the time when said contract was entered into, and the cash received therefor, of which said cash the sum of fifteen thousand dollars (\$15,000) was put into the treasury of said city, as a special fund to be applied to the payment of plaintiff herein for the erection of the above-specified bridge, to the full extent of said contract price, and which said fund was in the treasury of the city of San Antonio, defendant herein, as a special fund for said purpose, when said contract was entered into, and had been specially applied and appropriated by said city to the payment of said contract price, in accordance with the stipulations of said contract, and which said fund said city, under its charter, could not apply to any other purpose except the payment of said contract price of

said bridge; and said fund was in said city treasury for said purpose at the time said bridge was completed and accepted by said city, as heretofore alleged, and which said sum is still in the treasury of said city as a special fund to be applied to the payment of the contract price of said bridge, due plaintiff, in accordance with the terms of said contract.

Ninth. That, by reason of the premises, defendant became bound and promised to pay to plaintiff the said sum of thirteen thousand dollars (\$13,000), as in said contract specified, with six per cent. per annum interest on \$6,500 thereof, from the 1st day of February, 1891, upon which date the iron, etc., specified in said contract, was duly delivered to said city, and with six per cent. per annum on the balance thereof from said 23d day of June, 1892, but, though often requested, has failed and refused to pay same, or any part thereof, except the sum of \$6,500 paid upon delivery of said iron as in said contract specified. Premises considered, plaintiff prays for process as the law directs, and, upon final trial, it have judgment against defendant for the full amount sued for, to wit, \$6,500, together with interest thereon at six per cent. per annum from the 23d day of June, 1892.

Tenth. Plaintiff further avers that in the event the court should hold that the contract hereinabove specified is not legal and binding upon said city, then it says that, at the special instance and request of defendant, it sold and delivered to defendant, and erected for defendant, the iron superstructure of the bridge across the San Antonio river, where Crockett street crosses said river in said city, which said request was made by ordinance duly passed by the city council of said city on the 20th day of October, 1890, and that the said superstructure of said bridge, after it was so erected, was, to wit, on the 23d day of June, 1892, accepted by said city, and said city immediately went into possession, use, and occupation of same, and is still using, occupying, and enjoying same. That the reasonable value of said superstructure, as delivered, laid, and erected for said city, was the sum of \$13,000, and that by reason of the premises the city became bound and obligated and promised to pay plaintiff, upon the delivery of said superstructure, the sum of \$13,000. That said city, on or about the 1st day of March, 1892, paid to plaintiff, in part payment of said bridge, the sum of \$6,500, and that the balance remaining due, to wit the sum of \$6,500, is still due and unpaid, together with legal interest thereon, from the 23d day of June, 1892; and, should the court hold that plaintiff is not entitled to recover on the contract herein sued upon, then plaintiff prays for judgment against the said city for the value of said bridge still remaining unpaid, as above shown, with legal interest thereon, as above claimed.

Defendant demurred to and answered the petition, by its amended answer, as follows:

First, that it excepts to plaintiff's petition, and says the same is insufficient in law to require further answer from this defendant; and of this exception it prays the judgment of the court.

Specialty excepting, this defendant says:

(1) That the petition of the plaintiff does not show that the plaintiff, being an incorporated company, has filed its charter to do business in the state of Texas, as is required by the laws of this state.

(2) That it does not appear from said contract sued upon by plaintiff, or from plaintiff's petition, that this defendant was authorized by its charter or laws to enter into a contract, or to contract for a debt, for the purpose of building bridges within the city of San Antonio.

(3) Because it does not appear from plaintiff's petition that, at the time of the issuing of the bonds specified in paragraph 6 of plaintiff's petition, that provision was made for levying and collecting a sufficient tax to pay the interest thereon, and provide at least two per cent. as a sinking fund, as is required by the constitution and laws of the state of Texas, and by the charter of defendant city.

(4) Because it does not appear from plaintiff's petition that at the time of the execution of the contract mentioned in plaintiff's petition, or at the time said contract was authorized by defendant city, or at the time the debt created by defendant city for the erection of the bridges men-

tioned in plaintiff's petition, that provision was made by this defendant to levy and annually collect a sufficient tax to pay the interest on said debt, and provide at least two per cent. as a sinking fund, as was required by the constitution and laws of this state, and by the charter of this defendant city.

(5) It does not appear from plaintiff's petition why, in the event of the plaintiff, from any cause, failing to recover on the contract sued upon, that this plaintiff should, in this suit, be permitted to recover the bridges described in plaintiff's petition, and be permitted to remove the same.

And of these exceptions the defendant prays the judgment of the court, and that it be dismissed, with its costs.

Further answering, this defendant denies, all and singular, the allegations in plaintiff's petition contained, and of this defendant puts itself upon the country.

Further answering, this defendant says that if there was any contract made between plaintiff and defendant for the construction of the bridges, as alleged in plaintiff's petition, that said contract was illegal, and not binding upon this defendant, because said contract was obtained by the plaintiff by fraud, in this: That the said plaintiff, by a combination with other bridge companies, prevented and paid said other bridge companies from bidding for the erection and construction of said bridges, and that the said plaintiff did pay to other bridge companies, and to divers other persons, firms, and corporations, large sums of money, to prevent such other bridge companies, persons, firms, and corporations from bidding for the construction of the bridges for this defendant, and that the payment of such sums by this plaintiff did prevent such other companies, firms, and corporations from bidding for the erection of the bridges aforesaid. Further answering, defendant says that by reason of such combination as aforesaid this defendant was compelled to pay this plaintiff a greater sum of money for the construction of such bridges than said bridges were reasonably worth; that by reason of the combination aforesaid this defendant city has already paid to this plaintiff the sum of ten thousand dollars more for the construction of the bridges aforesaid than would have been paid had such combination aforesaid not been made. Wherefore, defendant pleads in offset against this plaintiff the said sum of ten thousand dollars for damages sustained by this defendant by reason of the fraud practiced upon this defendant by this plaintiff, as above mentioned.

Further answering, this defendant particularly denies that prior to the execution of the contract mentioned in plaintiff's petition, and with a view to raising the fund necessary to pay for the erection of said bridge, or other bridges, the defendant city executed and issued its certain bridge bonds, which bonds were by it sold, and cash sufficient received therefor to more than pay for the bridges above specified. But this defendant says that at no time, prior or since the execution of the contract mentioned in plaintiff's petition, has defendant city issued any bridge bonds upon which defendant city is liable, and says that, if there are any outstanding bridge bonds issued by this defendant city, they were issued illegally, without authority of law, and at the time such bonds were issued no provision was made for the levying and collecting of a sufficient tax to pay the interest thereon, and provide at least two per cent. as a sinking fund, as is required by the constitution and laws of the state of Texas, and by the charter and ordinances of defendant city. Wherefore, this defendant prays for its judgment for damages in the sum of ten thousand dollars over and against the plaintiff, for costs, and for general relief.

Plaintiff demurred and replied to the amended answer by a supplemental petition, containing general and special exceptions thereto.

Denman & Franklin, for plaintiff.

A. Lewy, for defendant.

MAXEY, District Judge. My conclusions upon the questions arising on demurrer are as follows:

1. The contract entered into between the plaintiff and defendant on the 12th day of November, 1890, for the erection of the superstructure of a wrought-iron bridge across the San Antonio river, is invalid, as being in contravention of the plain provisions of the constitution. The contract price of the superstructure was \$13,000, one-half to be paid on the delivery of the iron material at the site of the bridge on Crockett street, and the remainder on the completion and acceptance of the bridge, which was on the 23d day of June, 1892. At the time of the execution of the contract, no provision was made for the assessment and collection of a tax to pay the interest on the debt thus created, and provide a sinking fund, as required by the organic law. Section 5 of article 11 of the state constitution provides that:

"No debt shall ever at any time be created by any city, unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon, and to create a sinking fund of at least 2 per cent. thereon."

Section 7 of the same article contains the more emphatic declaration:

"But no debt for any purpose shall ever be incurred in any manner by any city or county, unless provision is made at the time of creating the same for levying and collecting a sufficient tax to pay the interest thereon, and to provide at least two per cent. as a sinking fund."

It is said by Justice Gaines in *City of Terrell v. Dessaint*, 71 Tex. 773, 9 S. W. 593, that:

"The language is general and unqualified, and we find nothing in the context to indicate that the framers of the constitution did not mean precisely what is said; that is, that no city should create any debt without providing, by taxation, for the payment of the sinking fund and interest."

See, also, *Biddle v. City of Terrell*, 82 Tex. 335, 18 S. W. 691.

The same may be said of the case now before the court. But the plaintiff, by its counsel, insists that it was not necessary for the city to provide for the payment of interest and the creation of a sinking fund, in reference to the debt in question, because it is averred that bridge bonds had been sold by the city, and the proceeds thereof placed in the city treasury, to secure the erection of the bridge which the plaintiff contracted to build. It is true that section 43 of the charter of the city authorizes the city to borrow money on its credit, and issue bonds therefor, to an amount not to exceed \$50,000, for street improvements, and it is further provided by said section as follows:

"That no debt shall be contracted, for the payment whereof such bonds are issued (except the side-walks bonds) until such bonds shall have been disposed of, and the proceeds thereof paid into the city treasury, and when any bonds are issued by the city, a fund shall be provided to pay the interest and two per cent. per annum on the principal as a sinking fund to redeem the bonds, which fund shall not be diverted or drawn for any other purpose, and the city treasurer shall honor no draft drawn on said fund except to pay the interest or to redeem the bonds for which it was provided; and for the payment of such loan to levy a special tax over and above the general tax allowed by this act."

Without considering the question whether the issuance of bonds denominated "bridge bonds," would be a compliance with the charter provision authorizing the issuance of "street improvement bonds," it is sufficient to say that by the imperative mandate of the constitution, which rises superior to all charter provisions, "no debt" shall be created by any city except in the manner therein indicated. The method of creating debts, pointed out by the constitution, should be followed; otherwise, the debts are invalid, and not enforceable against the municipality. Where the meaning of constitutional provisions is plain and obvious, it is the duty of courts to give effect to such meaning, without placing upon the words used a forced construction, and one not intended by the framers of the instrument. Upon this point it is said by Justice Lamar in the case of *Lake Co. v. Rollins*, 130 U. S. 670, 671, 9 Sup. Ct. 651, that:

"We are unable to adopt the constructive interpolations ingeniously offered by counsel for defendant in error. Why not assume that the framers of the constitution, and the people who voted it into existence, meant exactly what it says? At the first glance, its reading produces no impression of doubt as to the meaning. It seems all sufficiently plain, and in such cases there is a well-settled rule which we must observe. The object of construction, applied to a constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself; and, when the text of a constitutional provision is not ambiguous, the courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument. To get at the thought or meaning expressed in a statute, a contract, or a constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning, which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it. *Newell v. People*, 7 N. Y. 9, 97; *Hills v. Chicago*, 60 Ill. 86; *Denn v. Reid*, 10 Pet. 524; *Leonard v. Wiseman*, 31 Md. 201, 204; *People v. Potter*, 47 N. Y. 375; *Cooley, Const. Lim.* 57; *Story, Const. par.* 400; *Beards-town v. Virginia*, 76 Ill. 34. So, also, where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction. *U. S. v. Fisher*, 2 Cranch, 358, 399; *Doggett v. Railroad Co.*, 99 U. S. 72. There is even stronger reason for adhering to this rule in the case of a constitution than in that of a statute, since the latter is passed by a deliberative body of small numbers, a large proportion of whose members are more or less conversant with the niceties of construction and discrimination, and fuller opportunity exists for attention and revision of such a character, while constitutions, although framed by conventions, are yet created by the votes of the entire body of electors in a state, the most of whom are little disposed, even if they were able, to engage in such refinements. The simplest and most obvious interpretation of a constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption. Such considerations give weight to that line of remark of which *People v. Purdy*, 2 Hill, 31, 36, affords an example. There, *Bronson, J.*, commenting upon the danger of departing from the import and meaning of the language used to express the intent, and hunting after probable meanings not clearly embraced in that language, says: 'In this way the constitution is made to mean one thing by one man and something else by another, until in the end it is in danger of being rendered a mere dead letter, and that, too, where the language is so plain and explicit that it is impossible to make it mean more than one thing unless we lose sight of the instrument itself, and roam at large in the boundless fields of speculation.'"

Nor can the court concur with counsel in the position assumed that the debt created by the contract of the parties was a current expense of the city, payable out of the current revenues. I do not regard it as a debt of that character, and hence it does not come within the principle announced by the supreme court in the case of *City of Corpus Christi v. Woessner*, 58 Tex. 462. See *Biddle v. City of Terrell*, supra; *City of Terrell v. Dessaint*, supra; *Bell v. Live Stock Co.* (Tex.) 11 S. W. 344.

2. Counsel for the plaintiff further contends that if the express contract of the parties be held void the plaintiff should, nevertheless, be entitled to recover from the city the value of the bridge, as upon an implied contract. The court is unable to appreciate the force of this argument. The provisions of the constitution above referred to apply equally to express and implied contracts. Whether the contract be of the one character or the other, the city must provide for the interest and sinking fund to meet the debt at maturity, in the manner indicated by the constitution. Whether the agreement between the parties be express or implied, it is nevertheless a contract, and the city is prohibited from creating a debt evidenced by such contract, unless the method pointed out by the constitution is pursued. See *City of Bryan v. Page*, 51 Tex. 532. In the case last cited, at page 535, it is said by the supreme court of this state (Justice Gould delivering the opinion) that "the law never implies an obligation to do that which it forbids the party to agree to do." The pleadings in this case show that the plaintiff has constructed a bridge, which the defendant is now using and enjoying, and for which, upon principles of fair dealing, the plaintiff should be paid. But that aspect of the case cannot be considered by the court; and it may be here remarked, as was said by the supreme court in the case of *Buchanan v. Litchfield*, 102 U. S. 293:

"Our attention is called by counsel to the exceeding hardship of this case upon those whose money, it is alleged, has supplied the city of Litchfield with a system of waterworks, the benefits of which are daily enjoyed by its inhabitants. The defense is characterized as fraudulent and dishonest. Waiving all considerations of the case in its moral aspects, it is only necessary to say that the settled principles of law cannot, with safety to the public, be disregarded in order to remedy the hardships of special cases."

In accordance with the foregoing views, the general demurrer of the defendant, and its third, fourth, and sixth special exceptions, are sustained, and its first and second special exceptions are overruled. The defendant's fifth special exception is also overruled, because it does not appear from the petition that plaintiff seeks to recover and remove the bridge. Looking to the answer of defendant, it presents no defense to the suit, and without discussion the general demurrer and special exceptions of the plaintiff interposed to the answer will be sustained.

Ordered accordingly.

LYMAN v. NORTHERN PAC. ELEVATOR CO. (CULLIFORD, Intervenor).

(Circuit Court, D. Minnesota. August 29, 1894.)

CONTRACTS OF CORPORATION—CONSTRUCTION.

An agreement under which the stockholders loan money to a corporation, which provides that each shall loan his pro rata share of \$275,235 which the number of his shares bears to the total amount of shares, and that the company's notes, at 12 months, shall be issued for the loan, payable out of the first net earnings, limits the company's liability on the notes to the net earnings; and, where there are none, the stockholders, or those to whom they have indorsed the notes, cannot recover thereon from the company.

Action by David B. Lyman against the Northern Pacific Elevator Company. Thomas Culliford, holder of a note executed by defendant, intervenes, claiming the right to be placed on the footing of a general creditor, and as such to be entitled to share in future dividends. Claim disallowed.

John B. Sanborn, for intervenor.

Davis, Kellogg & Severance, for defendant Northern Pac. Elevator Co. and for M. J. Forbes, Receiver.

WILLIAMS, District Judge. This cause has been heard upon a motion by the intervenor for judgment upon the petition of intervention and answer. The following facts appear:

On or about August 15, 1890, the Northern Pacific Elevator Company was a corporation created under and by virtue of the laws of the state of Minnesota, owning a line of elevators through the states of Minnesota, North Dakota, Idaho, Washington, and Oregon; and being in need of money to carry on its business, and owing a large amount of money, the stockholders of the company made and entered into an agreement with each other whereby they subscribed for a loan to said company for \$275,235, pro rata, according to the number of shares held by each, and signed an agreement, agreeing to take the company's note at 12 months, bearing 7 per cent. interest per annum. The agreement was in the following words and figures.

"Minneapolis, August 15th, 1890.

"The undersigned stockholders in the Northern Pacific Elevator Company hereby each agree to loan to said company our pro rata share of the sum of two hundred and seventy-five thousand two hundred and thirty-five dollars, which the number of shares held by each bears to the total number held by the signers thereof. The company's note, at twelve months, with interest at seven per cent. per annum, shall be issued for the loan, and paid out of the first net earnings of the company before dividend. Owners of ten thousand shares to subscribe to make this binding."

The said agreement was signed by all the stockholders making said loan, exceeding 10,000 shares. One of the stockholders so signing said agreement was L. Fletcher, and he received the company's note therefor, which was renewed, and which said original note and renewal note read as follows:

"1,996.74.

Minneapolis, Minn., Sept. 1st, 1892.

"One year after date, we promise to pay to the order of L. Fletcher nineteen hundred and ninety-six 74/100 dollars at our office in Minneapolis, Min-

nesota, in accordance with the terms of his subscription to the loan of Aug. 15, 1890, with interest at the rate of 7%, payable semiannually.

"[Signed]

Northern Pacific Elevator Company,

"By C. H. Graves, President."

The intervenor is the immediate indorsee of Fletcher.

It further appears that the company is insolvent, that there have been no net earnings, and that the debts exceed the property by several hundred thousand dollars. On this state of facts, I think the intervenor cannot recover.

At the date of the agreement of August 15, 1890, and of the note of which the one under present consideration is a renewal, the corporation, if not actually insolvent, was largely indebted, to liquidate which debts the need to raise money was imperative. Each stockholder, under the constitution of the state of Minnesota (article 10, § 3), was, as to this debt, liable to the amount of the stock held or owned by him. Accordingly, the stockholders and the corporation adopted the method of raising money above stated. In doing this they entered into the agreement of August 15, 1890, by which each one of the many stockholders signing that agreement agreed to take and cash the note of the company for an amount proportionate to the share of each stockholder in the corporation. The company was not in condition to pay this debt, and it is manifest that the stockholders wished to avoid being called upon for contribution in a summary manner. Accordingly, it was provided in the said agreement, to which the note under consideration, by its terms, refers, that the note should be paid out of the first net earnings of the company before dividend, and that owners of 10,000 shares should subscribe to make the agreement binding. The effect of this agreement was that even the net earnings could not be subjected to the payment of this liability for the period of one year after the date of the note. It is clear that the present petitioner, who is an immediate indorsee of the stockholder Fletcher, the payee of the note, is in no better position to assert this claim than Mr. Fletcher himself. I think it is very clear from the agreement and note, which must be read as one paper, that there is no liability of the company upon this note, except out of the net earnings, and that if net earnings have not been made it cannot be contended that the company is liable for the face of the note as absolutely as if there was no provision, either in the note or contract of August 15, 1890, respecting payment out of net earnings. Certainly, the clause was inserted for some purpose,—either to limit the liability or add to the security of the stockholder. It certainly does not add to his security, for, if no provision had been inserted when the note became due, not only the net earnings, but all the company's property, could have been applied to the payment of the note. It therefore limited the company's liability to the net earnings. If it was intended as a pledge of the net earnings as security, such language would have been used in the contract, but the contract does not provide that the net earnings are pledged as security, but rather limits the payment to the net earnings. The entire assets of this corporation are in the hands of a receiver of this court for distribution among creditors. Certain distributions have been made. The first was to per-

sons claiming that they had actual wheat in the elevators at the time when the receiver was appointed. The claim was conceded to these persons, and a distribution made to them. There was another distribution as to a certain number of alleged lien holders. Now, in the present case, the petitioner, who stands in the position of a stockholder, and is the assignee of a stockholder, appears with the note and contract under present consideration, which, as I have observed, constitute one agreement, and which were executed, given, and received for the purpose of raising money from the stockholders in order to clear off an indebtedness upon which each one of the stockholders would have been liable to pay under his obligation as a stockholder of the company, and which papers contain a provision that the payment shall be made out of a certain fund, which might or might not thereafter exist, and claims that he has a right to be put upon the footing of a general creditor, and as such entitled to share in future dividends. I think not. The very terms of the agreement are against this construction. I cannot allow this claim to participate in the distribution of the assets.

HENDRICK v. EMPLOYERS' LIABILITY ASSUR. CORP.

(Circuit Court, E. D. Missouri, N. D. June 2, 1894.)

ACCIDENT INSURANCE—PASSENGER IN PUBLIC CONVEYANCE.

One insured by an accident policy "as a passenger in a public conveyance provided by a common carrier," after he had alighted from a railroad train, at a station from which he intended to continue his journey by a later train, attempted to speak to the engineer about a matter having no connection with the continuance of his journey, or his condition as a passenger, and, while crossing the platform of a car, fell therefrom, and was injured. *Held*, that he could not recover on the policy for his injuries.

This was an action by James M. Hendrick against the Employers' Liability Assurance Corporation on an insurance policy.

This was an action brought upon a policy of accident insurance issued September 21, 1893, the material portion of which is as follows: "For and in consideration of a premium of \$1.00, this policy hereby insures James M. Hendrick, of Louisiana, Missouri, for the under-mentioned benefits, and always subject to the conditions on the back thereof (which are made a part of this contract), from one o'clock a. m. on September 21, 1893, as a passenger in a public conveyance provided by a common carrier within the limits of the United States or dominion of Canada, and also insures within the limits of the city of Chicago, Illinois, during the progress of the World's Fair. This insurance shall cease when the insured shall have returned to his residence, but shall in no event extend beyond a period of seven days (expiring at one o'clock a. m.) from date of register above. Benefits: \$3,000 at death, or for the loss or actual separation of two entire feet, or two entire hands, or one entire foot and one entire hand, or of the complete and irretrievable loss of the sight of both eyes; \$1,500 for loss, by actual separation, of one entire hand or one entire foot."

The facts in the case were undisputed, and were as follows: The plaintiff purchased the two accident policies on September 21, 1893, at that time residing in Bowling Green, Mo. On September 23, 1893, he started from Bowling Green, Mo., intending to go to Chicago, for the purpose of attending the World's Fair. He had passes over the Chicago & Alton Railroad from Louisiana, Mo., to Chicago, and had left them at the hotel at Louisiana, Mo. He started from Bowling Green late on the night of September 23d, and arrived at Louisiana,

Mo., about 2 o'clock on the morning of the 24th. The plaintiff paid his fare from Bowling Green to Louisiana. When the train reached Louisiana, the plaintiff got off the train, for the purpose of going to his hotel and getting his passes, and continuing his journey to Chicago at 3 o'clock in the afternoon of the same day. After alighting upon the platform, the plaintiff, who had just resigned his position as locomotive fireman for the Chicago & Alton Railroad Company, started forward, towards the head end of the train, for the purpose of seeing the engineer, and advising him that he had left the service of the railroad company, and that some other person—a mutual friend—could now apply for the position made vacant by his resignation. The track upon which the train was standing ran east and west, the engine being to the east. The plaintiff had gotten off on the north or left-hand side of the train, and, as he started forward towards the engine, he was prevented from reaching the engine upon that side of the train by a large truck load of baggage, which stood in his way, and prevented him from getting by. He thereupon crossed over to the south or right-hand side of the train, passing over the platform of the smoking car. Plaintiff then started forward, towards the engine, but, when within a few feet of the tender, the bell upon the engine began to ring, indicating that the train was about to start. Seeing that he would be unable to have a conference with the engineer before the train should start, he retraced his steps to the west end of the baggage car, and there started to cross over the platform of that car. After he had gotten upon the steps of the platform, he stumbled upon a large box which was lying upon the platform of the baggage car, and fell backwards. In falling, his foot became entangled in a rope attached to the box, and he was dragged quite a distance, and the wheels of the train passed over his left arm, necessitating its amputation.

Fagg & Ball and Geo. A. Mahan, for plaintiff.

Lathrop, Morrow, Fox & Moore, for defendant.

WILLIAMS, District Judge (charging the jury). It is a question, under this complaint and the testimony, as to whether the court shall instruct the jury peremptorily to find for the plaintiff or for the defendant.

The rights of the plaintiff under an accident policy of this kind should be liberally construed in favor of his recovery. That is the settled policy of the law, where he has purchased an accident policy, and relied upon it, that, if he is injured, and seeks redress at the hands of the court, as against the issuers of the accident ticket or policy, it should be liberally construed in favor of his recovery. The testimony in this case is simply the testimony offered by the plaintiff himself. The policy undertakes to pay him a certain amount in case of an accident he receives as a passenger upon any railroad or other public carrier. It says "vehicles," but upon the line of any public carrier. The testimony of the plaintiff himself shows that he got on a train at Bowling Green, and paid his fare to the city of Louisiana; that he got off at Louisiana, for the purpose of going to his boarding place and stopping there until 3 o'clock the next day, and take that train for the city of Chicago. He says there was no other train that he could take until 3 o'clock the next day. That was his intention. He arrived in Louisiana during the night some time. Now, if he had been injured while doing anything incident to his journey from Bowling Green to Chicago, the court would instruct the jury to find a verdict in favor of plaintiff. I will go further, and say that, if he was injured after getting off from the cars at Louisiana, and going up to his boarding place

to get his transportation, I would hold that to be a continuance of his journey; that is, that the accident was received while doing something to continue his journey as a passenger. That, however, would be an extreme view of it in favor of the plaintiff. But the testimony here shows that he had gotten off the train safely, without harm to himself, and that this injury was received while doing something in no manner connected with his journey to Chicago, or in any manner connected with the condition of a passenger. He himself says that he got off the train, and that it was his intention to stay there until 3 o'clock the next day, and that he went down the platform on the north side to interview the fireman or engineer about something entirely disconnected with the relation of a passenger,—to tell them that he had quit the road, that they might notify some friend of his that he might apply for his situation. It had nothing to do at all with the continuance of his journey, or with his position as a passenger. While doing this he did a very dangerous thing,—in the nighttime, passed over the platform of the train, and got upon the other side, and heard the bell ring, giving the signal to start. Now, he said he could not see the engineer, and he got on the platform again to cross over; train liable to start at any moment. But even if he had done that while pursuing the idea of being a passenger, and in the relation of a passenger to the common carrier, I think the ticket would provide even for that kind of an accident. But this company had a right to limit their liability to the relation of a passenger upon a common carrier. The view of the court is that he had clearly ceased to be a passenger when this injury occurred. He had got to the end of his journey. By the very charge of Judge Drummond, in the case cited by plaintiff, it is unquestionable, if Judge Drummond had found the testimony, as in this case, clearly showing that that man had arrived at the end of the journey, the charge would have been to find for the defendant; but he said: "It is not clear, and it is for the jury to say, whether he had arrived at the end of his journey or not." "If you find he had not arrived at the end of his journey," he says, "then the liability continues." "He had a right to get off." A man is not obliged to stay upon the cars at every station. He may want to get off, for various reasons incident to his passengership, but, after arriving at the end of his journey, and getting off upon the platform, if he is injured in the doing of something that is not at all incident to his journey, then the liability ceases. The testimony is unquestioned that this injury was received after he arrived at the end of his journey at Louisiana, and while doing something that was not at all connected with the idea of his being a passenger upon any common carrier. He says himself that he was doing something else.

The instruction of the court to the jury is that the defendant is entitled to a verdict upon this testimony, and it is so ordered.

GRAHAM v. CHICAGO, ST. P. & O. RY. CO.

(Circuit Court, D. Minnesota, Second Division. Sept. 4, 1894.)

INJURY TO RAILROAD EMPLOYEE—NEGLIGENCE.

The failure of a railroad company to securely fasten the ends of a car which are on hinges, so as to allow the car to be used as a flat car by dropping the ends inward, is not negligence, so as to render the company liable to a brakeman who, in getting off the car, is thrown beneath the wheels by reason of the end falling in, he having used it as a support.

Action by Hall I. Graham against the Chicago, St. Paul, Minneapolis & Omaha Railway Company. There was a verdict for plaintiff, and defendant moved for a new trial. Granted.

Motion by defendant for new trial. The plaintiff, a brakeman in the service of the defendant company for more than six years, suffered personal injuries on February 25, 1892, in attempting to alight from a coal car. He was precipitated under the moving cars, and his right arm badly crushed, necessitating amputation. It was the duty of the plaintiff to aid in distributing freight cars and making up a mixed train at Kasota Junction, on defendant's road, in this district. There was a grade at or near the station at this junction, and a part of plaintiff's duty was to mount moving cars coming down this grade, and set the brakes to stop them, so they would not run into and injure stationary cars farther down on the track. In pursuance of his duty, the plaintiff had mounted a string of moving cars, and, in alighting from a coal car in this string, was injured. This car was called a "Gondola," which usually has hand holds at each end, to aid brakemen in ascending and descending therefrom, and also end gates or end boards hinged to the floor of the car, and so made that they could be fastened upright or perpendicular to the floor by hooks and staples, or laid down inward on the floor. In attempting to alight from this car, the plaintiff took hold of the top of one of the end gates, which was upright, and, as he gave a spring to jump off, it fell inward, and he was thrown with his arm on the track. On the trial, the jury found a verdict for the plaintiff. A motion is now made for a new trial, for errors apparent on the record.

Henry A. Morgan and John A. Lovely, for plaintiff.

Thomas Wilson, Lorin Cray, and S. L. Perrin, for defendant.

NELSON, District Judge. This gondola car was constructed with reference to carrying coal and bulky articles and lumber. It was not out of repair or improperly constructed. The injury to the plaintiff did not result from the want of a hand hold on the car, for the plaintiff admits that he knew there was none on the car before he made the attempt to alight. The car was adapted to the purposes for which it was designed. The end gates or boards were made adjustable, so that the car would carry coal or other material when the end gates were upright, and could be used as a flat car when the gates were down. For such purposes this car was built and could be safely used, though it might be unsafe for a brakeman to rely upon an end gate when upright as a support in alighting from the car when in motion. The only alleged negligence of the defendant urged is the failure to have the end gate securely fastened, so as to allow the plaintiff to safely use it when he attempted to alight from the car. The duty of the defendant company to keep these end gates, when upright, fixed securely with special reference to their use by a brakeman in alighting from the

car, does not appear. On the trial, the court left it to the jury to determine whether or not the defendant company, at the time of the injury, had failed to perform a duty it owed the plaintiff in connection with the end gates. I am satisfied this was error, and, on the record as it stood, the motion made to instruct the jury to return a verdict for the defendant should have been granted. Being of this opinion, the motion for a new trial is granted; costs to abide the final judgment.

HEMINGWAY MANUF'G CO. v. COUNCIL BLUFFS CANNING CO.

(Circuit Court, S. D. Iowa, C. D. May 11, 1893.)

DAMAGES—EXECUTORY CONTRACT OF SALE—BREACH BY PURCHASER.

Defendant ordered of plaintiff two machines, which plaintiff had to manufacture, and for which defendant was to pay the usual price, which did not change after the order was given. Before the machines were made, defendant countermanded the order; but plaintiff made and tendered the machines, which were of the usual make, and not specially designed, and defendant refused to receive them. The machines were covered by a patent owned by plaintiff, but there were other machines used for the same purpose. *Held*, that plaintiff was entitled to nominal damages only for the breach of the contract.

This was an action by the Hemingway Manufacturing Company against the Council Bluffs Canning Company to recover damages for breach of a contract of sale of machines by plaintiff to defendant.

Finding of Facts.

The above case having been submitted to the court, a jury being waived, the court makes the following findings of facts:

(1) The plaintiff was, when this suit was brought, and is now, a corporation created under the laws of the state of New York, and the defendant was, when the suit was brought, and is now, a corporation created under the laws of the state of Iowa.

(2) That on the 21st day of April, 1888, the plaintiff and defendant entered into a contract in writing at Chicago, Ill., which is worded as follows:

"Hemingway Manufacturing Co., Patentees and Manufacturers of Corn Cookers and Special Machinery for Cannery Use. Syracuse, N. Y.

"Memorandum of agreement made this 21st day of April, A. D. 1888, by and between the Hemingway Company, a body corporate, organized under the laws of the state of New York, with its principal business office at Syracuse, New York, party of the first part, and Council Bluffs Canning Co., of Council Bluffs, Iowa, party of the second part, witnesseth, that on this 21st day of April, 1888, the said party of the first part agrees to sell to the said party of the second part, delivered on cars at Syracuse, N. Y., six No. 2 patent corn cookers, manufactured by said party of the first part, and the said party of the second part agrees to purchase the said number 2 cookers, and to pay for the same the sum of three thousand dollars, as follows: Net cash upon delivery of railroad receipt showing shipment of same. There is also to be furnished with said cookers, by parties of first part, six of Huston and Dale automatic feeders, free of charge to parties of second part, with the exceptions of freight charges from Beatrice, Neb., to point of delivery.

Council Bluffs Canning Co.

"D. W. Archer, Sec'y.

"Hemingway Mfg. Co.

"H. C. Hemingway, Manager.

"[Indorsed] D. W. Archer, Council Bluffs, Iowa.

"Council Bluffs Canning Co., Council Bluffs, Iowa.

"June 15, 1888, — ready to ship."

(3) That on April 23, 1888, the plaintiff company, at Syracuse, N. Y., placed orders with third parties for the manufacture and delivery to plaintiff of the several parts composing six No. 2 corn cookers, of the description called for in said contracts, and on the same date sent an order to Huston & Dale, at Beatrice, Neb., for six automatic feeders, as called for in said contract.

(4) That it was the custom of the plaintiff company, in filling contracts for the sale of the corn cookers, to cause the several parts of the cookers to be made by third parties, and to be delivered to the plaintiff company, the same being put together in working order by plaintiff.

(5) That on April 25, 1888, the defendant company, through D. W. Archer, its secretary, sent to the plaintiff company, at Syracuse, N. Y., the following telegram, which was received on the day of its date by plaintiff:

"Chicago, Ill., April 25, 1888.

"To Hemingway & Company, Syracuse, New York: Don't order corn cookers made until you hear from us." See letter. D. W. Archer."

And on the same day the following letter was written to the plaintiff company, and received in due course of mail:

"Ex. B.

(Copy.)

Ex. No. 2.

"Chicago, Ill., Apl. 25, 1888.

"Mess. Hemingway & Co., Syracuse, N. Y.—Dear Sirs: Have wired you: 'Don't order corn cookers made until you hear from us. See letter.' This I now confirm. I have not heard from M. & S. since seeing your Mr. H. last Saturday, and do not know what they (M. & S.) will actually do; but your Mr. H. and I both agreed last Saturday, before the order was placed with you, that they would not ship, but cancel the order, as I had notified them in due time. I trust, in a very few days, to notify you that we have had the matter cleared up. If M. & S. force the machines on us, you will have to cancel the order for (10) ten steamers.

"Yours, truly,

D. W. Archer, Sec'y.

"Address, c/o Council Bluffs, Iowa."

(6) That on May 2 and May 14, 1888, the defendant wrote letters to the plaintiff, affirming that it would not receive the machines ordered.

(7) That the plaintiff company proceeded with the manufacture of the machines, and within a reasonable time, to wit, on June 4, 1888, notified the defendant that the machines were ready for shipment, and in reply the defendant refused to accept the same.

(8) The usual price at which the plaintiff company sold No. 2 corn cookers, with feeder attached, in April, 1888, was \$500 for each machine. The actual cost of manufacture was \$135 for each cooker and \$30 for each feeder. It does not appear that there has since been any change in the price or salability of the feeder and cooker.

(9) The plaintiff company still has in its possession the machines and feeders, having made no efforts to sell the same.

(10) The cookers and feeders were not specially designed for the building or use of the defendant, but are of the usual make for sale to purchase at bay.

Harl & McCabe, for plaintiff.

Wright & Baldwin, for defendant.

SHIRAS, District Judge (after stating the facts). It clearly appears from the evidence in this case that when the written contract for the sale of the corn cookers and feeders was entered into, on the 21st of April, 1888, the machines were not in existence, and were not ready for delivery. The contract, therefore, was an executory one, having relation to articles to be thereafter manufactured by the plaintiff company; and the title thereto, during the process of manufacturing, remained in the plaintiff, and has not since been trans-

ferred to the defendant. It no less clearly appears that there has been a breach of contract on part of the defendant company, in that on the 25th of April, 1888, it notified the plaintiff that it would not receive the machines, as it had contracted to do, nor pay for the same. The only question in dispute between the parties is as to the rule of damages applicable to the case. When notified, on the 25th of April, that the defendant company would not fulfill the contract on its part, it was open to the plaintiff to countermand the orders it had given for the manufacture of the separate parts of the machine, and the costs and expense resulting therefrom would have been recoverable against the defendant. Instead of so doing, the plaintiff completed the manufacture of the machines. When completed, the defendant still refused to receive them, and the machines remained in the possession of the plaintiff. The title and possession of the property are therefore in the plaintiff, never in fact having passed to the defendant, and the only question in dispute is as to the damages recoverable under these circumstances.

The usual rule in regard to executory contracts is that a vendor who retains the property is entitled to the difference between the contract price and the market value of the articles. It does not appear from the evidence that there has been any change in the price at which the manufactured articles are sold in the market by the plaintiff since the 21st of April, 1888; and, as the burden is on the plaintiff to prove the damage sustained, the court cannot assume that the property has at any time since April, 1888, been of any value less than the contract price, which the evidence shows was the usual price for which the plaintiff company sold the articles in question. If this case, therefore, is governed by the usual rule applicable to executory contracts, where the title and possession of the property never passed from the vendor, it must follow that all the plaintiff can recover is merely nominal damages. It is, however, urged on behalf of the plaintiff that the facts of this case are peculiar, and take the same out of the reason of the ordinary rule, which is based upon the assumption that the property can be sold in the market for its value, and therefore the vendor can in this way protect himself from loss up to the salable value of the property, and is only damaged by the failure of the vendors to the extent of the difference, if any, between the market value and the contract price. It is sought to except this case from the general rule upon the theory that, as the articles agreed to be sold are covered by a patent owned by the plaintiff company, all purchasers thereof must buy from the plaintiff, thereby giving it the profit upon each sale made, and, if the plaintiff is required to sell the article made for defendant, it would thereby be deprived of the profit of the sale which it could make to the second buyer of another set of the patented articles. Although there is much plausibility in the position taken, it would have more force if it were true that the only corn cookers in use in the canning of corn were the kind made by the plaintiff company. There are, however, other machines used for the same purpose, and it cannot be certainly known whether the person who might wish to purchase such machines, if he did not buy those manufactured for the defendant

company, would purchase a set of the plaintiff's manufacture, or a set of a rival in the trade. Furthermore, if the defendant should be compelled to pay the contract price for the machines, then the same would rightfully become the property of defendant, and in that event the latter company would then have the right to sell these machines to any third party, and the plaintiff could not object thereto on the ground that by such sale it would lose the profit it might have made by an independent sale to such third party. As the plaintiff could not deprive the defendant of the right to resell the machines if they became the property of the defendant by the payment of the purchase price, it cannot rightfully refuse to account for the market value of the articles, when the title and the possession thereof remain in it, and hence there is nothing in the facts of the case which takes it out of the general rule already stated. The facts of the case show a breach of contract on part of the defendant, but fail to show any actual damages, beyond a nominal amount, and the judgment will therefore be for the plaintiff for the sum of one dollar, without costs.

NICKERSON v. BIGELOW.

(District Court, E. D. Wisconsin. August 7, 1894.)

WRONGFUL DEATH—MEASURE OF DAMAGES.

Four thousand dollars, allowed as the pecuniary value to wife and children of the life of an able seaman, 26 years of age, sober, industrious, and of good physique, whose yearly earnings applicable to their benefit amounted to about \$300.

This was a libel by Harold W. Nickerson, administrator of the estate of Erik Anderson, to recover damages for death caused by collision.

Frank M. Hoyt, for libelant.

C. E. Kremer, for respondent.

SEAMAN, District Judge. This is a libel to recover for the death of Erik Anderson, alleged to have been caused by the negligence of respondent's steamer Robert Holland, having two barges in tow, and colliding with the schooner William Aldrich, November 1, 1891, off Pilot island, on Lake Michigan. The question of liability must be treated as ruled by the decision of this court in *Poppe v. Bigelow* (*The Robert Holland and The Parana*) 59 Fed. 200, for the present consideration. The only matter for determination is, therefore, the amount of damages; the death of Erik Anderson appearing, at least presumptively, while serving on board the schooner William Aldrich. The statute of Wisconsin, which applies here, limits the amount of recovery where death ensues to \$5,000. The allowance must be based entirely upon the showing of pecuniary loss suffered by the wife and children in their deprivation of the fruits of his labor and services by his untimely death. No consideration of sympathy or sentiment can enter in. It demands a sober judgment of the productive value of a life. There are no certain standards

for any case, and there are many contingencies upon productive life which do not enter into the standard tables of life expectancy. The fact that a statute limits all recoveries to a minimum amount should not be regarded as instituting any comparative estimate of the value of lives, but only as a limitation for all cases.

The testimony shows that the deceased was 26 years of age, was an able seaman on the Aldrich, and had sailed about 9 or 10 years. He was sober, industrious, and of good physique; but there is no showing to warrant a presumption, if any could be indulged, of increase of earning capacity. I think it satisfactorily appears that his gross earnings for a sailing season were about \$300; and he worked in the winter season (in shipyards and other employments) and probably earned sufficient to cover any further personal expenses; so that nearly \$300 remained at the end of the year for the benefit of the family. At his age and in his calling this rate may fairly be accepted as a criterion. For the libelant it is claimed that the full allowance of \$5,000 should be adjudged upon this proof, because interest upon that sum would produce \$300 at 6 per cent. per annum. This would not be a fair estimation, as the principal sum would remain for benefit after the termination of any life expectancy; the consideration should rather be of the probable value of an annuity charge to produce that income for the term of expectancy. There is difficulty in the application of life tables to this view; but I conclude, taking into account all the circumstances here shown, that an allowance of \$4,000 would be just and reasonable; and judgment for the libelants will be entered for that amount, with costs.

GOTTSCHALK CO. v. DISTILLING & CATTLE-FEEDING CO.

(Circuit Court, D. Illinois. April 24, 1894.)

1. SALE—AGREEMENT FOR REBATE—BREACH.

Where defendant sold liquors to plaintiff for more than its market value, agreeing to return part of the excess to plaintiff at the end of the six months if it appeared that plaintiff had made purchases from no one else, the fact that one of plaintiff's agents, accidentally, without plaintiff's knowledge, and without intention to violate the understanding of the parties, made a purchase from another person, will not prevent recovery by plaintiff of such excess.

2. SAME—FURNISHING PROOFS.

Nor will plaintiff be prevented from recovering by reason of failure to furnish a form, as stipulated with defendant, showing all the sales made by plaintiff, and to whom made, where he furnishes all the data necessary to enable defendant to ascertain if plaintiff had sold any goods other than those he had purchased of defendant.

Action by the Gottschalk Company against the Distilling & Cattle-Feeding Company. Judgment for plaintiff.

H. B. Stevens, for plaintiff.

Green & Robbins, for defendant.

GROSSCUP, District Judge (orally). The action in this case is to recover from the Distilling & Cattle-Feeding Company something

over \$35,000, said to be the money of the plaintiff, and unlawfully and wrongfully withheld from the plaintiff by the defendant. The testimony shows that the method of doing business of the defendant was something like this: It would appoint wholesale liquor dealers throughout the country as its ostensible agents. It would then sell to these supposed agents the products of the defendant at a price seven cents per proof gallon above the prevailing market price. This seven cents thus taken from the liquor dealers would be held in the treasury of the defendant until the expiration of six months. If it then appeared that the liquor dealer had not made purchases from any other source than from the defendant, there would be refunded to him two cents per proof gallon of the money remaining in the hands of the defendant. The liquor dealer, in turn, selling to his customers, would issue to them vouchers, and at the expiration of six months each customer could present this voucher to the distilling company, and, if accompanied by proof that the customer, whether he be a wholesale or retail dealer, had not purchased any goods except from the so-called agents of the distilling company, such customer would be entitled to receive five cents per proof gallon from the distilling company. The scheme is a very ingenious one, and was gotten up for the purpose of compelling the liquor trade to buy all its product from the Distilling & Cattle-Feeding Company.

One of the questions presented on the trial of the case was whether the method was legal. The argument was made that it was a simple rebate, such as railroads and other corporations had been in the habit of taking, and such as had been sanctioned by the courts. I do not regard it as a simple rebate. If the defendant had sold its product to the trade at the market price of such product through the country, and had then agreed with one of its consumers to discount or rebate from that market price a certain percentage on account of continued patronage, or for any other reason, such would be distinctly a rebate; but the defendant in this case exacted seven cents above the market price, and only agreed to return this amount thus exacted by it beyond the market price of the product on condition that the customer continue to buy all of his product from the defendant. It is not so much a rebate as a hostage that the customer will not go into any other market to purchase the product. Whether that is a restraint on trade which the law, in deference to public policy, will permit, it is not necessary, in this case, to pass upon. I have very great doubt, however, if the case were dependent on that question, whether I could find that such were a legal method of transacting business. It seems to be devised on the lines of a general agency, the distilling company being the principal, and all its customers being its agents, carrying its scheme along those lines with great plausibility, but escaping from all the obligations or relations which agency imposes upon parties; and in the end its practical effect is simply the taking of a hostage from the customer that he will buy from the defendant only, and to that extent is restraint on trade. But it is not necessary, in this case, to pass on that question.

The plaintiff in this case purchased a great quantity of goods from the defendant, and received back a certain amount of so-called rebates, until a time when the defendant refused to return any further rebates. The excuse of the defendant is, first, that the plaintiff purchased a car load of spirits from some other party than this defendant. The evidence does not disclose that such a purchase was made purposely. It was accidental on the part of one of the agents of the plaintiff, and the plaintiff itself had no knowledge of it. It was not done with any intention to deceive the defendant, or to break or in any way trench upon the understanding between them. I do not think it furnishes the ground for a forfeiture of the plaintiff's money the defendant had in his hands at that time.

The other breach alleged is that the plaintiff refused to deliver to the defendant a collector's form, known as "Form 52," whereby the defendant might be enabled to ascertain if the plaintiff had sold more to the retail trade than they had reported to the defendant. The object of that requirement, in the arrangement between them, was to enable the defendant to always check up the sales of the plaintiff, and in that way ascertain whether the plaintiff was buying any goods in any other quarter than from the defendant. The proof shows that the plaintiff offered an abstract of this form,—all the data that was necessary to enable the defendant to ascertain if the plaintiff had sold any goods other than those purchased from the defendant,—but the defendant insisted upon looking at the form itself. The form disclosed, not only the amount of goods sold by the plaintiff, which was the sole object of the requirement, but the names of the customers of the plaintiff, the places they were located, and the amount of goods that each had purchased. The form would have put into the hands of the defendant every business detail of the plaintiff's business, and thus enabled the defendant, in case it broke off relations with the plaintiff,—a thing which it could do under the arrangement at any time, and a thing that was even then the talk between the parties,—to go into the field of the plaintiff, knowing exactly all the details necessary to invade the plaintiff's territory. I do not think that the spirit of the agreement between the parties contemplated that the defendant should have any such advantage,—any such power over the plaintiff's business. It seems unfair and intolerable, as long as the plaintiff was ready to furnish to the defendant all the details that were necessary to enable the defendant to check up the plaintiff's sales. So long as that was complied with upon the part of the plaintiff, any further demand was, in my judgment, beyond the spirit, and therefore not in violation, of the agreement between the parties.

These being the only two reasons upon which the defendant refused to deliver up to the plaintiff the amount of money in its hands,—that money being clearly the money of the plaintiff, subject only to be forfeited in case the plaintiff should buy goods from any other source,—the plaintiff is entitled to recover back that money, and the finding of facts will be that the plaintiff in this case is entitled to recover of the defendant. Judgment accordingly.

HARTFORD FIRE INS. CO. et al. v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court, N. D. Iowa, Cedar Rapids Division. September 11, 1894.)

1. LEASES—EXEMPTIONS OF LESSOR FOR NEGLIGENCE—STATE DECISION—RULE OF PROPERTY.

The provision in a lease that the lessor shall not be liable for destruction, through his negligence, of the building on the leased land, does not affect title to real estate; and therefore the question as to its validity is not within the rule that decisions of state courts constituting a rule of property will be followed by the federal courts.

2. RAILROAD COMPANIES — LEASES — QUESTIONS AFFECTING INTERSTATE COMMERCE.

The facts that a lease exempting the lessor from liability for destruction of the buildings on the leased land is of part of a railroad company's depot grounds, and that it is to be used for a cold-storage warehouse, do not render the question of the validity of the exemption one affecting interstate commerce,—a matter of federal control.

3. SAME—LIABILITY FOR FIRES—STATE CONTROL.

Defining the extent of the liability of railroad companies for destruction of property by fires in the operation of the road is within the control of the state; therefore a federal court will hold valid the exemption in a lease of the lessor, a railroad, for the burning of the buildings on the leased property, through the negligence of the road, it not being against the public policy of the state.

4. PUBLIC POLICY—CHANGE—EFFECT ON CONTRACTS.

If at the time a court determines the validity of an exemption in a lease of the lessor from liability for destruction, through his negligence, of buildings on the leased land, such exemption is not against the public policy of the state, it is of no consequence what the public policy was at the time the lease was executed, as a change would not impair the obligation of contracts, but merely affect the remedy.

Action by the Hartford Fire Insurance Company and others against the Chicago, Milwaukee & St. Paul Railway Company. Plaintiffs demur to the answer. Demurrer overruled.

Herrick & Hicks, C. A. Clark, and R. W. Barger, for plaintiffs.
Mills & Keeler, for defendant.

SHIRAS, District Judge. The questions presented by the demurrer to the answer in this cause grow out of the following state of facts, as disclosed by the pleadings in the case: On the 1st day of February, 1890, the defendant railway company executed a lease, in writing, to the firm of Simpson, McIntire & Co., of a named portion of its depot grounds at Monticello, Jones county, Iowa, for the term of one year, with the right to erect and maintain on the leased premises a cold-storage warehouse, "and upon the express condition that the said railway company, its successors and assigns, shall be exempt and released, and said parties of the second part, for themselves and for their heirs, executors, administrators, and assigns, do hereby expressly release them, from all liability or damage by reason of any injury to or destruction of any building or buildings now on or which may hereafter be placed on said premises, or of the fixtures, appurtenances, or other personal property remaining inside or outside of said buildings, by fire occasioned or originated by sparks or burning coals from the locomotives, or from

any damage done by trains or cars running off the track, or from the carelessness or negligence of employes or agents of said railway company." Simpson, McIntire & Co., as authorized in this lease, erected a cold-storage warehouse on the leased premises, and continued in the occupation thereof until November 11, 1892, when the building and contents were destroyed by fire, which fire, it is averred in the petition, was due to the negligence of the company in moving and operating its trains. At the time of the fire, Simpson, McIntire & Co. held insurance policies in the plaintiff companies upon the warehouse and its contents, consisting of butter and eggs, upon which policies the companies paid to Simpson, McIntire & Co. the aggregate sum of \$27,118.88, which amount they now seek to recover, against the defendant railway company, as assignees of the rights of Simpson, McIntire & Co. As a defense to this claim, the railway company pleads the stipulation in the lease already cited, and the plaintiffs demur thereto, on the ground that the exemptions from liability sought to be secured by the conditions contained in the lease are void, because contrary to public policy. This demurrer was argued orally before me at the April term of this court, and it then appeared that a case involving the question at issue was pending before the supreme court of Iowa; that, upon the first hearing before that court, it had been held that such stipulations or conditions were void as against public policy, but, upon a rehearing and reargument, the court had held to the contrary, and had sustained the validity of the condition, stipulating for exemption from liability; and that a second petition for rehearing had been filed, and was then pending before that court. Under these circumstances, final action on the demurrer was postponed, awaiting the decision of the supreme court of Iowa. Since then the supreme court of Iowa has refused the petition for rehearing, thereby finally affirming the validity of an exemption from liability for fires negligently caused, such as is contained in the lease to Simpson, McIntire & Co. *Griswold v. Railroad Co.* (Iowa) 57 N. W. 843.

Counsel for the parties have now finally submitted the demurrer upon very full and able briefs. Upon behalf of the plaintiffs, it is strenuously argued that this court is not bound by the ruling of the state supreme court upon the question involved, but, on the contrary, that it is the duty of the court to exercise its independent judgment upon the question whether the condition contained in the lease is or is not valid. Counsel for plaintiffs have presented in their brief citations from a large number of cases decided by the supreme court of the United States, which iterate and reiterate the rule that the courts of the United States are not bound by the decisions of state courts upon questions of general law, or upon questions arising out of matters committed by the constitution to national control, or even upon the construction of state constitutions or statutes, when the question at issue is the effect of such constitutions and statutes upon pre-existing contracts. But it does not seem to me that these cases reach the real point at issue upon this demurrer. If the demurrer presented the legal question

whether a contract which was in substance contrary to public policy was enforceable in the courts of the country, and it should appear that the supreme court of Iowa had held, as a proposition of law, that the fact that the contract was contrary to public policy was not a bar to its enforcement through the aid of judicial process, this court would clearly not be bound by the decision of the state court. The effect upon the validity or enforceability of a contract, of the fact that its provisions are admittedly contrary to public policy, would be a question of general law, upon which this court must exercise its own judgment. In fact, however, this court and the supreme court of Iowa are in accord upon this question of general law, and in both forums it is held that a contract contrary to public policy is invalid.

The real question for consideration is, how shall it be determined whether the contract is or is not contrary to public policy? The subject-matter of the contract may be such that it affects the country at large, or it may be local in its nature. The nature of the subject-matter determines the source from which light must be sought upon the question of fact whether the provisions of a given contract are or are not contrary to public policy. In other words, there is a public policy of the nation, applicable to all matters wherein the people at large are interested, including those committed to the control of the national government, and coextensive with the boundaries of the union, and also a state public policy adapted to the circumstances of the locality embraced within the boundaries of the state, and applicable to all matters within state control. Thus, in *Greenhood on Public Policy*, it is said that any contract made by a competent party, upon valuable consideration, is valid, unless it binds the maker to do something opposed to the public policy of the state or nation. *Greenh. Pub. Pol. p. 1, rules 1 and 2.* In seeking to ascertain the requirements of the public policy of the nation, the principal sources of information are the constitution of the United States, the statutes enacted by congress, and the decisions of the courts, federal and state; and in case there should be a divergence in the views of the federal and state courts upon a question of national public policy, the conclusion reached in the federal courts must be accepted as the best evidence of what the requirements of the national public policy are. On the other hand, when seeking to determine the public policy of the state towards a subject within state control, the principal sources of information are the state constitution and statutes and the decisions of the courts, state and federal; and, in case of a divergence between them, the decisions of the state court must be accepted as the best evidence of the public policy of the state. *Vidal v. Girard's Ex'rs, 2 How. 127-197; Swan v. Swan, 21 Fed. 299.*

Thus, we are brought to the question whether the contract found in the lease to Simpson, McIntire & Co. deals with a subject-matter which falls within national or state control. On behalf of the defendant, it is argued that the lease and the stipulations therein contained create or convey a title to real estate, and thus form part of a subject-matter clearly within state control. I am not prepared

to go to this extent in construing the subject-matter of the contract between the parties. The lease, as a whole, creates and conveys a title to real estate; and, if the question at issue was one touching the title conveyed, it would come within the rule that the decisions of the state courts, which constitute a rule of property, will be accepted and followed by the federal courts. The lease, however, in addition to its clauses creating and conveying a leasehold interest to Simpson, McIntire & Co., contains other provisions constituting a contract, not affecting the title to the realty, but dealing with the question of the liability for fire accidentally or negligently set out or caused in the operation of the railway of the defendant,—a question apart from that of title to realty, wherein the decisions of the state court become a rule of property.

On behalf of plaintiffs it is argued that the conditions in the lease affect the question of interstate commerce,—a matter of national control,—because cold-storage warehouses, adjacent to railways and the depots thereof, are needed to protect produce, like butter, when being gathered for shipment out of the state. To a certain degree, interstate commerce is dependent upon the erection and maintenance of proper warehouses for the reception and storage of the products of the country, but the fact that such buildings are so used does not place them beyond the police power of the state. Thus, it is clearly within the power of the state to direct the character of the buildings that may be built for storage purposes. As a protection against fire, the state may enact that elevators, depots, warehouses, and the like shall be built of brick or iron, and not of wood; and the power of the state in this respect cannot be denied on the ground that such buildings are needed for and used in commerce between the states. Neither is there force in the suggestion that the conditions contained in the lease pertain to the duties and obligations resting upon common carriers engaged in interstate commerce. There is nothing in the pleadings which shows that the property burned was used in connection with interstate commerce; but, even if that was the fact, the conditions of the lease do not deal with the relations of common carriers and the public, nor did these relations exist between the defendant and Simpson, McIntire & Co. with regard to the property destroyed by the fire which consumed the warehouse and its contents. The stipulations in the lease, so far as they affect this case, deal only with the duty and obligation resting upon the defendant company growing out of the fact that the company, in its business, uses the dangerous agency of fire. The right to use the agencies of fire and steam in the movement of railway trains in Iowa is derived from the legislation of the state, and it certainly cannot be denied that it is for the state to determine what safeguards must be used to prevent the escape of fire, and to define the extent of the liability for fires resulting from the operation of trains by means of steam locomotives. This is a matter within state control. The legislation of the state determines the width of the right of way used by the companies. The state may require the companies to keep the right of way free from combustible material. It may require the depot and other buildings

used by the company to be of stone, brick, or other like material when built in cities or in close proximity to other buildings. The state, by legislation, may establish the extent of the liability of railway companies for damages resulting from fires caused in the operation of the roads. When providing for the acquisition or condemnation of the right of way, the state may declare the public uses to which the right of way may be subjected. Can there be any doubt that the state may empower the railway companies to contract with third parties for the erection of warehouses or elevators on the right of way, to be used for the reception and storage of grain and other products, preparatory to shipment upon the railway, and that the state can define the extent of the liability of the railway companies for damages resulting to such property from fires caused by the operation of trains upon the railway? These considerations, and others of like import which might be suggested, clearly show that it is a matter within state control to determine the extent of the liability for injury by fire resulting from the operation of railway trains under charters or authority granted by the state. Therefore, when the question arises whether a given contract, intended to define or limit the liability of a railway company with respect to injury resulting from fires, is valid or not, it must be solved by ascertaining what is the statute law or public policy of the state wherein the fire may have occurred. In the case now before the court, if the contract contained in the lease does not violate any of the provisions of the constitution of the state of Iowa, or is not contrary to any statute of the state, or is not contrary to the public policy of the state as otherwise declared, it cannot be held invalid.

It is not claimed that the contract contained in the lease violated any provisions of the state constitution or statutes, but it is averred that it is repugnant to public policy. As already shown, evidence of the public policy of a state is ordinarily to be sought in the constitution, statutes, and judicial decisions of the state. The right of parties to contract freely and fairly cannot be denied upon the ground of an adverse public policy, unless it clearly appears that there is a recognized or established public policy touching the subject-matter which will be violated if the contract is enforced. The burden is upon the plaintiffs in the case of showing that the contract in question is contrary to the public policy of the state of Iowa. No express provisions of the constitution or statutes of the state are cited as evidence of the public policy of the state, and the only final decision of the supreme court of the state upon the question holds that a contract such as is found in the lease to Simpson, McIntire & Co. is not contrary to the public policy of the state. Upon what theory can this court hold that the invalidity of the contract is established? Is this court justified in ignoring the decision of the supreme court of Iowa as evidence of the public policy of the state? Clearly not. But it is argued on behalf of plaintiffs that the final decision of the supreme court of Iowa in the Griswold Case should not be considered, because it was not rendered until after this contract was entered into, and in fact not until after this suit was commenced. The supreme court of the United States,

in applying that provision of the federal constitution which declares that no state shall pass a law impairing the obligations of contracts, has uniformly held that the validity of a contract was to be determined by the laws in force at the date of the contract, whether evidenced by express statutes or by the decisions of the courts; and that if, thus tested, the contract was valid at its inception, it could not be rendered invalid by a subsequent change in the law of the state, whether that change was brought about by legislative enactment or by a difference in the decisions of the courts. This provision of the constitution is intended to prevent the impairment of the obligation of contracts, valid when made, by a subsequent change in the law of the state, and the principle has no application to the case at bar. When the lease to Simpson, McIntire & Co. was executed, in February, 1890, it had not been ruled or held in Iowa that conditions such as are contained therein were contrary to public policy. It cannot be maintained that Simpson, McIntire & Co. were induced to execute the lease in reliance upon any decisions of the courts of Iowa that such conditions were invalid and void, and hence there has not been such a change in the state law, evidenced by the decisions of its courts, as would bring the case within the provision of the constitution of the United States. In fact, the decision in the *Griswold Case*, *supra*, instead of impairing the obligation of the contract entered into by Simpson, McIntire & Co., sustains the validity thereof. Furthermore, even if it were true that at the time the lease in question was executed the conditions therein contained limiting the liability of the railway company for damages caused by fire were then, in fact, contrary to the public policy of the state, but the requirements of such public policy have since been changed by statutory enactment or by the decisions of the supreme court of the state, so that when the fire occurred, in November, 1892, such exemption from liability was not contrary to public policy, would not such change in the law of the state have the effect of rendering the condition in the contract enforceable by judicial aid? The final decision in the *Griswold Case* shows that on the 30th day of April, 1890 (more than two years before the fire happened in this case), the public policy of the state was not adverse to the validity of exemptions from liability, such as are contracted for in the lease to Simpson, McIntire & Co. In *Ewell v. Daggs*, 108 U. S. 143, 2 Sup. Ct. 408, this general question came before the supreme court in a suit for the foreclosure of a mortgage brought in the state of Texas. The defense was a plea of usury. It appeared that, when the mortgage debt was contracted, a statute of the state of Texas declared all contracts for the payment of interest at a rate greater than 12 per cent. per annum to be void, but that the principal sum loaned, without interest, would be recovered. The note secured by the mortgage included interest at the rate of 20 per cent. per annum, and therefore, under the statute in force at the date of the note, the contract for interest was invalid. Subsequently, the state of Texas adopted a new constitution, which, in terms, repealed all usury laws without any saving clause as to existing contracts. The supreme court held that the defense of usury

could not be maintained, the general principle being stated as follows:

"Independent of the nature of the forfeiture as a penalty, which is taken away by a repeal of the act, the more general and deeper principles on which they are to be supported is that the right of a defendant to avoid his contract is given to him by statute, for purposes of its own, and not because it affects the merits of his obligation; and that whatever the statute gives, under such circumstances, as long as it remained in fieri, and not realized by having passed into a completed transaction, may by a subsequent statute be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract. The benefit which he has received as the consideration of the contract which, contrary to law, he actually made; is just ground for imposing upon him, by subsequent legislation, the liability which he intended to incur. That principle has been repeatedly announced and acted upon by this court. * * * The right which the curative or repealing act takes away in such a case is the right in the party to avoid his contract,—a naked legal right, which it is usually unjust to insist upon, and which no constitutional provision was ever designed to protect."

The rule applicable to cases of the character of that now before the court, wherein a party seeks to evade the obligation of a contract to which he is a party, on the ground of public policy, is that the court will not lend its aid to enforce the contract if, at the time its aid is sought, the contract is contrary to the then existing public policy. The court, in such case, refuses its aid for the enforcement of the contract, not because such is the right of either of the contracting parties, but because the public interests are adverse to the enforcement of the contract. If, however, at the time when the aid of the court is sought to enforce the terms of an existing contract, the public interests do not demand that the court should refuse to aid in enforcing the contract according to its terms, the court would not be justified in refusing its aid simply because at some previous time, under the then existing laws, and as circumstances then were, such aid would have been refused if then demanded. Thus, in the present case, the defendant asks the court to enforce in its favor the conditions of the contract existing between it and Simpson, McIntire & Co. The plaintiffs, as assignees of the rights of Simpson, McIntire & Co., object to the enforcement of the terms of the contract, on the ground that the same are contrary to the public policy of the state. To sustain this objection to the enforcement of the contract, it must appear that the contract is adverse to the now existing public policy of the state; for, unless that be true, the court is not justified in refusing its aid for the enforcement of a contract which is confessedly good between the parties thereto. Therefore, the inquiry is, what is the public policy of the state of Iowa upon the question of the right of railway companies to exempt themselves from liability for damages caused by fire under the circumstances pertaining to this case? No better evidence has been brought to the attention of the court upon this subject than that afforded by the decision of the supreme court of the state in the Griswold Case; and, relying upon that decision, I hold that the contract contained in the lease to Simpson, McIntire & Co., exempting the defendant company from liability for fire, is not contrary to the public policy of the state of Iowa, and hence is not invalid. The demurrer to the answer is therefore overruled.

SHAW v. INDEPENDENT SCHOOL DIST. OF RIVERSIDE.

(Circuit Court, N. D. Iowa, W. D. September 6, 1894.)

1. COUNTY BONDS—REISSUE—ESTOPPEL TO DENY VALIDITY.

Where school bonds—void for issuance in violation of Const. Iowa, art. 11, § 3, providing that no county or municipal corporation shall become indebted beyond 5 per cent. of the value of taxable property therein—are canceled by the owner, not a bona fide holder, in consideration of new bonds issued to him under chapter 132, Acts 18th Gen. Assem., clothing school districts with power to issue refunding bonds, no estoppel arises, from recitals in the refunding bonds, to prevent a showing that the constitutional limitation was exceeded in the prior issue.

2. SAME—NOTICE TO PURCHASER.

A purchaser of such refunding bonds is bound to take notice of the listed value of the property of the district.

Action on interest coupons belonging to bonds issued by the independent school district of Riverside. By consent of parties a jury was waived, and the issues of fact and law were submitted to the court.

Finding of Facts.

From the evidence submitted, the court finds the following to be the material facts in this case:

(1) The plaintiff, John H. Shaw, was when this suit was filed, and is now, a citizen of the state of Colorado, and a nonresident of the state of Iowa, and the defendant was, when this suit was filed, a corporation created under the laws of the state of Iowa, being a school district situated in the county of Lyon, Iowa.

(2) In the year 1883 the plaintiff, John H. Shaw, purchased, at one time, of a syndicate represented by John H. Gear, the following named bonds, with interest coupons attached, issued by the defendant, to wit, bond No. 28, dated July 1, 1881, for \$500, which reads as follows:

"Number 28.

\$500.

"United States of America.

"State of Iowa, County of Lyon.

"The independent school district of Riverside, in the county of Lyon, in said state, for value received, promise to pay to — or bearer, at the office of the treasurer in said district, on the 1st day of July, A. D. 1891, or at any time before that date, after the expiration of five years from date of issue, and after ninety days' notice, at the pleasure of said independent school district, the sum of \$500, with interest thereon at the rate of seven per cent. per annum, payable semiannually, at the office of the treasurer in said district, on the first day of January and July in each year, on presentation and surrender of the interest coupons hereto attached. This bond is executed and issued by the board of directors of said independent school district in pursuance of and in accordance with chapter 132, Acts of the Eighteenth General Assembly of Iowa, and in conformity with a resolution of said board of directors, passed in accordance with said chapter 132, at a meeting thereof held the 21st day of June, 1881.

"In witness whereof, the said district, by its board of directors, has caused this bond to be signed by the president and attested by the secretary this 1st day of July, 1881.

G. W. Stoop, President of said Board.

"G. R. Matthews, Secretary of said District."

Also, bonds Nos. 10, 11, 12, 16, 17, 18, and 19, each for the sum of \$1,000, and dated March 11, 1882 with interest coupons attached, and coming due March 11, 1892, and reading as follows:

"Number 10.

\$1,000.

"United States of America.

"State of Iowa, County of Lyon.

"The independent school district of Riverside, in the county of Lyon, in said state, for value received, promises to pay to — or —, at the office of district treasurer, in Riverside, on the eleventh day of March, A. D. 1892, or at any time before that date, after the expiration of five years from date of issue, and after ninety days' notice, at the pleasure of said independent school district, the sum of one thousand dollars, with interest thereon at the rate of seven per cent. per annum, payable semiannually, at the office of district treasurer in Riverside, on the eleventh day of September and March in each year, on presentation and surrender of the interest coupons hereto attached. This bond is executed and issued by the board of directors of said independent school district in pursuance of and in accordance with chapter 132, Acts of the Eighteenth General Assembly of Iowa, and in conformity with a resolution of said board of directors, passed in accordance with said chapter 132, at a meeting thereof held the eleventh day of March, 1882.

"In witness whereof, the said district, by its board of directors, has caused this bond to be signed by the president of the board and attested by the secretary this eleventh day of March, 1882.

"G. W. Stoop, President of said Board.

"G. R. Matthews, Secretary of said District."

(3) The bonds purchased by plaintiff formed part of a series numbered from 1 to 39, inclusive, issued to one C. W. Rollins in pursuance of a resolution adopted by the board of directors of the defendant district on the 11th day of March, 1882, reading as follows:

"Riverside March 11, 1882.

"Board of Directors of Ind. District of Riverside Lyon Co., Iowa met at the School House, in said District on the 11th day of March 1882; the following resolution was passed.

"WHEREAS, C. W. Rollins, came before the Board with a proposition to settle with the District some bonds of said District, which he held to the amount of \$72000 at the 30 cents on the dollar, and take in exchange new bonds drawing 7½ his not counting the accrued interest, now therefore, it is resolved by the Board that they issue bonds to the amount of \$36000 and exchange the same with the aforesaid C. W. Rollins, and also to allow the Treasurer 2½ for exchanging as provided in resolutions of June 30, 1880 Therefore the Secy. and President is authorized and directed and and turn over to the Treasurer and take his receipt for the same, said bonds to be numbered as follows;—No. 1,—2,—3,—4,—5,—6,—7,—8,—9,—10,—11,—12,—13,—14,—15,—16,—17,—18,—19,—20,—21,—22,—23,—24,—\$1000 each; No 25,—26,—27,—28,—\$500, 29,—30,—31,—32,—\$1000 each; 33,—34,—\$600 each; 35,—36,—37,—38,—39,—\$1000 each. There being no further business, adjourned subject to the call of the Chairman."

The bonds held by Rollins, and by him exchanged for the 39 bonds provided for in the foregoing resolution, formed part of what are called the "Martin Bonds," which issue was without consideration, fraudulent, and void.

(4) It does not appear from the evidence that C. W. Rollins was an innocent holder for value of the bonds by him exchanged for those issued under the resolution of the board of directors of March 11, 1882.

(5) It does not appear from the evidence that the syndicate who sold the bonds sued on, to plaintiff, were innocent holders for value of the bonds thus sold to plaintiff.

(6) It does not appear in the evidence that the plaintiff, when he purchased the bonds in question, had any actual knowledge of the facts connected with the issuance of said bonds. It affirmatively appears that the plaintiff paid full value for the bonds to the syndicate from which they

were purchased, relying upon the recitals in the bonds as evidence of their validity.

(7) The principal of said bonds is now due, amounting to \$7,500 and interest thereon, as evidenced by the coupons sued upon, to the amount of \$7,721.65, remains due and unpaid.

(8) At and prior to July 1, 1881, and at and prior to March 11, 1882, the defendant district had outstanding against it evidences of indebtedness largely in excess of 5 per cent. upon the taxable property within the limits of the district. Judgments are now in existence against the district, remaining unsatisfied, and in favor of the Geneva National Bank, for \$550; of Eleanor Nesbit, for \$857.40; of H. D. Eastman, for \$2,240.14; of Wm. Blodgette, for \$800; and of John J. Booge, for \$2,094.35; thus aggregating \$6,541.89, exclusive of accruing interest and costs. These judgments are all based upon evidences of indebtedness which had accrued prior to July 1, 1881, and which were in existence and outstanding when the bonds in suit were issued, and when they were purchased by plaintiff. In addition to indebtedness evidenced by the judgments above named, there were outstanding against the defendant at and prior to July 1, 1881, and at and prior to March 11, 1882, bonds issued in the name of the defendant district, largely in excess of the sum of \$25,000, the exact amount of which is not clearly proven.

(9) The assessed value of the taxable property situated within the limits of the defendant district, as shown by the state and county tax list, is as follows, for the several years named below:—

For 1872.....	\$48,995 32	For 1878.....	\$72,175 97
„ 1873.....	68,307 01	„ 1879.....	47,220 00
„ 1874.....	68,890 83	„ 1880.....	44,571 00
„ 1875.....	70,435 64	„ 1881.....	44,033 00
„ 1876.....	70,706 96	„ 1882.....	49,170 00
„ 1877.....	57,247 53	„ 1883.....	71,824 00

Gatch, Connor & Weaver, for plaintiff.

S. M. Marsh and O. J. Taylor, for defendant.

SHIRAS, District Judge (after stating the facts). On behalf of the defendant, it is pleaded that the bonds upon which this suit is based are void, in that the constitution of the state of Iowa (section 3, art. 11) provides that “no county, or other political or municipal corporation shall be allowed to become indebted in any manner, or for any purpose to an amount in the aggregate exceeding five per centum on the value of the taxable property within such county or corporation,—to be ascertained by the last state and county tax lists, previous to the incurring of such indebtedness,” and that the constitutional limit had been exceeded when the bonds in suit were issued, and therefore the defendant district had no power to issue the bonds in question. On behalf of the plaintiff, it is claimed that chapter 132 of the Acts of the 18th General Assembly of the State of Iowa clothed school districts with full power to issue refunding bonds; that the bonds contain recitals showing that they were issued in pursuance of and in accordance with the provisions of that act, and that the plaintiff, having paid value for the bonds, relying upon the recitals therein contained, is entitled to estop the defendant from showing that the constitutional limitation had been exceeded.

The material questions arising in this case were before me in Cummins v. District of Doon, 42 Fed. 644, and I therein held that bonds issued for refunding purposes under the provisions of chapter v. 62F.no.10—58

132, Acts 18th Gen. Assem. Iowa, differed from bonds issued for purposes other than to refund outstanding obligations; that the burden of showing that the refunding bonds were invalid was on the defendant, and that this required the defendant to show that the pre-existing indebtedness which it was proposed to refund was itself invalid, and not enforceable; and that, in the case of refunding bonds sold for cash, the purchaser, having paid his money to the proper officers of the district, was not bound to see to the proper application of the money after it had passed from his control, as he had a right to assume that the officers of the district would properly perform their official duties. This case was carried to the supreme court by writ of error, and the judgment was reversed. See *Doon Tp. v. Cummins*, 142 U. S. 366, 12 Sup. Ct. 220. The ruling of the supreme court in that case is decisive of the one now before the court. In this case, as in that, the amount of bonds purchased by the plaintiff, to wit, \$7,500, was in excess of the constitutional limitation, and of this fact the plaintiff was bound to take notice, because, as is held by the supreme court in *Doon Tp. v. Cummins*, he was bound to take notice of the constitutional provision, and also of the amount of the taxable property of the district, as shown by the public tax lists. Under these circumstances, if I correctly interpret the ruling of the supreme court in the *Doon Township Case*, the plaintiff cannot rely on the recitals in the bonds as an estoppel on the defendant. If it appeared that the bonds bought by the plaintiff were in fact used to retire or refund a pre-existing, enforceable indebtedness of the district, then it might be true that they would be valid, even though they exceeded the limitation. From the evidence it appears that they were issued to C. W. Rollins in exchange for other bonds held by him, but it does not appear that the latter bonds were valid in his hands, but, on the contrary, it appears that they were part of a fraudulent series known as the "Martin Bonds," the nature of which may be readily seen from the fact that Rollins held \$72,000 of them,—an amount in excess of the entire taxable property of the district. Under these circumstances, judgment must be in favor of the defendant, and it is so ordered.

LEE KAN v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. May 21, 1894.)

CHINESE—EXCLUSION—"McCREARY ACT" DEFINING "MERCHANTS."

To except a Chinaman from the operation of the "Geary Act," as a merchant within the definition of section 2 of the "McCreary Act," his interest must be real, and appear in the business and partnership articles in his own name. It is not necessary that his name appear in the firm designation.

Appeal from the District Court of the United States for the Northern District of California.

This was a petition by Lee Kan for a writ of habeas corpus. The district court remanded the petitioner, and he appealed.

Thomas D. Riordan, Lyman I. Mowry, and Henry C. Dibble, for appellant.

Charles A. Garter, for the United States.

Before McKENNA and GILBERT, Circuit Judges, and HAWLEY, District Judge.

McKENNA, Circuit Judge. This is an appeal from a judgment of the district court for the northern district of California, rendered in proceedings on habeas corpus, appellant being petitioner, adjudging him to be a person forbidden by law to land in the United States, and remanding him to the custody of the ship Oceanic in San Francisco harbor, and to the custody of the United States marshal, until the order be executed. The facts as stipulated by counsel are substantially as follows: That appellant is a native of China, and came to reside in the United States in November, 1880, and continuously resided in San Francisco from that time until November, 1893, engaged in mercantile pursuits. In 1887 he became a member of the Chinese firm of Wing Tai Lung (sometimes called Wing Lung & Co., for the purpose of following the American custom), wholesale importers of Chinese merchandise. That his interest amounts to \$1,000, and that his interest stood and stands in his own name. That his firm is composed of eight partners, having a total of \$8,500, and did business at 417 Commercial street, in San Francisco, a fixed place, buying and selling merchandise for a period of more than two years continuously prior to the 2d of November, 1893; and that petitioner can establish by the testimony of two credible white witnesses that he conducted such business at such place for more than one year prior to his departure from the United States, and did not engage in the performance of any manual labor except such as was necessary in the conduct of his business. That the name Wing Tai Lung is not the name of any person, nor does it contain the name of any person whatever, but is a mere fanciful designation used as a means of convenience, and for trading purposes, and in accordance with the custom of the Chinese race. That the name of petitioner appears in the articles of copartnership and partnership accounts, and on the verified list of partners filed in the custom house September 9, 1893, the latter being a list filed at the request of the collector as a precaution against imposition on the law.

The petitioner is undoubtedly a merchant in fact, and the question presented is, is he one within the definition of the character contained in section 2 of the "McCreary Act," so called, which is as follows:

"Sec. 2. * * * The term merchant as employed herein and in the acts of which this is amendatory, shall have the following meaning, and none other: A merchant is a person engaged in buying and selling merchandise in a fixed place of business, which business is conducted in his own name, and who, during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant. When an application is made by a Chinaman for entrance into the United States on the ground that he was formerly engaged in this country as a merchant, he shall establish

by the testimony of two credible witnesses, other than Chinese, the fact that he conducted such business as hereinbefore defined, for at least one year before his departure from the United States, and that during such year he was not engaged in the performance of any manual labor, except such as was necessary in the conduct of his business as such merchant, and in default of such proof he shall be refused landing."

The learned judge of the district court found the facts as hereinbefore stated, but held that petitioner did not conduct business in his own name, and denied him the right to land. To ascertain the meaning of congress, the purpose of the act as well as the language must be considered. The provisions of section 2, *supra*, are amendments to the act of May 5, 1892, commonly called the "Geary Act," and they and the act they amend are but steps in legislation to regulate and restrict the coming of Chinese laborers into the United States, and all provisions in regard to other classes are but means to that end. In interpreting that legislation, this purpose has been steadily regarded, as by well-known canons of interpretation it must have been regarded, and the general language of the acts confined to executing this purpose. In *re Low Yam Chow*, 13 Fed. 605. The sanction of these acts is the treaty of November, 1880, modifying that of 1868, except the Scott law, which, to its extent, abrogated the treaty; but this also was no exception to the purpose of the legislation, to wit, the exclusion of laborers. Besides, it was expressed in terms so irresistibly clear as to leave interpretation no function. The first article of the treaty of November, 1880, provides that "the government of the United States may regulate, limit, or suspend the coming or residence of Chinese laborers to the United States, but may not absolutely prohibit it;" but the treaty also provides "that the limitation or suspension shall be reasonable, and shall apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitation." Furthermore, in the second article it is declared that "Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body or household servants, and Chinese laborers who are now in the United States, shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nations." The first act after this treaty was that of May 6, 1882. It prohibited the coming of Chinese laborers for 10 years, and contained provisions to secure the prohibition. Among others, it provided, in section 6, that the identity of "every Chinese person other than a laborer should be evidenced by a certificate issued under the authority of the Chinese government." This act came up for consideration before Justice Field in the case of *In re Low Yam Chow*, *supra*, and he held that the "section was evidently designed to facilitate proof by Chinese, other than laborers coming from China, and desiring to enter the United States. * * * It is not required as a means of restricting their coming. To hold that such was its object would be to impute to congress a purpose to disregard the stipulation of the second article of the new treaty

that they should be allowed to go and come of their own free will and accord." The learned justice also says:

"And we will not assume, in the absence of plain language to the contrary, that congress intended to disregard the obligation of the original treaty of 1868, which remains in full force except as modified by the supplementary treaty of 1880."

This case and its language were approved by the United States supreme court in *Lau Ow Bew v. U. S.*, 144 U. S. 59, 12 Sup. Ct. 517, and other cases were there collected and commented on which sustain its principle. There is nothing in the Geary and the McCreary acts which excludes them from the doctrine of these cases, or in any way includes merchants in the limitations or prohibitions on immigration. That we are right in this case is sustained by the explanation made by Mr. Geary in the house of representatives when the McCreary bill was under consideration. The provisions of section 2, *supra*, were not contained in the bill reported by the committee on foreign affairs. They were moved as amendments by Mr. Geary, and in explanation of them he said:

"There is one other definition that we think necessary. The treaty permits 'merchants' to come into this country. We have no desire to restrict the movements of the mercantile class; but the trouble has been that men pretending to be merchants have asked for admission at New York and other places, have sworn that they had interest in stores established in those communities, have been admitted as merchants, and immediately developed into full-fledged laborers. We merely ask for a definition of the word 'merchant' which shall be broad enough to protect every man legitimately engaged in that industry, and narrow enough to prevent the designation being used as an instrument of fraud by a class that we do not desire. This amendment requires every Chinaman asking to be admitted into the United States, and who claims to have formerly resided here, to prove that for at least one year, at some fixed place of business within the Union, he was engaged in buying and selling merchandise. We do not demand that he shall have a dollar's worth of stock, or a thousand dollars' worth; we simply follow the language of the treaty, and demand this protection to our own people."

How efficient the amendment is for the purposes declared by Mr. Geary we shall hereafter show. It is incontestable that it was not directed at merchants any more than prior legislation was, or that it was not intended to regulate their methods of business, except so far as necessary to prevent evasions of the act. It was directed at laborers,—to prevent them from assuming a false character. To construe it otherwise is to make merchants its primary objects, and subject them to a discrimination and inconvenience within the country to which no other merchants are subjected. It would not only forbid them to do business as it is their custom to do, but to do business as it is the custom of all commercial people to do. It is stipulated in this case that the designation of the firm of which petitioner is a member was selected in accordance with a custom which has prevailed from time immemorial among the Chinese, and expresses a propitious omen, and means, when literally rendered in English, "everlasting," "great," "bountiful." But, as stated by counsel, the custom is not exclusive with Chinese. It prevails with other people, and the *Bon Marche* of Paris, and the *Golden Rule Bazaar* of this city were cited, among others, as ex-

amples. These designate, as the name Wing Tai Lung designates, a house rather than a firm, and expresses the sentiment and principle which shall govern its dealings. It might be better if the practice were more general. The construction contended for by the government would not only forbid the Chinese this practice, but forbid them, as we have said, the common practice of this country, and of all commercial countries. The designations of very few business houses contain the names of all of the partners. One or two are usually named, and the others are not named, but only their existence indicated by the addition "and Company." We cannot believe that congress intended to forbid to Chinese merchants, not only their own customs, but the custom of merchants wherever trading is practiced. But we construe section 2 to mean that the interest of the merchant must be real, and appear in the business and partnership articles in his own name, and not that his name must appear in the firm designation. And this reaches the evil which existed. It was not complained that the firm designation was a cover to deception. According to the stipulation, it could not be in many cases. It contained no name to claim. It was complained that an interest was claimed which stood in a name other than the claimant's, and that the ownership was established by Chinese testimony. Section 2 prevented this, and required name and ownership to go together, and to be established by the testimony of credible witnesses other than Chinese. This view is confirmed by considerations drawn from other sections of the act. The definition of "merchant" is general. The provision of section 2 is:

"The term merchant employed herein and in the acts of which this is amendatory shall have the following meaning, and none other."

The definition is then given as hereinbefore stated. Section 6 requires all Chinese laborers to register, the penalty of refusal being deportation from the country. All who are not merchants within the requirements of the definition (excluding, of course, certain privileged classes) are laborers; hence the definition applies not only to the merchant who claims to enter the United States, having formerly been here, but to him who stayed and while he stays.

The interpretation of the government makes the law forbid him to stay as a merchant and do business as he formerly did, and to what end? That he may be deported? No one desires it. That he may be compelled to register as a laborer? A useless compulsion. And, to accomplish an undesired or useless result, we are asked to attribute to congress an intention to change the business methods of many people, and to compel them to adopt inconvenient and, maybe, impracticable ones. Chief Justice Fuller, delivering the opinion of the court in *Lau Ow Bew v. U. S.*, supra, said:

"Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion."

And the learned chief justice cites *Church of Holy Trinity v. U. S.*, 143 U. S. 457, 12 Sup. Ct. 511; *Henderson v. Mayor*, 92 U. S. 259;

U. S. v. Kirby, 7 Wall. 482; **Oates v. Bank**, 100 U. S. 239. This is a wise canon of construction. By it, language general enough to include other things is confined to the purpose of the lawmakers, securing it and avoiding confusion and disappointment, and often absurdity. Illustrating this canon, Justice Field, in the **Case of Ah Tie**, 13 Fed. 294, said:

"So the judges of England construed the law which enacted that a prisoner breaking prison should be deemed guilty of felony, holding that it did not apply to one breaking out when the prison was on fire, observing that the prisoner was 'not to be hanged because he would not stay to be burnt.' And, in illustration of this doctrine, the construction given to the Balognian law against drawing blood in the street is often cited. That law enacted that whoever thus drew blood should be punished with the utmost severity, but the courts held that it did not extend to the surgeon who opened the vein of a person falling down in the streets in a fit."

And the learned justice, in **Re Low Yam Chow**, *supra*, gave two additional illustrations taken from decisions of the supreme court:

"A law of congress declares that whoever willfully obstructs or retards the carrier of the mails of the United States shall be deemed guilty of a public offense, and be punished by a fine. A mail carrier in Kentucky was arrested by the sheriff upon a charge of murder, and for the arrest the sheriff was indicted. The supreme court held that the general language of the act of congress was not to be construed to extend to the case; for it could not be supposed that congress intended to interfere with the enforcement of the criminal laws of the state in its legislation to prevent unnecessary obstruction in the carriage of the mails. It would have been absurd to hold that, in order to secure the speedy transportation of the mails, immunity from punishment for a crime was given to the mail carrier. **U. S. v. Kirby**, 7 Wall. 482. So the act of congress for the recovery of the proceeds of captured and abandoned property during the late war required the claimant in the court of claims to prove that he had never given aid or comfort to the rebellion; yet the supreme court held that one who had been pardoned by the president was relieved from this requirement. The general language of the act covered his case, but, as the pardon in legal effect blotted out the guilt of the offender,—that is, closed the eyes of the court so that it could not be considered as an element in the determination of his case,—the pardon was deemed to take the place of the proof, and relieved him from the necessity of establishing his loyalty. 'It is not to be supposed,' said the supreme court, 'that congress intended by the language of the act to encroach upon any of the prerogatives of the president, and especially that benign prerogative of mercy which lies in the pardoning power. It is more reasonable to conclude that claimants restored to their rights of property by the pardon of the president were not in contemplation of congress in passing the act, and were not intended to be embraced by the requirement in question. All general terms in statutes should be limited in their application so as not to lead to injustice, oppression, or any unconstitutional operation, if that be possible. It will be presumed that exceptions were intended which would avoid results of that nature.' **Carlisle v. U. S.**, 16 Wall. 153."

And the learned justice said, virtually, that these cases would have justified him in restricting section 6 of the act of 1882 to merchants coming from China, even if the general term used in the section were susceptible of a larger meaning. Undoubtedly, if the purpose of the act had been a limitation on the immigration of merchants, as it was of laborers, its language would have applied to their coming from everywhere. There can be no temptation, in order to secure the exclusion of Chinese laborers, to give a strained construction to section 2. As we construe it, it is entirely sufficient,

and completely fulfills the objects of the legislation. It does not disturb real merchants in the privileges guarantied by the treaty, and it prevents false ones from claiming them. It makes the definition of the word "merchant" that which Mr. Geary aptly said it was intended to be,—“broad enough to protect every man legitimately engaged in that industry, and narrow enough to prevent the designation being used as an instrument of fraud by a class that we do not desire.” The burden of proof is on the person seeking to land, and the character of the facts which he must prove, the time which they must have existed, and the witnesses by whom proved, together with the possibilities of counter proof inevitably suggested, make deception impossible, except under a very negligent administration of the law. A place in the firm name would not prevent this, nor is it to be apprehended.

The construction we have given to section 2 makes it unnecessary to decide, under the facts in this case, the point made by petitioner that it does not apply to merchants who departed prior to its enactment. The judgment of the district court is reversed, and the cause remanded, with directions to discharge the petitioner.

STAHL v. ERTEL et al.

(Circuit Court, S. D. Illinois. December 28, 1893.)

1. PATENTS—SUITS FOR INFRINGEMENT—VIOLATION OF INJUNCTION—EVIDENCE.

In proceedings to punish violation of injunctions against manufacturing, using, selling, offering for sale, or advertising defendant's incubator, containing an egg tray, or heater, pipes, and tank, found to infringe complainant's patents, incubators designated by the same name, made, after notice of the injunctions, by the same company, will be presumed, in the absence of any denial, to be the same as those made by it before the injunctions.

2. SAME.

Continued advertising of such incubators, in the same general terms and description and name, for sale, after notice of the injunctions, is strong evidence of violation thereof in other respects, as well as the prohibition against advertising, which requires positive proof on defendant's part to the contrary.

3. SAME—WHO PUNISHABLE FOR CONTEMPT.

A defendant who, though not originally a party to the infringement suit, became interested, as a controlling member of the infringing corporation, before the hearing on which the injunction was granted, and thereafter controlled the litigation and bore the expenses, and moved to modify the injunction, and who is shown to have employed workmen to manufacture machines by which he might evade it, is punishable for contempt, upon a violation of the injunction by him.

4. CONTEMPT—PROCEEDINGS TO PUNISH—COSTS.

A reasonable attorney's fee is properly taxable as costs in contempt proceedings.

This was a suit by George H. Stahl against the Victor Incubator Company and others for infringement of patents, in which injunctions were granted against defendants. Complainant moved for an attachment against George Ertel and A. L. Chase for contempt in violating the injunctions.

L. H. Berger and Sprigg, Anderson & Vandeventer, for plaintiff.
George H. Knight, for defendants.

ALLEN, District Judge. This suit was brought for the infringement of letters patent No. 267,422, issued to Augustus M. Halstead November 14, 1882, of letters patent No. 258,295, issued May 23, 1882, to Augustus M. Halstead, and of letters patent No. 368,249, issued to complainant, George H. Stahl, August 16, 1887. Other patents were declared on, but at the hearing were withdrawn. The bill was filed February 18, 1892, and on motion made for preliminary injunction, on due notice to the defendants in that suit, the cause came up for hearing on April 4, 1892, at which hearing, which was had upon affidavits, it was agreed by counsel that they would argue the case fully, and whatever order the court should make could be entered as a final order. Plaintiff relied upon the infringement, by defendant's Victor incubator, of the egg tray of the Halstead patents, and of the tank, pipes, and heater of the Stahl patent. Defendants denied infringement, and set up some 26 different patents for the purpose of showing the state of the art at the time complainant's patents were obtained, and for the purpose of showing anticipation of the Stahl patent. After full and extended argument, this court, on April 4, 1892, declared defendants' egg tray an infringement of claim 3 of Halstead patent No. 267,422, and of claims 6, 7, and 8 of Halstead patent No. 258,295, and issued an injunction restraining each of defendants from using, manufacturing, or selling their egg tray until the further order of the court, and postponed further hearing until April 23, 1892. At the postponed hearing the cause was again taken up, and fully reargued, and on May 16, 1892, this court signed a second decree, declaring Stahl's patent No. 368,249 valid, and holding the heater, pipes, and tank of defendant's Victor incubator an infringement upon the Stahl patent, and issued an order restraining defendants from further "manufacturing and using, selling, offering for sale, or advertising their said incubator, with heater, pipes, and tank," as then made by them. Both of these injunctions were duly served on defendants.

Afterwards, and on June 11, 1892, defendants, on due notice to complainant, entered a motion for a modification of the order of May 16, 1892, which motion, on hearing, was overruled. Afterwards a motion founded on affidavits was made by complainant to the court for an attachment against George Ertel, who was not a party to the original suit, and A. L. Chase, for contempt for violating said injunction. The defendants opposed the motion on affidavits, and the court made an order referring the matter to J. C. Thompson, Esq., to take evidence upon the question of whether defendants, or either of them, had, since service of said injunction, made, sold, offered for sale, or advertised any of their incubators containing either the said egg tray, or the said heater, pipes, and tank, which had been restrained. A large number of witnesses were heard by the referee, and a number of incubators and models were presented as exhibits. All of this evidence was transmitted

to this court by the referee without any findings, and upon this documentary evidence this cause was submitted after full argument by counsel for the respective parties.

Upon the consideration of the whole case the court is of the opinion that defendant George Ertel has committed the contempt alleged.

The machine enjoined was the Victor incubator, and the testimony of witnesses and the books of the Victor Incubator Company showed that there had been sold five Victor incubators since notice of the restraining orders. The defendant did not deny upon the witness stand that the Victor incubator made subsequent to the notice of the restraining orders had either the tray or pipes, tank, and heater of complainant's machine, nor did he produce any witness by whom he proved this. In the absence of any denial, it will be presumed that a Victor incubator, made since notice of injunction, and manufactured by the same Victor Incubator Company, is the same as the Victor incubator manufactured by the same company prior to the injunction. *Stebbins v. Duncan*, 108 U. S. 32, at page 48, 2 Sup. Ct. 313; *Brown v. Metz*, 33 Ill. 339.

Again, the evidence showed that the said Victor Incubator Company, since the notice of the restraining orders above mentioned, had continued advertising the Victor incubator complete, with the same cuts and cards that said company had been using prior to the injunction; also, exhibits of advertising, made since notice of the restraining orders, were offered in evidence, showing offers and terms of sale of Victor incubators of the same manufacture and style of those restrained. This is in violation of the terms of the restraining order, which specially prohibits defendants from advertising the sale of their incubators; and, besides this, the deliberate act of defendants, in advertising in the same general terms and description and name, for sale, the very machine enjoined, is strong evidence of a violation of the injunction, and requires positive proof on the part of the defendants to the contrary. *Rob. Pat. § 1042*; *Allis v. Stowell*, 19 O. G. 77. While the said Ertel was present with counsel, and was used as a witness for plaintiffs, he failed to deny under oath that he had made or sold any incubators containing the egg tray, or the heater, pipes, and tanks, that he had been restrained from making and selling.

Again, there was positive evidence that defendant George Ertel had manufactured incubators containing the very parts he had been restrained from making. Witnesses Fairman & Glenn, who are dealers in stoves, tinware, etc., in Quincy, Ill., testified that their house built for defendant George Ertel incubators, with tanks, pipes, and heaters, substantially the same as those in the machine restrained, and that this was done after notice of the restraining orders. One of these witnesses, Glenn, said: "This, however, is the original tank that we made for Sheer and Chase. We also made at least two of them for George Ertel." The "original tank" referred to by this witness is the tank that was enjoined. In addition to this, several of the workmen of Fairman & Glenn testified to the manufacture of these same tanks for defendant Ertel. While

it is true defendant George Ertel was not a party to the original suit, the evidence shows that he became interested, as a controlling member of the Victor Incubator Company, before the hearing at which the first restraining order was made by this court, and had from that time on controlled the litigation, furnished counsel at his own expense, and borne the cost and expense of that suit, and that after the injunction he appeared by counsel, and argued the motion to modify and dissolve the injunction. Having an interest in the litigation, all that was necessary to bring him within the order was to show that he was apprised of its existence. High, Inj. 1421, 1422. The defendant Ertel has not attempted to raise any question of the binding force of the injunction upon him. He appeared with counsel at the time the reference was made, and before the referee when the evidence was taken, and at no time has he made any objection or raised any question against the proceedings. There was also evidence tending to show that defendant Ertel had employed workmen to manufacture machines by which he might escape the injunction. Defendant should not attempt to see how near he can come to an infringement and escape. High, Inj. § 1427; Craig v. Fisher, 2 Sawy. 345, Fed. Cas. No. 3,332. Nor can he, by subterfuge, do substantially what he has been enjoined from doing. High, Inj. § 1433; Rob. Pat. § 1215.

I am therefore of the opinion that George Ertel is guilty of contempt, and should be required to pay the cost and expense of this proceeding. Such costs and expense should include a reasonable attorney's fee, which is properly taxable in contempt proceedings. High, Inj. § 1457; Rob. Pat. 1219. The clerk will please issue an order of reference to Edward J. Mitchell, as special commissioner to take evidence and report the amount of petitioner's charges, expenses, and reasonable attorney's fees.

As to defendant A. L. Chase, there is no evidence connecting him with any of the acts of violation or contempt.

MILLER v. MURRAY.

SAME v. DONOVAN et al

(Circuit Court, S. D. New York. June 1, 1894.)

Nos. 5,380 and 5,381.

1. PATENTS—LIMITATION OF CLAIM—PRIOR STATE OF ART—ROAD CARTS.

In the Miller patent, No. 371,090, for an improvement in road carts, claims 1, 2, and 5, for combinations which include longitudinal springs, each consisting of a long and short branch, supporting the shafts, must be restricted, in view of the prior state of the art, to the particular form of such spring described, and therefore are not infringed by a road cart not having such two-part spring.

2. SAME.

In the Miller patent, No. 459,098, for an improvement in road carts, claims 1 and 2, for combinations which include springs supporting the shafts, the forward ends bolted to the shafts, and the rear ends running loosely through eyes bolted to the shafts, and having cushions surrounding the ends of the springs, to prevent rattling and take up the jar, as such

devices are old, must be restricted, as to such shaft supports, to the precise combination, and are not infringed by a structure in which the ends of such springs are inserted into boxes secured to the rear ends of the shafts, and packed with rubber, which permits a slight vibration, but not the free play and longitudinal movement characteristic of the patented device.

8. SAME—ANTICIPATION.

Claims 7, 8, 9, and 10 of said patent, for combinations of the shafts, the hangers suspended from them, the side bars, and the foot rest shown, cannot be sustained in view of previous patents and devices, the differences being trivial and showing no patentable invention.

These were two suits by Henry J. Miller, one against George W. Murray, the other against J. Donovan and another defendant, for infringement of patents.

Knight Bros., for complainant.

Henry Bacon, for defendants.

LACOMBE, Circuit Judge. These are applications at final hearing upon pleadings and proofs for the usual decree of injunction and accounting, in two suits in equity, brought for alleged infringement of letters patent No. 371,090 (October 4, 1887) and No. 459,098 (September 9, 1891), both issued to Henry J. Miller, the complainant, for improvements in road-carts.

Patent No. 371,090.

The claims alleged to be infringed are:

"(1) In a road cart or other vehicle, the combination of the transverse spring attached at its ends to the shafts, and supporting a centrally located seat, the said shafts resting upon other springs, as shown and described.

"(2) In a road cart or other two-wheeled vehicle, the springs for supporting the shafts, constructed and arranged substantially as shown and described, in combination with said shafts, the transversely arranged spring extending between and attached to them, the centrally located seat upon said spring, and the downwardly and forwardly extending braces and supporters connected directly to the seat and pivotally to the shafts, all arranged substantially as and for the purposes set forth."

"(5) In a road cart or other two-wheeled vehicle, the combination of the rearwardly and downwardly extended shafts connected rigidly together at their rear ends by means of the crossbar, as shown; said shafts being supported by springs located parallel therewith, both springs consisting of a long and short branch, and each branch being attached separately to the aforesaid shafts, as and for the purposes set forth."

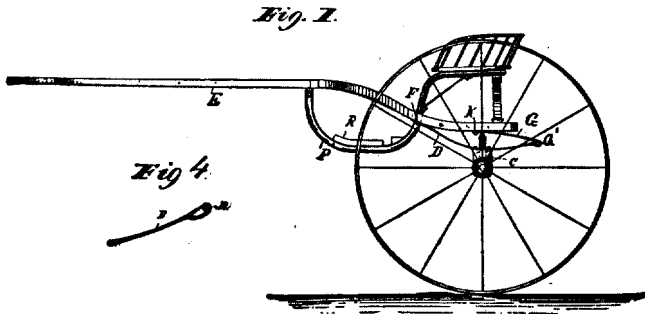
The object of the invention is to reduce as much as possible the effect of horse motion and of any jar or shock occasioned by the vehicle coming in contact with any stone or other unevenness upon the road. The parts of the combination are all old. The "springs located parallel with the shafts," and which support the shafts above the axle, are thus described in the specification:

"Upon suitable bearings, C, on the axle are arranged and attached the lower branches of my springs, D. The fore ends of these springs, D, are attached to the shafts, E, at points, F, several inches forward of the axle."

The drawing and context show that by the words "springs, D," the inventor meant to indicate the lower branches of his springs, which springs he elsewhere refers to as "being each composed of two

branches having a relative longitudinal movement." The specification continues:

"The upper branches, G, of these springs, are connected to the lower branches at the rear [extending, as the drawing shows, rearwardly beyond the vehicle], and are so arranged as to have a relatively sliding movement longitudinally between the upper and lower branches of the springs. * * * In the drawings I have shown the upper branches of the springs as provided with ears, G, which fit over the rear ends of the lower branches, and with pins, H, which extend through said ears and the longitudinal slots or openings arranged in the lower branches of the springs. The longitudinal movement, however, may be secured in other ways, and I do not limit myself to the exact means shown. The upper branches of these springs are attached to the shafts at points K [which in the drawing are shown to be just forward of the axle]."



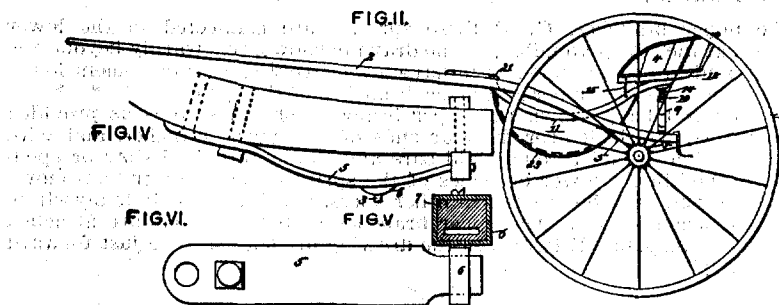
An examination of the various patents put in evidence to show the prior art discloses the fact that it was old to support the shafts above the axle by springs extending longitudinally beneath them, and that such a device was used in combination with a transverse spring supporting the seat. Reference to the patents of Bach, No. 288,757 (November 20, 1883), Bach, No. 299,319 (May 27, 1884), Barber, No. 316,934 (May 5, 1885), Barber & Croft, No. 342,993 (June 1, 1886), not to mention others, shows that the field of invention was much restricted when the complainant entered it, and that the combinations claimed by him can be sustained only when the patent is construed so as to confine them to the particular form of longitudinal spring which he has described, and which in the precise form shown in his specification and drawings seems not to have been used in road wagons. As the defendants use no such two-part spring, the bill as to this patent is dismissed.

Patent No. 459,098.

In this patent the complainant modified the structure of his longitudinal springs. His specification says:

"As customary in such carts, the seat is supported from the axle through the medium of the shafts and suitable springs. * * * The connection of the shafts to the axle is clearly shown in Figs. IV., V., and VI. 5, 5, are heavy plate springs, bolted or otherwise clamped at their forward ends to the shafts. Their rear ends run loosely through eyes, 6, 6, bolted to the shafts. A cushion, 7, preferably of soft rubber, surrounding the end of spring 5 in each eye, and having the greater portion of its body above said springs, pre-

vents rattling, and also takes up the jar. The springs 5, 5, are clamped to the axle."



The claims of the patent which include this device, and which are alleged to be infringed, are:

"(1) In a light sulky or road cart, the combination of the axle, the shaft extending over and to the rear thereof, the bent plate or bar springs bolted at their forward ends directly and rigidly to the shafts forward of the axle, thence bent down slightly, and resting on the axle, thence passing to the rear thereof, and the sockets or eyes fixed to the shafts' rear ends having a gum or rubber cushion within it with a hole to receive cushion and permit longitudinal motion of said springs, substantially as set forth. [To make sense out of the last clause of this claim, it is necessary to insert a comma between the words 'receive' and 'cushion.']"

"(2) In a road or other cart, the combination of the shafts, the axle, the spring fixed at one end of the shafts, and at an intermediate point to the axle, eyes fixed to the shafts and adapted to receive the other ends of said springs, and resilient cushions in said eyes surrounding the ends of said springs, the greater portion of the body of said resilient cushions being above the springs, substantially as herein set forth."

It was old in the art to give play to a spring by running one or both of its ends through an eye or slot, with rubber packing, washers, or cushions in the eye, to obviate rattling or noise and prevent too free play of the ends of the spring. Such a device is found applied to a spring supporting a wagon seat in the patent to Naramore, No. 174,288, February 29, 1876.

The defendants' structure has plates or bars, bolted to the shafts forward of the axle, bending downward to the axle, where they are clamped, and thence bending upward, with their ends inserted into boxes which are secured to the rear ends of the shafts. The interior of each box is packed with rubber, which acts as a cushion for the plate or bar. The bar impinges rearwardly upon this rubber cushion, which permits a slight vibration, sufficient to prevent granulation or fracture consequent upon shock, but does not admit that free play through the box and consequent longitudinal movement which is the characteristic of the complainant's device. The differences between defendants' and complainant's shaft supports are slight, it is true; but the field of invention was a very narrow one, and complainant's claim can be sustained only under a construction which will restrict it closely to the precise combination of his patent.

The same patent contains four other claims which are alleged to be infringed:

"(7) The combination of the shafts, the hangers suspended from the shafts, consisting of a housing, a supporting pin, and a cushion on said pin, and the side bars hung at their forward ends on the cushion of said hangers, substantially as set forth."

This claim cannot be sustained in view of the patent to Sargent, No. 273,610, March 6, 1883, which shows shafts, hangers, housings, supporting pins, cushions, and side bars hung at their forward ends on the cushions of the hangers. The difference in the shape and location of the side bars is trivial, and the suggestion of complainant's expert that the Sargent patent does not anticipate because the vehicle therein described is "not a road cart, but more properly a gig, with the body mounted on the axle through the medium of an elliptic spring, and the shafts likewise coupled to the axle," is frivolous.

"(8) The hanger having housing, pivot pins, cylindrical cushion, and side washers, in combination with the side bar having a strap at its forward end adapted to surround said cushion, substantially as set forth."

This is simply the combination of the seventh claim, with the addition of what the patentee calls "wear plates or washers, preferably of leather or rubber." The use of such washers to relieve friction, prevent rattling, secure even pressure, and avoid wear and tear between wood or metal surfaces, has been the common property, not only of mechanics, but also of persons possessing ordinary intelligence for many generations. It might reasonably be supposed that, by this time, patentees, their experts and their counsel, would appreciate the fact that it is a waste of time to claim that the insertion of such a washer, for such a purpose, in an old combination, is evidence of even the feeblest glimmer of inventive genius.

"(9) The two-part hanger having two housings with pivot, cylindrical cushions, and side washers, in combination with the side bars and foot-rest supports, and adapted to hang from the two parts of the housing, substantially as set forth."

The patent to Vorwick, No. 411,114, September 17, 1889, shows that it was old to make the foot rest of a road cart independent of the side bars of the seat, and to hang its forward supports from the forward cross bar (the splinter bar) of the shafts, so as to admit of freedom of movement at the point of attachment. Vorwick's support simply hooked into an eye. Complainant has substituted the housing pin and cushion which Sargent had already used for hanging the side bars, adding the side washers, and affixed side-bar supports and foot-rest supports side by side, to the splinter bar, so that the same supporting pin will run through both housings. Such a device is plainly within the skill of the ordinary mechanic, and in the patent to McGrath, No. 392,622, November 13, 1888, side and foot rests are both hung from the same pin.

"(10) The combination of the side bars having the hooks, cushions on said hooks, the shafts having the hangers, cushions on said hangers, and the foot rest, whose supporting bars have eyes at one end and hooks at the other end adapted to engage said hooks and hangers, as and for the purpose set forth."

Reference to the patents already cited above, especially Vorwick's, sufficiently discloses a lack of patentable invention in the combination covered by this claim.

The bills are dismissed, with costs.

SIMMONS et al. v. STANDARD OIL CO. OF NEW YORK et al.

(Circuit Court, N. D. New York. July 30, 1894.)

No. 5,957.

1. PATENTS—PRIOR USE—EVIDENCE TO ESTABLISH.

The defense of prior use and sale must be established beyond a reasonable doubt, and a patent will not be overthrown when the evidence is so uncertain, conflicting, and unreliable that it is impossible to say which of the rival devices first saw the light.

2. SAME—INFRINGEMENT—IMPROVEMENTS.

The fact that defendant's machine may be an improvement on the patent, and has introduced some novelties, does not avoid infringement, when the principal features of complainant's invention have been appropriated.

3. SAME—BARREL-HOOPING MACHINES.

The Glankler patent, No. 439,142, for an improvement in barrel-hooping machines, whereby the end or chine hoop may be put on without bending or crinkling, *held valid*, and its claims entitled to liberal construction, and infringed by machines appropriating the salient operative features of the patented device.

This was a suit by William W. Simmons and John L. Wellford against the Standard Oil Company of New York and the Acme Oil Company for infringement of a patent. On final hearing.

Phillip, Munson & Phelps and Frederick G. Fincke, for complainants.

W. Bakewell & Sons and Charles A. Talcott, for defendants.

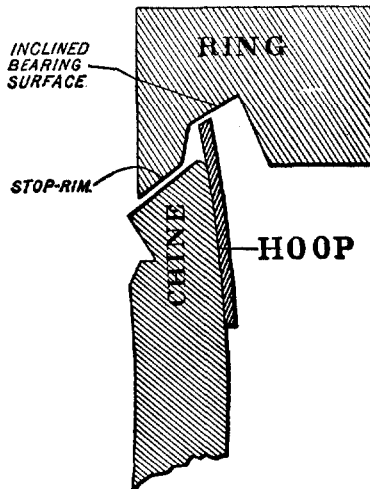
COXE, District Judge. This is an equity suit for infringement of letters patent No. 439,142, dated October 28, 1890, application filed February 8, 1890, granted to Frank Glankler, for an improvement in barrel-hooping machines. The patent is for an improvement on a machine covered by a prior patent, No. 420,683, granted to the same inventor February 4, 1890, application filed October 10, 1888. In the earlier of these patents (No. 420,683) the inventor recites that prior to his invention there was no machine capable of driving the end or chine hoop of a barrel. This hoop being thin, flaring, and difficult to drive, and having no support from the barrel, was crimped or bent at the edges where the hooked drivers, used in the old machines for pulling the hoop in place, bore against it. No suitable machine being in existence these hoops were driven usually by hand. Glankler started with the type of machine shown in letters patent No. 37,719, granted to Edward Holmes for an improvement in hoop-driving and barrel-crozing machines, granted February 17, 1863. The Holmes machine was successfully used for driving the bilge and quarter hoops. By combining the hooked arms of this machine with a stout ring interposed between the pulling hooks and the barrel hoop, Glankler obviated in a great measure the difficulties just mentioned. The specification says:

"The invention consists in the combination, with the hooked arms or drivers, of a ring or annular platen, which is made to fit beneath the hooks of the arms and to rest upon the edge of the hoop, so that the strain of the arms, instead of being concentrated upon the edge of the hoop at isolated points, will be uniformly distributed around its entire circumference, which permits the end hoop to be forced on the barrel without being injured or mutilated by the driving strain."

Although the flat ring was an improvement upon previous contrivances and upon the hand, or chine maul, process, it was still incomplete and impracticable, and its use frequently resulted in bending the edges of the hoop. The invention of the patent in suit (No. 439,142) is an improvement upon the platen of the prior patent, (No. 420,683)—

"Whereby the hoop is not driven entirely on the barrel, but is allowed to project a little beyond the chine or ends of the staves. * * * The ring or platen is formed with a groove in its lower face, which is designed to receive the chine hoop when the application of power is made to drive on the hoop. On the inner side of the ring next to the chine of the barrel the ring has a stop flange or rim, which is designed to strike the chine of the barrel and arrest the further movement of the ring before the hoop is fully driven on. The bottom of the groove is also inclined, the side of the groove next to the flange being shallowest and the outer side of the groove being deepest. The object of this inclination of the bearing-surface for the hoop is to produce an outward strain on the upper edge of the hoop in driving it on, and thus prevent its top edge from curling inwardly, which it would have a tendency to do on account of the taper of the hoop. After the hoop is driven on to the extent shown—i. e., with an eighth or a quarter of an inch of the hoop projecting—the barrel is stored away, and when it is required for use any opening which may have taken place from shrinkage is closed up by driving the hoop its full distance on the staves by means of a flat ring, as shown in my previous patent, or by hand. In making use of my invention the stop flange or rim need not be continuous, but may be broken or cut away at intervals. The metal of the ring on the outside of the groove may also be cut away, if desired. I may also in some cases use a disk; or I may dispense with a continuous ring-shaped platen and construct a series of segmental platens, each having the inner edge arranged to strike the chine of the barrel before the hoop is fully driven on."

The device is not at all complicated and may be clearly comprehended by an examination of the following diagram, showing a sectional view taken through the ring and the chine of the barrel.



The inclined bearing-surface tends to produce an outward strain and prevents the hoop from being curled inwardly or broken down.

The stop-rim prevents the hoop from being driven fully down and leaves a small portion of the hoop—uniform as to all the barrels—projecting above the chine of the barrel. These—the inclined bearing-surface and the stop-rim—are the principal features of the invention.

The claims are as follows:

"(1) A platen for a hoop-driving machine having on its inner surface a flange or stop-rim, a, extending inside and below the bearing for the hoop, substantially as described. (2) A ring on platen for a hoop-driving machine having an abutting flange or stop-rim, a, for the chine, and a bearing-surface above it for the hoop, substantially as shown and described. (3) A ring or platen for a hoop-driving machine having a bearing-surface, b, for the hoop arranged upon an incline, as described, to produce an upward strain on the upper edge of the hoop to counteract its tendency to curl inwardly, as set forth. (4) A ring or platen for a hoop-driving machine having an inner abutting flange or stop-rim, a, for the chine, and an inclined bearing, b, for the edge of the hoop, substantially as shown and described."

The defenses are anticipation, want of patentability and noninfringement.

A number of prior patents are introduced in evidence and discussed in the defendants' brief. Some of these patents are not pleaded in the answer and are offered only to show the prior art. It is not pretended that any of them anticipates, and, when it is remembered that the complainants' patent is confined to the peculiar features described and claimed, it cannot be said that, singly or combined, they operate to restrict materially the field of invention. They do not show an annular platen, continuous or segmental, having a stop-rim or an inclined bearing-surface. They do not show any successful method of driving a chine hoop.

The principal defense is prior use at Cincinnati and Chicago. The rule applicable to this defense is well known. It must be established beyond a reasonable doubt. Both parties invoke this rule. The complainants insist that, tested by it, the proof of what was done at Cincinnati and Chicago falls far short of anticipation. The defendants, on the contrary, maintain that they have proved that the invention was used prior to the date of the application, and that the attempt of the complainants to carry the invention back to an earlier date has failed; at least it has not been successful beyond a reasonable doubt. The complainants have introduced a mass of testimony to show that Glankler conceived the invention in the autumn of 1888—months prior to the alleged use at Cincinnati and Chicago. This testimony, notwithstanding numerous contradictions and discrepancies, is upon the whole so full and circumstantial that it would be accepted as conclusive were it not for the fact that Glankler himself failed to appear as a witness. No sufficient reason is given for his nonappearance. It was, apparently, without excuse, and leaves room to doubt the accuracy of the complainants' dates and the correctness of their conclusions. No matter from what point of view the question is approached, there is always the suspicion that if Glankler could have corroborated this testimony he would have done so. The unfavorable impression thus produced is in no wise diminished by the refusal of the witness

Wellford to answer several questions which might have thrown some light upon the controversy. In these circumstances the court hesitates to find the date of the invention as early as October or November, 1888. Before the defendants' testimony as to the Chicago use was taken, Wellford was asked on cross-examination to give the date of the invention, and gave it as early in the year 1889. He had no data before him and did not pretend to perfect accuracy, but was confident that the machine was perfected and in operation early in 1889. Assuming that the effort to carry the invention still further back has not been entirely successful within the rule referred to, it cannot be denied that the experiments which resulted in the invention in suit began soon after the first patent was applied for and continued almost without interruption until the difficulties were solved. The testimony of the complainants should not be wholly rejected because the court is unable to give it the weight to which the complainants think it entitled. The court may hesitate to find that Glankler had perfected his invention in October, 1888, and yet may be convinced that it was perfected before May, 1889. The testimony may be unreliable as to some details, but it is hardly possible, after reading it, to believe that a ring having an inclined bearing-surface and a stop-rim was unknown to the employes of the Chickasaw Cooperage Company in the latter part of 1888 and the early part of 1889. Unless the defendants are able to show that the patented device was used by others prior to the early part of 1889 it will be the duty of the court to overrule the defense as not having been established beyond a reasonable doubt. There is plausibility in the argument that the Glader machine was not perfected and used successfully until after the patented machine had been exhibited in Chicago and been seen by Glader and his employer in October, 1889. The earliest dates given by the defendants are April, May and June, 1889, but there is nothing definite or convincing about this testimony. Glader never conceived the idea which Glankler embodied. The Glader rings may have been worn by the heavy work put upon them into something resembling the Glankler device, but that Glader appreciated the significance of the grooves thus produced until after he had become familiar with the machine of the patent is entirely problematical. To state, with anything approaching accuracy, when the Glader ring became the Glankler ring is simply impossible.

To sum up the situation on this branch of the case, it is thought that the weight of evidence proves that the Glankler machine was first in existence. Surely no one can say with any degree of certainty that the Glader machine was first. Let it be assumed that the testimony is so uncertain, conflicting and unreliable that it is impossible to say which of the rival devices first saw the light, the court would still be constrained to overrule the defense. The defendants are entitled to no more favorable view of the evidence than this, and even this will not avail them. Unless the court is convinced by clear and indubitable proof that Glader preceded Glankler, and is prepared to make a positive finding of fact to that effect, the patent must be upheld. It is thought that such a finding is

simply out of the question. It would seem that the tribunal reaching such a conclusion must be perplexed with the doubt that after all it might be untrue—that perhaps a valuable patent was being stricken down upon mere speculation and guesswork. To relieve the court of such grave responsibility the rule before referred to was established.

The foregoing applies with equal, if not greater, force to the alleged Cincinnati use. That grooved plates were used at the Cincinnati factory in 1885 is not disputed, but it is denied that they were used to drive chine hoops, or that they embodied directly or indirectly the Glankler invention. Two witnesses on behalf of the defendants testify to a use of these plates, which, if true, would amount to an anticipation of the patent. On the other hand the complainants have called eight witnesses, apparently as intelligent and disinterested as those of the defendants, who flatly contradict this testimony and prove a number of facts which, to say the least, render the anticipating use highly improbable. For instance, it is undisputed that during all the time in question chine mauls were used at the Cincinnati factory. This fact alone is sufficient to raise the necessary doubt. If this highly practical invention, which, in other factories, drove out the hand process the moment it appeared, had been known in 1885 in a large establishment like that of the Cincinnati Cooperage Company, it is hardly possible that they would have continued for three years to use the primitive, clumsy and expensive chine maul in any of their departments. To find with the defendants upon this issue would be to convict the Cincinnati people of unparalleled stupidity. Business men do not act in this way. When the alternative between two methods, the one speedy, uniform and cheap, the other slow and expensive, is offered them, it is safe to assume that they will choose the former. The Cincinnati defense fades away in the light of common sense.

It appears, then, that Glankler was the first person who ever drove successfully a chine hoop by machinery. He was the first who ever used for this purpose a ring having an inclined bearing-surface and a stop-rim. He is entitled, therefore, to liberal treatment.

The claims are aptly drawn to cover the features referred to. It may be that there are more claims than are necessary, the first and second, for instance, being, substantially, for the same subject-matter; and yet there are shades of difference which in some subsequent litigation may become important. There is no necessity here for a strict verbal analysis of these claims, no necessity for holding any of them void because the invention might have been covered by three claims instead of four.

The defendants' machines are made in substantial compliance with the provisions of letters patent No. 454,803, granted June 23, 1891, to Leonard D. Morrison. Instead of using an annular platen they use segments of a ring as suggested in the Glankler patent, but when these are assembled and in use the ring is almost continuous. "This series of segmental platens each has the inner edge arranged to strike the chine of the barrel before the hoop is fully

driven on," and each is provided with a bearing-surface so inclined as to prevent the top edge of the hoop from curling inwardly. The bottom platen has these features and is not segmental. In other words, the defendants do precisely what Glankler did; but Glankler did it before the defendants or any one else. Their machine may be an improvement, they may have introduced some novelties, but that they have appropriated the principal features of the invention—the inclined bearing-surface and the stop-rim—there can be no doubt. Many minor differences can be pointed out, but a discussion of them is unimportant in view of the construction to which the complainants are entitled. The fact cannot be denied that the defendants have seized upon the salient operative features of the patented device. Glankler was the first to hit upon mechanism for driving the chine hoop of a barrel which supplanted the primitive hand method. The defendants have appropriated his ideas and seek to accomplish the same results by analogous means. The features which make their machine successful are Glankler's and not theirs. The patent law would offer but slight protection to an inventor if an infringer can escape the consequences of his acts by making the unsubstantial changes which these defendants have made.

The complainants are entitled to the usual decree.

TRAYER v. BROWN.

(Circuit Court, D. Vermont. July 31, 1894.)

1. PATENTS—INFRINGEMENT.

The fact that one using the material features of a patented invention has made improvements thereon does not prevent such use from being an infringement.

2. SAME—MARKING ARTICLES "PATENTED."

Marking an article "Patented," not with the day and year of the patent which covers it, but with the date of a previous patent to the same inventor, upon which the later patent is an improvement, is not a compliance with the statute, and gives the patentee no right to recover damages.

3. SAME—STITCH-BREAKING MACHINE.

The Trayer patent, No. 431,957, for a "stitch-breaking and raveling attachment for machines for sewing looped fabrics," held valid and infringed.

This was a bill by Adelbert Lee Trayer against Eugene H. Brown for infringement of a patent.

Odin B. Roberts, for orator.

Franklin Scott, for defendant.

WHEELER, District Judge. This suit is brought for infringement of patent 431,957, dated July 8, 1890, and granted to the orator, with three claims for a "stitch-breaking and raveling attachment for machines for sewing looped fabrics." The first claim is for:

"(1) A fabric stitch-breaking and raveling attachment, combining with the pin plate of a turning-off machine a bar having a wedge-shaped end, consisting of two parallel sides, a lower edge lying close to and parallel with the pins on said pin plate, and an inclined upper edge of sufficient length and inclination to give to the wedge-shaped part, near its rear end, sufficient dimension to draw out or break the loops of the fabric, a guide plate lying against and supporting the opposite side of said fabric from said bar and wedge, and having a slot opposite said wedge mechanism whereby said bar may be reciprocated in the direction of the lower edge of its wedge-shaped end through said slot in said guide plate, and a frame for supporting and guiding said bar, for supporting said guide plate, and carrying said mechanism, substantially as and for the purpose set forth."

The third claim is for substantially the same elements, with a jaw for clearing away the surplus material of the fabric.

These attachments are for preparing the uneven edges of knit fabrics for sewing to others. At first the edges were sheared, which was objectionable, breaking the stitches in line being better. The orator took out patent 410,720, dated September 10, 1889, for a trimmer for this purpose, which pierced the loops from opposite sides, and raised them to break the stitches, and made one machine under it, which did not work well. This prior patent, and proceedings in the patent office by which a claim for a single stitch-breaker was dropped, are relied upon to defeat the novelty and validity of the patent in suit. The claim dropped was for a combination with other devices, of one or more, and the patent was for the combination of several, levers with points for piercing the fabric positioned on them for breaking the stitches, by lifting the points while in the fabric. The patent in suit is for a combination with other devices of a bar, shaped "to give to the wedge-shaped part, near its rear end, sufficient dimensions to draw out or break the loops of the fabric." The former pulled on the fabric, and the latter forced the sides of the loop apart, to break the stitch. They did the same thing, but in different ways, and mechanically were different things. Neither the claim dropped nor the patent was for any combination of such wedge-shaped bar with any devices; and the dropping of the claim was not any abandonment of, nor the former patent any anticipation of, the invention patented in this patent. That the orator is really the first inventor of this machine is not much questioned; he does not appear to have lost his right to any part of the invention; and this patent, not the former, seems to cover it.

The defendant makes such attachments having such a bar with its rear end of "sufficient dimensions to draw out or break the loop of the fabric," operating horizontally to spread the loops and break the stitches, instead of perpendicularly, and in combination with different-shaped guide plates and propelling contrivances, but breaking the stitches and clearing away the surplus material in substantially the same manner. In doing this he appears to have taken and used a part of the orator's patented invention, and to that extent to infringe. He may have improved upon it, but using it in an improvement is none the less, because of that purpose, an infringement.

The orator makes and sells these patented attachments; marks them "Patented September 10, 1889," the date of the former patent, and not as patented at the date of this patent. The statute (section 4900) requires a patentee making or selling the patented articles to give notice of the patent by fixing thereon, or on the packages, the word "Patented," with the day and year of the grant, and provides that, on failure in this, no damages shall be recovered, except on proof that the defendant was duly notified of the infringement, and continued it afterwards. This statute prevents a manufacturing patentee from recovering any damages without alleging and proving, either the marking of the articles or packages as patented, with the day and year of the patent, or actual notice to defendants of the patent and the infringement, as a part of the case. *Dunlap v. Schofield*, 152 U. S. 244, 14 Sup. Ct. 576. In this case the orator has alleged marking the articles "Patented," "according to the statute," without alleging actual notice of the patent or of the infringement. The answer neither admits nor denies this, but puts the orator to proof of it. The proofs do not show marking with the day and year of this patent, and therefore the orator has failed to show any right to recover damages for the infringement of this patent. Upon these considerations the orator seems to be entitled to an injunction only.

Let a decree be entered for the orator for an injunction, with costs

THE WANDRAHM.

MERRITT et al. v. THE WANDRAHM.

(District Court, E. D. New York. August 1, 1894.)

MARITIME LIENS—CONTRACT—RAISING SUNKEN VESSEL.

A subcontract to furnish materials and do certain work in the raising of a vessel sunk in the St. Lawrence river for a stated sum *held*, in view of all the circumstances, and especially the absence of any reference to the credit of the vessel, to have been made upon the credit of the principal contractors alone, and to have given the subcontractors no lien.

This was a libel by Israel J. Merritt and another against the steamship Wandrahm to enforce an alleged lien.

Benedict & Benedict, for libelants.

Hyland & Zabriskie, for claimants.

BENEDICT, District Judge. The steamship Wandrahm having been wrecked in the St. Lawrence river, her owners made a contract with the Morse Iron Works, a corporation of the state of New York, by which the vessel was to be raised by the Morse Iron Works, brought to New York, and there repaired so as to restore her to her former condition, the whole for the sum of \$60,000, to be paid by the owners to the Morse Iron Works. Thereafter, the Morse Iron Works employed the libelants to do certain work in raising the vessel then sunk in the St. Lawrence river, in pursuance of

which employment the libelants dispatched eight men and some \$10,000 of material to the St. Lawrence river, to be used in raising the vessel. They now seek, by this proceeding, to enforce a lien upon the vessel for the contract price of the work done and materials used by them in the performance of their contract with the Morse Iron Works.

In view of all the circumstances, the situation of the vessel, and the fact that the libelants' contract with the Morse Iron Works made no allusion to the credit of the vessel, I am of the opinion that the evidence does not justify holding that the libelants furnished the labor and material on the credit of the vessel, but, on the contrary, shows that the libelants relied on the credit of the Morse Iron Works alone. Upon this ground the libel is dismissed.

THE NIKITA.

SUNDSTROM v. FRAGNUL.

(Circuit Court of Appeals, Fifth Circuit. June 5, 1894.)

No. 229.

MARITIME LIENS—ENFORCEMENT—LACHES.

Attempts to enforce a lien for supplies and repairs to an Italian vessel at Marseilles were made at her first port of arrival in Europe, and, about a year later, on her return to Europe from a voyage to Buenos Ayres; but, though payment was contested, no effort was made to follow the vessel to Buenos Ayres, the only port to which she made regular voyages, and the residence of her owner; and the lien was not indorsed on her certificate of registry as provided by the law of Italy for giving notice of such liens. *Held*, that the lien could not be enforced against an innocent purchaser for full value of the vessel at Buenos Ayres, who made every possible inquiry before purchasing.

Appeal from the District Court of the United States for the Northern District of Florida.

This was a libel by John O. Sundstrom against the bark Nikita, formerly named the Duca di Galliera, to enforce claims for repairs and supplies. The district court dismissed the libel. Libellant appealed.

John C. Avery, for appellant.

W. A. Blount and A. C. Blount, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

LOCKE, District Judge. The Italian bark Duca di Galliera, declared to be of Genoa, with one G. Maglio, master, was at the port of Marseilles, France, in November, 1888, and had sails and tarpaulins made, and other canvasswork, amounting to 2,921 francs, done, by John O. Sundstrom, for which Maglio, as master, gave him a note payable to his order 20 days after his arrival at a port in Europe from the voyage which he was about to undertake, to Buenos Ayres and Pensacola, or, in the event of the loss of the

vessel, to be paid from the insurance. At about the same time one Scotto did some woodwork and repairs to the vessel, for which Maglio gave him a note, secured on the value of the vessel, payable in four months. These notes both bore date the 26th January, 1889, and unquestionably gave a lien upon the vessel, under the general admiralty law. Scotto's, first becoming due, was presented for payment where made payable in Marseilles, but was protested for nonpayment. He then indorsed the same to Sundstrom for collection. In April, 1890, Sundstrom, learning that the bark had arrived at Newcastle on the Tyne, sent his notes there for collection; but the mate in charge stated that Maglio was in Buenos Ayres, the master was not on board, and he did not know when he would return, and that he had no instructions to pay them,—that the vessel had been there four months. Sundstrom says that the Credit Lyonnais, who held the drafts, commenced suit for nonpayment, but, the English law not recognizing debts made out of England, the vessel was released, and proceeded to Buenos Ayres with cargo. On her return from that second voyage, and upon her arrival at Hamburg, Sundstrom alleges that he attempted to have her seized again; but that the master used extraordinary vigilance in having her entered at the customhouse as loading for Las Palmas, and the government would not permit her attachment. He says that he also attempted to have her seized at Las Palmas, but, the laws being nearly identical with those of England, he could not succeed, and she again sailed for Buenos Ayres; and he, knowing she was to return by Pensacola, forwarded his claim there, where the suit was commenced October 10, 1892, for the amount of his and Scotto's notes, and the expenses which had been incurred in the attempts to make the collection. In the meantime, on the 10th of July, 1892, the bark was sold at Buenos Ayres, for 35,000 francs, to one Nicholas Sichirich, in whose behalf her master now claims her, and who had her flag and nationality changed from the Italian to the Austrian, and her name changed from Duca di Galliera to Nikita. The purchase is claimed to have been made in good faith, for full value paid in cash, and the evidence tends to support such claim, and shows nothing to the contrary. The transfer was made by Maglio, by a power of attorney from one Carlo Francesco, the owner, at the Italian consulate, in the presence of the consul, and was certified to by him. There was at the time of sale found indorsed upon the certificate of registry of the vessel a lien upon her of 13,625 francs, which was taken charge of by the consul out of the purchase money, and held for the benefit of the creditors. The purchase of the vessel was advertised in *La Nacion* and *La Prensa*, the two leading newspapers of Buenos Ayres, calling upon any one having claims against the vessel to come forward and present them. The Code of Commerce of Italy provides that any credit given vessels, in order to be privileged, must be indorsed in the national certificate of registry of the vessel, and that no Italian consul shall proceed to sell any vessel without first pro-

protecting the rights of the holder of such privileged credits. The national register of every Italian vessel, which is her evidence of nationality, has a special column for the indorsement and registering of such liens or privileged credits. The lien of the libellant in this case was not so entered upon the register of the Duca di Galliera.

The only question which appears to demand consideration in this case is whether the libellant has forfeited the right to enforce his lien on this vessel, as against an innocent purchaser for full value, either on account of his failing to prosecute the same more actively, and with earlier result, or on account of his failure to have it recorded upon the certificate of registry in accordance with the law of the country to which the vessel belonged. In reading his testimony, it would seem that he had continued his exertions, and made attempts at collection in immediate succession; but when the places are considered, and the times at which such efforts must have been made, although no dates are given or times specified when suit was sought to be brought at Hamburg or Las Palmas, it appears clear that much time was permitted to elapse between such efforts. The evidence shows that while an attempt was made to enforce the lien at the first port of her arrival in Europe, in accordance with the note and agreement to pay, yet after the failure to collect the money there, and notice thereby that payment would be contested, and that Maglio, who had given the note, was in Buenos Ayres,—the only port to which the vessel was making regular voyages, and where it appears the owner resided,—no effort was made to follow the vessel to that port with notice of the indebtedness and lien. The length of time which must have been permitted to elapse until she again returned to Europe, when another attempt was made, must have been about a year. Even then the vessel was not followed to what appears to have been, for all practical purposes, her home port, the residence of her owner, and of the acting owner or master and attorney in fact. There is no statute of limitation in admiralty to bar a suit in an effort to enforce a lien, but each case in determining the laches of a libellant must stand upon its own peculiar circumstances and the rights and relations of the parties. Nothing but the most prompt diligence and energetic action will justify a court of admiralty in enforcing a lien when the loss must fall upon an innocent purchaser who has been drawn into a purchase by the negligent silence of the lienor. A creditor may trust his debtor and accept promises and wait the day when a happy turn of fortune may enable him to pay more easily; but if so he assumes the risk of his debtor's honesty and cannot put the burden of loss upon one whom he has permitted to be entrapped. While time may be granted, with some reason where the vessel is within easy reaching distance and where her movements and the business transactions of her owners may be known and watched, there is no reason where payment has been once refused by a foreign vessel and she leaves on long voyages where

she may be sold in any port that the lien should not be enforced or secured with all possible dispatch. The speed of mail or telegraphic communication in these days of steam and electricity has changed materially the principle of laches in admiralty; and what in the past would have been accomplished with so much difficulty, in enforcing a lien, that no court would have demanded it, is now so little of an inconvenience as to be deemed but reasonable. The ease with which maritime information can be obtained, and the movements of vessels of all classes traced, leaves no excuse for lack of diligence or loss of time in permitting them to continue their voyages under a secret lien, and he who does so permit it does it at the peril of encountering the bona fide claim of an innocent purchaser. Any one dealing with a foreign vessel upon credit should inform himself, to a certain extent, regarding the manner given by the laws of that nation for perpetuating and giving notice of such a lien; and while we do not desire to say that an admiralty lien, honestly obtained, should not be enforced under the laws of a forum permitting such enforcement, even in the absence of such a registration as is required, such registration is an additional protection and safeguard, of which the creditor should avail himself, if he desires to show due diligence. The papers of a vessel are always open to the examination and inspection of any one of whom the master is asking credit, and the law for the registering of liens upon vessels of the nationality of this one, as shown in this case, is but a reasonable protection for all parties dealing with her, which should be taken advantage of by them. While no laches can be imputed to the libellant, in this case, which would render void or invalid his lien in the absence of any superior intervening right, the intervention of such right is a risk which he assumed when anything but the utmost diligence was exercised, especially where notice of a desire to avoid payment and contest any suit was plainly given. In not following up the enforcement of his lien with greater diligence, and not seeing that it was duly indorsed upon the certificate of registry, we consider that the libellant has been so far guilty of laches as not to be entitled to protection at the expense of an innocent purchaser, who in no way appears to be in fault, but who made every inquiry possible before purchasing. It is ordered the decree below be affirmed, with costs.

THE J. G. CHAPMAN.

McCAFFREY v. THE J. G. CHAPMAN.

(District Court, D. Minnesota, Third Division. August 13, 1894.)

1. ADMIRALTY—ARREST OF VESSEL IN CUSTODY OF ASSIGNEE IN INSOLVENCY—PROPERTY IN CUSTODIA LEGIS.

After the owner of a vessel has made an assignment of all his property, including the vessel, under the insolvency law of Minnesota, and the assignment has been perfected, a United States marshal has no authority to seize

her under process from a federal court; for, under the law of Minnesota, the assignee is an officer of the state district court, and when the assignment is perfected, the assigned property, ipso facto, comes under its jurisdiction, and is in custodia legis.

2. SAME—ADMIRALTY CLAIMS IN STATE COURT.

A state court, having custody of a vessel through its assignee in insolvency, cannot adjudicate a maritime claim without the assent of the owner thereof; neither can it compel him to appear and assert his claim; and he can pursue his remedy in rem after the state court has disposed of the vessel.

This was a libel by Hugh McCaffrey against the steamer J. G. Chapman for wages. The claimant moved to dismiss for want of jurisdiction.

Williams, Goodenow & Stanton and Steel & Selover, for libellant.

Mullen & Bowditch and Warner, Richardson & Lawrence, for respondent.

NELSON, District Judge. A libel in rem was filed against the steamer J. G. Chapman, a vessel navigating the waters of the Mississippi, and duly registered at the port of La Crosse, to recover a balance due libellant for wages as pilot upon that steamer; and a motion is made to dismiss for want of jurisdiction.

Some months before the seizure by the United States marshal, the owner of the boat had made an assignment of all his property, which included this steamer, under the insolvency laws of the state of Minnesota; the assignee had duly qualified; and the assignment was perfected. An assignee, under the insolvency law of Minnesota, is recognized as an officer of the state district court; and, as long as he is in possession of the property, the marshal of this court cannot interfere with such possession, even to enforce a maritime claim. The supreme court of Minnesota has uniformly held that the insolvency law of 1881 is a bankrupt act, and that, when the assignment is perfected, the assignee is an officer of that court. *Simon v. Mann*, 33 Minn. 412, 23 N. W. 856.

The steamer was at the time of the seizure in the custody and under the jurisdiction of the district court of Wabasha county. In the language of the state supreme court in *Simon v. Mann*, supra:

"Upon the execution of the assignment, and filing it in court, the entire subject-matter, and everything involved in it, including the assigned property, come under the jurisdiction of the court, ipso facto, and the assigned property is in custodia legis."

See, also, *In re Mann*, 32 Minn. 60, 19 N. W. 347, where the court uses the same language.

That a federal court will not interfere with property in the custody of the state court, and in course of administration by it, is well settled. *Taylor v. Carryl*, 20 How. 583; *Lumber Co. v. Ott*, 142 U. S. 628, 12 Sup. Ct. 318. On the other hand, the state court has no authority to adjudicate this maritime claim without the assent of the libellant; neither can it compel him to appear and assert

his claim. When the state court has disposed of the property, then the libelant can pursue his remedy in rem against it, without regard to the proceedings in the state court.

The motion of the claimant is granted to this extent: that the marshal be ordered to deliver possession of the property to the assignee in the insolvency proceedings, from whom he obtained it. The costs will be divided equally between the parties.

THE HEKLA.

NATIONAL STEAMSHIP CO., Limited, v. THE HEKLA.

(District Court, E. D. New York. July 7, 1894.)

1. SALVAGE COMPENSATION—STEAMSHIP WITH BROKEN THRUST SHAFT.

A steamship on the Atlantic ocean, with her thrust shaft broken, must be considered as in a position of peril, although the shaft may be temporarily mended on board; and towing her into port is a meritorious service, entitled to a liberal reward.

2. SAME.

A steamship worth, with her cargo, \$213,300, and having 843 passengers on board, broke her thrust shaft on the Atlantic ocean, and was towed to New York by another steamship, worth \$200,000, having a cargo valued at \$248,000, and freight amounting to \$13,510. The towage occupied nine days, and was skillfully rendered, in rough weather, at an expense of \$3,681.05. *Held*, that \$30,000, with the expenses, was a reasonable reward.

3. SAME—RIGHTS OF CARGO OWNERS.

A shipper whose cattle suffer damage by reason of their detention on board during the extra time consumed in rendering salvage services is not entitled to share in the compensation. *Goldsmith v. North German Lloyds*, 23 Fed. 820, followed.

This was a libel by the National Steamship Company, Limited, against the steamship Hekla, her cargo and freight money, to recover for salvage services. The owner of cattle forming part of the cargo of the vessel rendering the services intervened, claiming to be entitled to share in the salvage award.

John Chetwood, for libelant.

Wing, Shoudy & Putnam, for claimants.

Butler, Stillman & Hubbard, for intervener.

BENEDICT, District Judge. This is an action to recover salvage compensation for services rendered the English steamship Hekla by the National steamship America in April, 1893. The Hekla, being a steamship of 2,113 tons, bound to New York, having a cargo on board consisting in part of exhibits for the World's Fair, and 843 passengers, on March 24th, when about 1,500 miles from New York and 250 miles from St. Johns, Newfoundland, broke her thrust shaft. The shaft was repaired, and on the evening of the 25th the steamer proceeded under steam towards New York. On the 27th a council of the officers of the steamer was held, at which it was decided to accept

the first assistance offered, "as the ship, during the last 24 hours, had only made 110 miles, in calm weather, and the first and second engineers declared it would not be advisable to make more revolutions, * * * and also that the repaired shaft might again break." Thereafter, she signaled the steamship *Normandie*, bound to New York, but assistance was refused her, and she proceeded slowly. On April 1st the repairing to the shaft gave way, and the ship, lying in the trough of the sea and rolling heavily, became helpless. About 12 hours afterwards she signaled the steamer *America*, a steamer of the National Line, bound to London. At her request the *America* lay by her, the heavy weather making it impossible to make fast until April 3d, when the towline was made fast, and the *America* proceeded to tow the *Hekla* towards Halifax. Meanwhile, an attempt to again repair the thrust shaft was being made, which succeeded in enabling steam to be used. At the request of the *Hekla* the *America* then changed her course for New York, the engine of the *Hekla* assisting at moderate speed. On April 4th the repairing to the shaft again gave away, and the engines of the *Hekla* stopped. For the third time, repairs to the shaft were undertaken, the *America* continuing on her course to New York. On April 7th, when the steamer had reached pilot ground, the repairs to the shaft were completed; but the *Hekla* did not connect her screw until after the pilot had spoken her, which was on the morning of the 9th of April. Thereafter, the *Hekla* used her steam until the towing lines of the *America* were finally cast off, near the Sandy Hook light, and the *Hekla* went up to Quarantine under her own steam. The *America* proceeded to her wharf in New York, took in fresh coal and fodder, and shortly after resumed her voyage for London; having disbursed for coal, fodder, and port bills, \$3,681.05. Much of the time during the rendition of this service by the *America*, the weather was heavy; part of the time the wind blowing a gale, in which the *Hekla's* line parted. The *Hekla* was in danger of being short of provisions, and was supplied with beef, milk, butter, etc., by the *America*. The value of the *Hekla*, in her condition on arrival, was \$70,000; the value of the cargo of Chicago exhibits, \$90,400; the value of sundry merchandise, \$52,900; rendering the total amount subject to salvage \$213,300. The value of the *America* was \$200,000, and she had a cargo valued at \$248,000, and freight amounting to \$13,510.

That a meritorious salvage service was rendered by the *America* to the *Hekla* is not disputed, but the claimants insist that a very moderate compensation should be allowed, upon the ground that the *Hekla* was not disabled by the breaking of her thrust shaft and only required assistance to expedite her progress. This proposition is based upon the fact that the *Hekla's* shaft was repaired, and able to work, by the time the steamer reached New York. Reference is made to the case of *The Umbria*, which vessel was navigated safely into port, a distance of 800 miles, with a mended shaft, without assistance. I cannot agree with the proposition that this is a case of acceleration only, for while it is true that the *Umbria* was navigated

in safety, with a repaired thrust shaft, nearly the same distance as was navigated by the Hekla, and while it is also true that in this instance the Hekla's thrust shaft was repaired three times, still this does not satisfy me that the delay was the only danger to which the Hekla was exposed. How long the Hekla's shaft, as finally repaired, would have endured, cannot be told. Each time that it was repaired before, it broke; and it appears in evidence that her owners—having, on her arrival in New York, an opportunity to ascertain the nature of the repairs made to the shaft—became satisfied that it would be unsafe to send her home again in that condition, and accordingly detained her in New York until a new shaft could be brought out from the other side. This shows, as it seems to me, that in the opinion of maritime men a steamship on the ocean, with her thrust shaft broken, is to be considered in a position of peril, although the shaft may be repaired on board. The officers of the ship thought her in peril, for, although they had repaired the shaft, they determined, in council, to take the first assistance that should be offered.

In view of the character of the property saved, the number of passengers on board the Hekla, the peril to passengers and to cargo, the constant exertion put forth in rendering the service (the master receiving severe injury in its performance), the skill displayed in the towing, and the successful result of the effort; considering, also, the value of the property at risk, the value of the salving vessel, and the resulting delay of 12 days,—I am of the opinion that the sum of \$30,000 is a proper salvage compensation. To this sum I add the amount of money actually expended by the America in re-coaling, etc., in New York.

The America, at the time of the rendition of this service, had on board 160 head of live cattle, which she was transporting to London. The owner of these cattle has intervened in this action, and claims to be entitled to share in the salvage award because of the fact that the detaining of his cattle on board the America during the 12 days that she was engaged in the rendition of this salvage service caused injury to his cattle. But the case of this shipper is similar to that presented to this court in the case of Goldsmith v. North German Lloyds, 23 Fed. 820. The decision in that case compels the dismissal of the petition. Following that decision, the petition of the interveners is dismissed, but without costs.

Let decrees be entered in conformity with this opinion.

THE MARY FREELAND.

DAILEY v. THE MARY FREELAND.

(District Court, E. D. New York. July 11, 1894.)

SALVAGE—DISTRIBUTION.

A schooner, broken from her moorings, and drifting through Hell Gate, was boarded by men in a rowboat, who carried a hawser to the shore.

and made it fast. Afterwards, a tug came and lay by the schooner for some hours, and then towed her back to her dock. *Held*, that the men in the rowboat were the principal salvors, and should have the largest part of the salvage.

This was a libel by John D. Dailey against the schooner Mary Freeland to recover salvage. George Forcher, James S. Bennett, and James Norton intervened by petition, claiming to share in the salvage award.

The schooner, with a cargo of paving stones, and having a canal boat attached to her, broke loose from her moorings, and drifted through Hell Gate, in the East river. Just at dark the captain of the canal boat, who was the only man on board, succeeded in attracting the attention of three men in a rowboat, who came out to his assistance, and, the schooner being just then near the shore, they took a hawser from her, made it fast on shore, and two of them stayed by the schooner while the third went off to find the owner, or some one who could come to her relief. Meantime, a tugboat passing up the river was attracted by the shouts of the men, came to the schooner, lay by her for some hours, and finally took her in tow, and brought her to a dock at Astoria. The rowboat men, who lost their boat during the night, came in as petitioners for salvage under the libel filed by the tugboat.

Stewart & Macklin, for Dailey.

E. A. Carpenter, for petitioners.

Owen, Gray & Sturges, for claimants.

BENEDICT, District Judge. For the salvage services rendered to the schooner Mary Freeland on the night of the 12th of September, I consider \$750 a sufficient salvage compensation.

This sum should all be paid to the petitioners, George Forcher, James S. Bennett, and James Norton, except \$50, which should be paid to the libelant Dailey, for the services of the tug Henry A. Crawford. The \$700 may be divided among the three petitioners as follows: Three hundred dollars to the libelant Forcher, who was injured in the rendition of the service, and who also lost his boat, and the remainder divided equally among the other two petitioners. The claimants must also pay costs.

CONSOLIDATED WYOMING GOLD MIN. CO. v. CHAMPION MIN. CO.

(Circuit Court, N. D. California. March 6, 1893.)

1. **RES JUDICATA—JUDGMENT IN STATE COURT.**

A judgment of a state court, within and responsive to the issues made by the pleadings, directly upon a point, is, as a plea in bar and as evidence, conclusive between the same parties on the same matter in another action in the federal court.

2. **SAME—FEDERAL COURTS—JURISDICTION.**

The fact that a judgment in the state court in an action involving a contest between mining claims is *res judicata* of the questions litigated in an action removed to the federal court does not deprive such court of jurisdiction, as a contest between mining claims necessarily involves a consideration of the laws of the United States as to the location and the effect of end lines and side lines on the rights to the mineral veins and lodes, and as the evidence whereby these things are proved, whether direct or through estoppel by some act of the party, or by a judgment of a court, does not remove consideration of the laws as elements of decision.

Action by the Consolidated Wyoming Gold-Mining Company against the Champion Mining Company. Defendant files a plea in abatement of the jurisdiction. Denied.

Wilson & McCutchen, for complainant.

Edward Lynch and C. H. Lindley, for defendant.

McKENNA, Circuit Judge (orally). This is an action for trespass and for an injunction. It was originally brought in the state court, and was removed here on petition of defendant. The petition alleges a prior suit between the same parties in the state court (16 Pac. 513), the parties, however, being reversed; the plaintiff here being defendant, and the defendant plaintiff. A motion was made (based on the petition) to remand to the state court, on the ground that the petition showed that there had been a prior suit between the same parties in the state court, in which it was claimed that the judgment of the court left no question, federal or otherwise, to be litigated between the parties, except the fact and extent of trespass. This motion was denied on the ground that the petition showed that a federal question was involved. A plea in abatement to the jurisdiction was then filed, alleging specifically the judgment in the state court, to which the defendant made replication, in which it was claimed that the points involved in the present suit were not involved in the suit in the state court. The replication sets out the pleadings, findings, and judgment of the state court, from which it appears that issue was made, and that the court found and adjudicated on the location, and the time of the location, of the mining claims involved in the suit at bar,—determining in favor of the plaintiff here,—and also found that certain boundary lines were side lines, not end lines, as was alleged by defendant here (plaintiff in such prior suit), and, as conclusions of law, held and adjudicated as follows:

"The issues in this cause having been tried by the court without a jury, and the written decision of said court having been made on the 21st day of

April, 1886, bearing date of that day, and duly filed with the clerk of said court on the same day, ordering judgment in accordance therewith: Now, therefore, it is considered, adjudged, and decreed that plaintiff have judgment against the defendant for the sum of one hundred and twenty dollars, with its costs therein expended up to the time of filing of the answer to the amended complaint; that plaintiff is not entitled to any injunction or other relief against defendant; that defendant is entitled to work its Wyoming mine along, and all points below the junction thereof with, the Phillips mine, of plaintiff, and that it is entitled to work both its Wyoming and Ural mines at any point below where either of said mines, on its dip, may unite with the New Year's or Climax or New Year's Extension or Annex mines of the plaintiff; and that defendant have and recover his costs herein expended since the filing of its said answer to amended complaint, which are hereby taxed at _____.

J. M. Walling, Superior Judge.

"Dated, April 21st, 1886."

It is admitted that the findings of the court and its judgment are in accordance with the issues presented by the pleadings, and that defendant here is estopped to litigate the same, "as far," to use language of counsel, "as that judgment is capable of certain and definite construction." It is, however, contended that the judgment is not estoppel, because, while the Ural and New Year's mines were included in the pleadings, no trespass was shown to have been committed, involving either of those claims, and that the allegations of the pleadings concerning them were irrelevant and immaterial. And it is further contended that the judgment of the court on these allegations was unnecessary and immaterial, because the action was in trespass, and, while the allegation was general,—of a trespass on the consolidated mine,—that no trespass was proved or spoken of on the New Year's claim, and that the action resolved itself into one for a trespass on the Phillips and Muller mines.

Counsel for defendant quotes a number of cases to show that in trespass *quare clausum fregit* the plaintiff may recover on proof of trespass done to a part only of the claim described in the declaration, and hence a judgment in the case is not conclusive of the title to the whole, as only title to a part may have been involved and decided, and therefore, upon plea of such judgment, evidence would be received to limit its estoppel to that which was actually passed on. But are these cases applicable? They might be if the judgment of the court had stopped by finding the special trespass, or awarding damages for it, but the court did not so stop. It not only adjudged and decreed that plaintiff have judgment against the defendant for the sum of \$120, with costs, but it decreed "that defendant is entitled to work its Wyoming mine along, and all points below the junction thereof with, the Phillips mine of plaintiff, and that it is entitled to work both its Wyoming and Ural mines at any point below where either of said mines, on its dip, may unite with the New Year's or Climax or New Year's Extension or Annex mines of the plaintiff." In other words, it adjudged to the Consolidated Wyoming mine the rights which, it is alleged, are trespassed upon by the Champion, and on account of which trespass this action is brought. The judgments in the cases cited were consistent with proof of title to the whole claim described, or part of it,

but the judgment pleaded here is only consistent with the supposition of evidence offered on all the issues of the complaint. The rule is well settled that a judgment of a competent court, directly upon a point, is as a plea a bar, and as evidence conclusive, between the same parties, upon the same matter directly in question, in another action or court. The judgment of the state court seems to satisfy this rule. It is certainly within and responsive to the issues made by the pleadings. If it went beyond the proof,—in other words, was not sustained by the evidence,—it may have been erroneous, but I am cited to no case which holds that the estoppel of a judgment can be avoided by showing the judgment was erroneous. The remedy for that is an appeal, and the plaintiff took that remedy. It appealed to the supreme court of California, and that court decided that the findings of the court below were sustained by the evidence. Besides, the action was not as narrow as defendant claims. The defendant makes the judgment of the court a measure of what it contended for. If this were the measure, few judgments would be an estoppel. If a party's allegations are not sustained, or are overcome by adverse proof, can it be said that he has not litigated them? It is the effort, not the success, which makes the estoppel. The reason is, having had his opportunity in court against the other party, he will not be permitted to contend with him again, on the same matters, in another action or court. The action in the state court united, as it could unite, legal and equitable relief, damages for trespasses done, injunction against trespasses threatened. The place of them was alleged to be "that body of quartz mining ground which is known as part of the 'Champion Consolidated Mines and Tunnel Right.'" It was composed of a number of mining claims. The Wyoming Company own adjoining claims, and the controversy was not for trespass on the locus of the plaintiff, in the sense of the ordinary action of trespass *quare clausum fregit*, but turned on rights growing out of independent claims of different and nonconflicting surface boundaries. The rights of the parties therefore depended upon time of location of such claims, and whether their respective boundaries were end lines or side lines. The importance of an adjudication on such lines and such locations is apparent. Beyond an end line, the vein of mineral cannot be followed into adjoining ground; beyond a side line, it can be; and to the oldest location is given, by section 2336 of the Revised Statutes, the right, when two or more unite, to take the vein below the point of junction, including all the intervening space of intersection. The trespass found by the court, and which counsel claims determines the extent of the estoppel of the judgment, was not an issue. It was confessed by the answer. It was an accidental trespass on the Phillips ledge, owned by plaintiff, at a point above its junction with the Wyoming, owned by defendant. "The real trespass complained of," the supreme court say in its opinion, "was that the defendant took gold-bearing quartz out of the United ledge below the junction, and so the main question is,

who owns the United ledge?" The court then quotes section 2336 of the Revised Statutes, supra, and continues as follows:

"Consequently, the main question depends upon the underlying question, which party holds under the older location? And the most important questions which appear in the record were the rulings of the court as to the admissibility of evidence offered upon this question of prior location." Page 80.

The supreme court also considers the finding and judgment of the lower court as to the Ural mine of defendant (plaintiff here) and the New Year's and New Year's Extension mine of plaintiff (defendant here), and holds that the findings were sustained by the evidence, and that there was no basis for an injunction or damages. Every point, therefore, on which the parties can rely in the case at bar, except the fact or degree of trespass, and the denial of them, seems to have been passed upon by the state court. But counsel say, quoting *People v. Johnson*, 38 N. Y. 63:

"Although a decree, in express terms, professes to affirm a particular fact, yet, if such fact was immaterial, and the controversy did not turn upon it, the decree will not conclude the parties in reference to that fact."

And counsel cites, in addition to *People v. Johnson*, *Woodgate v. Fleet*, 44 N. Y. 1; *Fulton v. Hanlow*, 20 Cal. 450.

I think counsel draws too broad a conclusion from the language quoted. When properly understood, it expresses correct doctrine. In all these cases cited the finding of the court was not necessary to the judgment, and the language of the court must be interpreted by this fact. There is no intimation in any of them that the judgment was not conclusive of all that was covered by it. In *People v. Johnson*, tenancy between the parties was alleged to have been decided in the prior suit. This, the court said, was not a question in issue. "The mere fact of the alleged tenancy," the court said, "is undoubtedly found by the judge on the trial in the superior court; but the fact was immaterial, and the judgment did not, in any respect, rest upon that finding, as is most obvious from the inspection of the pleadings, the findings of the court, and the final judgment rendered thereon." In the case at bar the judgment pleaded does rest on the findings, and could not be sustained without them. In *Woodgate v. Fleet*, as in *People v. Johnson*, there was a finding not necessary to the judgment; indeed, hardly amounted to a finding. At any rate, the judgment did not depend upon it,—it was good without it,—and the court said:

"If the court gave a wrong reason for its judgment, or placed it on unnecessary grounds, the parties would not be estopped, as to such reasons and grounds, in any other suit. The bill did not pray for a construction of the deed, and that does not seem to have been a matter of controversy and discussion on the trial. * * *

It will be seen that it was not decided that the judgment was not conclusive of all it covered; only that the wrong reason for the judgment stated by the chancellor was not conclusive.

In the case of *Fulton v. Hanlow*, the fact which was claimed to have been previously decided was that a certain sale under a judgment and execution of the San Francisco Gas Company against

the city of San Francisco was valid, and effectual to pass title to the purchasers at the sale. It was contended that "the decree was admissible, in connection with the conveyance, as a muniment of title, constituting a link in the deraignment of title." The court, by Justice Field, said:

"The construction which we give to the decree will render it unnecessary to consider the second proposition. As we read the decree, it is not an adjudication upon the character of the title to the city which the purchaser acquired from the sale and conveyance of the sheriff."

The learned justice further said that the court adjudged that the sale was effectual to pass such title as the sheriff had sold,—whatever it might be. It is that title, and no other, to which the decree refers. This being so, the declaration of the decree as to the effect of the sale was a finding of an immaterial matter, not necessary to the judgment of the court, and upon which, as was said in *People v. Johnson*, the judgment did not rest, and hence was not covered by it. But, as we have seen, in the case at bar the time of the location of the respective claims of the parties, the fact that certain of their boundary lines were or were not end lines, the places where the veins cropped out, and the rights resulting therefrom, were all put in issue by the action in the state court, and actually passed on by such court, and they were material. Evidence was submitted as to all of them, and the judgment depended upon and rested upon them. The judgment was affirmed by the supreme court of the state. The court say, "From a thorough examination of the whole case, we find no reason to disturb the judgment of the court below."

But does the fact of the judgment in the state court being res adjudicata of the questions litigated, and which I have detailed, remove this case from the jurisdiction of a federal court? The question is not without difficulty. A contest between mining claims necessarily involves a consideration of the laws of the United States. These laws prescribe how the location shall be made, and the effect of end lines and side lines on the rights to the mineral veins and lodes. The evidence by which these things are proved, whether direct, or through the estoppel of some act of the party, or by a judgment of a court, does not remove consideration of the laws as elements of decision. In section 86, *Dillon on Removal of Causes* says:

"The motion to remand must be based upon the petition for removal, and the record as sent from the state court. If the petition, in connection with the record, is sufficient, on its face, but states, as ground of removal, facts which are not true,—as, for example, in regard to citizenship, or value, * * * an issue may be taken thereon in the circuit court by a plea in the nature of a plea in abatement."

But citizenship and value have no other purpose than to fix the tribunal. The case, in its progress, or the judgment, does not depend upon them. In *Coal Co. v. Blatchford*, 11 Wall. 172, the supreme court say, "The question of citizenship constitutes no part of the issue upon the merits." The same may be said of value, so far as fixing jurisdiction. But a law of congress, upon which, as a factor in decision, a party's rights depend, determines, in conjunc-

tion with the facts, the judgment to be rendered. The form in which the evidence shall be introduced does not, therefore, remove the law of congress from being an element of decision, and hence of cognizance in a federal court. The prayer of the plea of abatement will therefore be denied, without prejudice, however, to the plaintiff urging the facts alleged by it in the subsequent stages of the case.

**CENTRAL TRUST CO. OF NEW YORK v. CHATTANOOGA, R. & C. R.
CO. et al. (BUNN, Intervener).**

(Circuit Court, N. D. Georgia. May 2, 1894.)

RECEIVERS.—CONFLICTING STATE AND FEDERAL JURISDICTION.

Where the property of a railroad has been in the uninterrupted possession of successive receivers appointed by a federal court from a time antedating the appointment of a receiver for same property by a state court, the federal court will not order it transferred to the receiver of the state court, if it appears that the last receiver of the federal court has actual physical possession under a bill filed by a trustee of bondholders who represent the bulk of the indebtedness of the road, while the receiver of the state court represents only junior creditors, and but little of the indebtedness.

On May 5, 1891, the Chattanooga, Rome & Columbus Railroad Company was sold to the Savannah & Western Railroad Company. At that time all the stock of the Savannah & Western Railroad Company belonged to the Central Railroad Company, which was in possession, operation, and control of the Savannah & Western, as its property, and so took and operated the Chattanooga, Rome & Columbus Railroad thereafter as a part of the Savannah & Western Railroad. On March 3, 1892, Rowena M. Clark filed an original bill in the circuit court of the United States for the eastern division of the southern district of Georgia against the Central Railroad & Banking Company and others. Under this bill, E. P. Alexander was made temporary receiver of all the property and assets of the Central Railroad & Banking Company. On March 28th the Savannah & Western Railroad Company was made party defendant to this bill, it being stated in the application that that company was a separate corporation, of which the capital stock was owned by the Central Railroad & Banking Company of Georgia, and which was practically operated by the latter company. On the same day the board of directors of the Central Railroad & Banking Company of Georgia were made permanent receivers of that company, the board consisting of H. M. Comer and others.

On July 4, 1892, the Central Railroad & Banking Company of Georgia filed its original bill against the Farmers' Loan & Trust Company and others, under which bill H. M. Comer was appointed sole receiver of all the properties of the Central Railroad & Banking Company of Georgia. This bill set out, as a part of the property of the Central Railroad & Banking Company of Georgia, the Savannah & Western Railroad, and also that the Savannah & Western Railroad owned the Chattanooga, Rome & Columbus Railroad Company.

On May 15, 1893, H. M. Comer and Robert J. Lowry were, by the Honorable Don A. Pardee, circuit judge, appointed receivers of the Savannah & Western Railroad Company, under an independent bill, filed originally in the middle district of Alabama, to foreclose a mortgage on the Savannah & Western, given on May 1, 1889, on the property then owned and afterwards to be acquired; the Chattanooga, Rome & Columbus Railroad being acquired May 5, 1891. Under this appointment, Comer, as receiver of the southern district, surrendered possession of all the property of the Savannah & Western to Comer and Lowry, as receivers under the last appointment, but the same was operated in connection with the Central Railroad. Among the properties so delivered and operated by Comer and Lowry was the Chattanooga, Rome & Columbus Railroad Company. Comer and Lowry held possession as such joint receivers until February 1, 1894, when Eugene E. Jones was appointed receiver of the Chattanooga, Rome & Columbus Railroad Company under a bill filed by the Central Trust Company against it, in the northern district of Georgia, to foreclose a mortgage dated 1st of September, 1887. Under this appointment, Comer and Lowry surrendered possession of the Chattanooga, Rome & Columbus Railroad to said Jones, as receiver, and it is now in his possession, as such receiver. In February, 1893, under a bill filed in the superior court of Floyd county against the Chattanooga, Rome & Columbus Railroad Company by Cason and others, averring themselves to be judgment creditors of said company, W. C. Bunn was appointed receiver of the property and assets of the Chattanooga, Rome & Columbus Railroad; and he now applies to this court to have Jones, the receiver of this court, turn over to him, as receiver of the state court, all property and assets of the said Chattanooga, Rome & Columbus Railroad Company.

Dean & Smith, for intervenor.

Henry B. Tompkins, for respondents.

NEWMAN, District Judge (after stating the facts as above). From the above statement of facts, it will be seen that the Chattanooga, Rome & Columbus Railroad has been in the continuous and uninterrupted possession and has been controlled and operated by receivers of the federal court since the appointment of the receiver in the case of Rowena M. Clark against the Central Railroad & Banking Company, March 3, 1892. The suit of the Central Trust Company against the Chattanooga, Rome & Columbus Railroad, under which Jones holds as receiver, was brought to foreclose a mortgage securing \$2,090,000 of bonds. It is not denied that the lien of this mortgage is superior to that of the judgment creditors who bring the proceeding in the state court. Even if the bill of the Central Trust Company against the Chattanooga, Rome & Columbus Railroad, under which Jones holds possession of the road, could be treated as a separate and distinct proceeding, and unconnected, so far as the receivership is concerned, with the former proceeding in the southern district of Georgia and in the middle

district of Alabama, it is not at all clear that the receiver of the state court would have the right to the possession of this property. Where a receiver of this court has gone into actual physical possession and control of a railroad under a bill filed by a trustee of bondholders representing the great bulk of the indebtedness of the road, the court will certainly hesitate about delivering possession to a receiver appointed by a state court in a bill filed by junior creditors, and representing a comparatively small amount of indebtedness of the road; and this, too, without violating any rule of comity between courts. But the case at bar presents a much stronger case against the right of possession by the state court than is assumed above. The order of the state judge recognizes that this property is in the hands of the federal courts, and directs that there shall be no interference with so much of the Chattanooga, Rome & Columbus Railroad as is in possession of its receiver. The possession of Jones, the present receiver, is so connected, however, in any view of it, with the possession of the former receivers, as that it cannot be said, in any fair sense, to have been, on his part, or on the part of the court, acting through him, a seizure of the property, notwithstanding the fact of the appointment of a different receiver by another court. The circuit court for the northern district of Georgia had, on the 16th day of January, 1894, appointed Comer and Lowry as receivers, under the bill of The Central Trust Company v. The Chattanooga, Rome & Columbus Railroad, as well as under the bill of The Central Trust Company v. Savannah & Western Railroad Company, thereby requiring the receivers to hold the property under both bills, they having been before that time in possession under the bill against the Savannah & Western Railroad Company. They declined this appointment, and by an order of the 1st of February, 1894, and by consent of parties, Jones was substituted and appointed as receiver under the Chattanooga, Rome & Columbus bill alone, and allowed to operate it as a separate property. While the primary proceeding against the Savannah & Western Railroad Company was in the middle district of Alabama, a bill had also been filed in the northern district of Georgia, under which Comer and Lowry were recognized as receivers of the property in this district, so that this court, so far as the property in this district was concerned, had had possession and control of the Chattanooga, Rome & Columbus Railroad, as well as the other Savannah & Western properties in this district, since the date of the appointment of Comer and Lowry under the Savannah & Western bill. The action of Circuit Judge Pardee in appointing Comer and Lowry receivers under the bill against the Savannah & Western Railroad Company is but a continuation of Comer's receivership in the Central Railroad of Georgia litigation, and the addition of Lowry as coreceiver, as to the Savannah & Western Railroad Company. Judge Pardee's order further provided for the operation of the Savannah & Western Railroad in connection with the Central Railroad property, and there was a most intimate connection in this way between the two proceedings. The Central Railroad receivership, it is conceded, antedates the appointment of Bunn as re-

celver in the state court; so that, tracing the possession of this property back, it seems entirely clear that each possession, since the original appointment in the Rowena M. Clark Case, has been but a continuation of the former possessions, and shows plainly that there has been no such possession taken of this property as would be in violation of the rights of any other court under the recognized comity of courts on that subject.

The facts here make no such case as was made in the litigation over the Atlanta & Charlotte Air-Line Railroad, in which conflicting opinions as to the duty of the courts as to possession of receivers were expressed by Justice Bradley and Circuit Judge Woods, in the case of *Wilmer v. Railroad Co.*, 2 Woods, 409, Fed. Cas. No. 17,775, or in the *Atlanta & Florida Railroad Case*, in which a decision was made by the judge of the state court (not reported), and afterwards heard by Judge Speer, of the southern district, in the case of *East Tennessee, V. & G. R. Co. v. Atlanta & F. R. Co.*, 49 Fed. 608. In both of these cases there was something of a race for the possession of the property, and the rule may be derived from these cases, as well as from all the other authorities on the subject, that the court which has the actual physical possession of the property will determine the justice and right of its possession, and any other court appointing a receiver, even prior to the appointment by the court having possession, will direct that an application be made to the court in possession to determine the question as to whether its receiver is rightfully entitled to possession. Under the facts stated as existing in the case at bar, a very different question is presented. The state court appointed its receiver, as has been stated, with the knowledge of the fact that the property was in the hands of the federal court, and notwithstanding that fact; and it did not direct its receiver to take possession, but, on the contrary, the effect of the order was to direct the receiver not to take possession. Such consideration having been shown by that court for the possession of the federal court, it is our duty to show equal consideration here.

But it is contended that the possession of the receivers in the Central Railroad litigation of the Chattanooga, Rome & Columbus Railroad was not rightful, in that the property did not properly go into the hands of the receivers there appointed; and the case of *Central Railroad & Banking Co. v. Farmers' Loan & Trust Co.*, 56 Fed. 357, is cited as authority. Without going into the question of what the effect of that decision was, and as to how far it is applicable here, it is sufficient to say that the fact is not questioned that the road did go into the actual possession and control of the receivers appointed in that litigation, and it is that fact which is effective here. The question here is simply one of possession. There is no contention whatever that Jones was not legally appointed under the bill of the Central Trust Company against the Chattanooga, Rome & Columbus Railroad; that is, that in itself that appointment was proper and rightful, and whether or not the road should have gone into the hands of the receivers in the bill against

the Central Railroad, if actual possession was taken, that is sufficient, so far as that matter is at all relevant to the issue here.

It is the desire of this court to show the utmost consideration for the courts of the state, but it is not perceived how, in any view of the matter, a better right is shown in the receiver of the state court to have possession of the property in controversy than the officer of this court who is now in actual possession. The order prayed for, therefore, requiring the receiver of this court to turn over to the receiver of the state court the possession of the Chattanooga, Rome & Columbus Railroad, must be denied.

MUNICIPAL INV. CO. et al. v. GARDINER et al.

(Circuit Court, D. Indiana. September 1, 1894.)

No. 99.

1. JURISDICTION—MOTION TO DISMISS.

The question of jurisdiction may be raised by motion to dismiss, want of jurisdiction being shown by the bill.

2. SAME—SPECIFIC PERFORMANCE—RESIDENCE OF PARTY.

A suit to enforce a contract to convey land should be brought in the district where one of the parties resides. within Act March 3, 1887, as amended by Act Aug. 13, 1888 (25 Stat. 433), providing that, where jurisdiction of a federal court is founded only on diversity of citizenship, suit shall be brought only in a district, the residence of one of the parties; Act March 3, 1875, § 8 (continued in force by said acts of 1887 and 1888), allowing suit to enforce any legal or equitable lien on or claim to, or to remove any incumbrance or lien or cloud on, the title to real or personal property, to be maintained in the district where the property is located, not applying to specific performance.

Suit by the Municipal Investment Company and another against J. M. Gardiner and another. Defendants move to dismiss. Motion granted.

Ball, Wood & Oakley, for complainants.

A. A. Chapin, for defendants.

BAKER, District Judge. This is a suit to enforce a contract for the conveyance of land, and for an accounting. The bill alleges that the complainants are citizens of the state of Illinois, and that the defendants are citizens of the state of Kentucky. The substance of the averments which purport to state the cause of action is that the Municipal Investment Company advanced money to defendants to improve certain real estate in Jay county, Ind., for which they held an option in a contract of purchase; that the defendants, in consideration of the agreement of the Municipal Investment Company to make further advancements, promised to have the legal title of the land conveyed to complainant Cole to secure the investment company for such advances, upon the faith of which advancements were made; and that in violation of the agreement the defendants took the deed in their own names. Cole, while made a co-complainant,

is not shown to have any interest other than as a mere trustee for holding the legal title for the benefit of the investment company. The prayer is that the court adjudge that the legal title to the land is held by the defendants in trust for the performance of their agreement; that they be required to execute a deed to said Cole of said real estate, or, in default, that the master make a deed therefor; and that the court take an accounting, and ascertain how much is due the complainants for their advancements, and award all other proper relief.

The defendants move to dismiss the bill for want of jurisdiction, because neither of the parties to the suit is a citizen of this district. This case is not one where a plea in abatement is required to raise the question of jurisdiction. Here the citizenship of the parties is averred in the bill of complaint, and the alleged defect in the jurisdiction of the court is apparent. Where the want of jurisdiction is disclosed on the face of the bill, the defect may be reached by demurrer, or taken advantage of without demurrer, by motion to dismiss. *Coal Co. v. Blatchford*, 11 Wall. 172. The defendants base their motion on the following provision of the act of March 3, 1887, as amended August 13, 1888 (25 Stat. 433), to wit:

"And no civil suit shall be brought before either of said courts, against any person, by any original process or proceeding, in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant."

The contention of the complainants is that this suit is maintainable upon the authority of section 8 of the act of March 3, 1875, which is continued in force by the acts of 1887 and 1888. The portion of section 8 material to the question in hand is as follows:

"That when in any suit, commenced in any circuit court of the United States, to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon, the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer or demur, by a certain day to be designated, which order shall be served upon such absent defendant or defendants if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be."

Section 8, having been continued in force by the acts of 1887 and 1888, must be construed as a part of the last-named acts. It is the duty of the court to harmonize and give effect to both of the foregoing statutory provisions, if practicable. It is firmly settled that the jurisdiction of the federal courts is a limited one, depending either upon the existence of a federal question, or upon the diverse citizenship of the parties. Where both of these elements of jurisdiction are wanting, the court cannot proceed, even with the consent of the parties. *Byers v. McAuley*, 149 U. S. 608, 618, 13 Sup. Ct. 906. In the present case no federal question is disclosed, and consequently, if the jurisdiction of the court can be maintained, it must be upon

the ground of the diverse citizenship of the parties. A circuit court of the United States has no jurisdiction over a suit to enforce a contract for the conveyance of land, brought in the district where the land is situated, unless the requisite diversity of citizenship exists. *Plant Inv. Co. v. Jacksonville, T. & K. W. Ry. Co.*, 152 U. S. 71, 14 Sup. Ct. 483. This case establishes the doctrine that in a suit to enforce a contract for the conveyance of land the diversity of citizenship, and not the situs of the real estate, determines the jurisdiction of the court. A suit to enforce a contract for the conveyance of land is a proceeding in personam, and not in rem. A decree in such a suit operates upon the person, and does not affect the title to the land. The court, by suitable process, compels the defendant to do that which, by the terms of his contract, he had agreed voluntarily to perform. In *Muller v. Dows*, 94 U. S. 444, it is said:

"It is here, undoubtedly, a recognized doctrine that a court of equity, sitting in a state having jurisdiction of the person, may decree a conveyance by him of land in another state, and may enforce the decree by process against the defendant."

In *Phelps v. McDonald*, 99 U. S. 298, it is said:

"Where the necessary parties are before a court of equity, it is immaterial that the res of the controversy, whether it be real or personal property, is beyond the jurisdiction of the tribunal. It has the power to compel the defendant to do all things necessary according to the *lex loci rei sitae*, which he could do voluntarily, to give full effect to the decrees against him. Without regard to the situation of the subject-matter, such courts consider the equities between the parties, and decree in personam according to those equities, and enforce obedience to their decrees by process in personam."

In *Hart v. Sansom*, 110 U. S. 151, 3 Sup. Ct. 586, it is said:

"Generally, if not universally, equity jurisdiction is exercised in personam, and not in rem, and depends upon the control of the court over the person of the parties, by reason of their presence or residence, and not upon the place where the land lies, in regard to which relief is sought. Upon a bill for the removal of a cloud upon the title, as upon a bill for the specific performance of an agreement to convey, the decree, unless otherwise expressly provided by statute, is clearly not a judgment in rem, establishing a title in land, but operates in personam only, by restraining the defendant from asserting his claim, and directing him to deliver up his deed to be canceled, or to execute a release to the plaintiff."

In *Carpenter v. Strange*, 141 U. S. 87, 11 Sup. Ct. 960, it is held that a court of equity may, in a proper case, compel a person to act in relation to property not within its jurisdiction; that while its decree does not operate directly upon the property, nor affect its title, it is made effectual through the coercion of the party defendant, as, for instance, by directing a deed to be executed by or on behalf of a party. In *Massie v. Watts*, 6 Cranch, 148, it is distinctly held that a court of equity has power to declare a trust in land without its jurisdiction, if it has acquired jurisdiction over the person of the defendant.

The doctrine announced in these cases is so firmly established that a further citation is needless. If, therefore, this suit had been brought in the district of which either the plaintiffs or the defendants are citizens, the circuit court of the United States for

that district could have decreed the specific performance of the contract in suit, and could have compelled obedience to its decree by attachment or sequestration.

Ought the court to give such a construction to the eighth section of the act of 1875 as to compel the defendants to litigate in this district a suit over which the circuit court of the United States for the district of their residence has complete and undoubted jurisdiction? I think not, because the circuit court of the United States for the district of which either the plaintiffs or the defendants are citizens has jurisdiction to award all the relief sought by the present bill. The acts of 1887 and 1888 provide that, "where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or defendant." In a suit to enforce a contract for the conveyance of land, the jurisdiction is founded only on the fact that the suit is between citizens of different states, and in such case the suit must be brought in the district of the residence of either the plaintiff or defendant. Section 8 of the act of 1875 does not, in terms, embrace a suit to enforce a contract for the conveyance of land. The cases provided for in this section are confined to suits "to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon, the title to real or personal property within the district where the suit is brought." It is evident that this suit is not one to enforce any legal or equitable lien upon or claim to the land. No decree is asked affecting the land, but one operating solely in personam. The decree sought would in no wise affect the land, nor alter the status of the title. Nor is it a suit to remove any incumbrance or lien or cloud upon the title to the land. The acts of 1887 and 1888 were enacted with the purpose of limiting the jurisdiction of the federal courts, and section 8 of the act of 1875 must be construed so as to effectuate this legislative intent. It ought not, in my judgment, to be construed to embrace any cases not falling clearly within its terms. In *Ames v. Holderbaum*, 42 Fed. 341, it is held that a suit to foreclose a mortgage on real estate is maintainable in the district where the land is situated, although neither party to the suit is a citizen of that district. But in such case the decree operates directly upon the land. It is a proceeding in rem. So in *Spencer v. Stock-Yards Co.*, 56 Fed. 741, it is held that an action of ejectment can be maintained in the district where the land is situated, although neither party to the action is a citizen of that district. Such an action is one to recover possession of the real estate, and is local in its nature. The present action is not local, but transitory, and does not seek any relief except a decree operating in personam. The bill is dismissed for want of jurisdiction.

MASSEY et al. v. FISHER.

(Circuit Court, E. D. Pennsylvania, May 4, 1894.)

1. BANKS—INSOLVENCY—TRUST DEPOSIT.

Where an indorser pays a note to a bank, and takes a receipt containing an order for a surrender of the note on return of the receipt, the relation between the bank and the indorser is not that of debtor and creditor, but is a fiduciary relation, entitling the indorser, on the bank becoming insolvent without applying the money on the note, or procuring its surrender, to have the assets in the hands of its receiver applied in payment thereof.

2. SAME.

The fact that the money was not marked, and, by a mingling with other funds of the bank, lost its identity, does not affect the right to recovery in full, if it can be traced to the vaults of the bank, and it appears that a sum equivalent to it remained continuously therein until removed by the receiver.

Suit by J. R. Massey & Son against Benjamin F. Fisher, receiver of the Spring Garden National Bank. Decree for complainants.

Charles Y. Audenreid and Frank P. Prichard, for plaintiffs.
David H. Stone, for defendant.

BUTLER, District Judge. There is no controversy about the facts; and the plaintiffs' statement may therefore be adopted:

"On February 3, 1891, J. R. Massey & Son, who were depositors with the Spring Garden National Bank, indorsed and had discounted by the bank a note, dated February 2, 1891, made by Samuel Young to the order of Ephraim Young for \$1,225, at four months, which had been indorsed by the payee and by one Edward Phair. This note fell due June 5, 1891. On February 17, 1891, the Spring Garden National Bank deposited the note with the clearing-house committee of the clearing-house association of the banks of Philadelphia in substitution for certain other notes then matured or about to mature, which had theretofore been pledged to secure advances made to the bank by that committee. On April 30, 1891, Frank H. Massey, one of the complainants, being ignorant that the bank no longer held the Young note, called at the office of the bank and stated to the cashier that he desired to pay it. The cashier sent a clerk to fetch the note, but the latter returned without it and informed him that it had been delivered to the clearing-house committee. The cashier then said to Mr. Massey: 'You pay me the money, and the next time we send to the clearing house we will take up this Young note and send it to you.' Massey thereupon gave the cashier \$1,225 in bank bills, and was handed a receipt for them in the following form:

"The Spring Garden National Bank,

"12th and Spring Garden Streets,

"Philadelphia, Apr. 30, 1891.

"Received of J. R. Massey & Son twelve hundred and twenty-five (\$1,225) dollars, being in full payment of note signed Edward Phair for that amount, due June 5/91, said note to be handed Messrs. Massey upon the return of this receipt.
H. H. Kennedy, Cash."

"The money thus received by the cashier was handed by him to the note clerk of the bank, and he, on the same day, transferred it to the receiving teller, by whom it was put into the drawer with the other money of the bank in his possession, and on the next morning turned over in bulk with other moneys to the bank's paying teller. On the diary of the bank, and on its book of bills discounted, credit entries were made indicating that the Young note had been paid. The bank, however, did not take up the note. On May

8, 1891, the Spring Garden National Bank suspended payment, and its assets were taken possession of by the bank examiner, who on June 1, 1891, transferred them to Benjamin F. Fisher, the receiver appointed for the bank by the comptroller of the currency. Among the other assets which came into the hands of the bank examiner on the failure of the bank was the sum of \$34,042.73 in bills, silver dollars and fractional currency, which sum, less about \$1,000 paid out by him for wages, etc., was turned over to the receiver. At no time between April 29, 1891, and the day on which it closed its doors, did the bank have on hand in cash less than \$24,000. On June 17, 1893, judgment was entered against the complainants in favor of the clearing-house committee, in an action instituted by the latter for collection of this note, in court of common pleas No. 4 for the county of Philadelphia, of December term, 1892, No. 881, for the amount of \$1,377.50, and this judgment, with interest and costs, was paid by the complainants November 9, 1893."

The plaintiffs claim that the transaction established a fiduciary relation between the parties, while the defendant claims that it established the relation of debtor and creditor only. If the question was new, its proper solution might be open to doubt. Even in such case however, I would adopt the plaintiffs' view. The money was delivered and received to extinguish the note. Neither party contemplated that the bank might use it for another purpose, leaving the note outstanding, and the plaintiffs' liability unextinguished. Such application of it therefore, would be a violation of duty, and a fraud.

But the question is not new; it arose, and was decided, in *People v. City Bank of Rochester*, 96 N. Y. 32. The facts there were substantially like those before us. It is true the check in that case was drawn in terms, to pay the note. This, however, is an immaterial difference. It is as plain here as it was there that the money was delivered and received to take up the note. In *Peak v. Ellicott*, 30 Kan. 156 [1 Pac. 499], the facts were identical with those before us. In each of these cases it was held that the transaction established a fiduciary relation between the parties.

The bank having failed to apply the money to the note can it be recovered from the receiver? His counsel thinks not, because the bank placed the money in its vaults with other money of its own, whereby its identity was lost. Why should this wrongful act defeat the plaintiffs' right? Nobody is injured by allowing the plaintiffs to take the amount from the deposit. The receiver and creditors stand on no higher plane than the bank, and can no more assert that it was the bank's money than the bank could. It is true they are entitled to all the bank's property; but this was not its property. It is not important that the plaintiffs' money bore no mark, and cannot be identified. It is sufficient to trace it into the bank's vaults, and find that a sum equal to it (and presumably representing it), continuously remained there until the receiver took it. The modern rules of equity require no more. *Knatchbull v. Hallett*, 13 Ch. Div. 696; *National Bank v. Insurance Co.*, 104 U. S. 54; *Bank v. King*, 57 Pa. St. 202; *Stoller v. Coates*, 88 Mo. 514; *McLeod v. Evans*, 66 Wis. 401 [28 N. W. 173, 214]; *People v. City Bank of Rochester*, 96 N. Y. 32; *Bank v. Weams* (Tex. Sup.) 6 S. W. 802; *Harrison v. Smith*, 83 Mo. 210; *Beech*, Eq. Jur. § 285; *Fisher v. Night*, [9 C. C. A. 582,] 61 Fed. 491.

I have not overlooked *Bank v. Dowd*, 38 Fed. 172. If that case can be distinguished from *Knatchbull v. Hallett*, as the judge who decided it believes, then it can as readily be distinguished from this. If it cannot, with all my respect for that distinguished judge, I must disregard it.

There is a class of cases—to which *Bank v. Beal*, 49 Fed. 606, and *Bank v. Armstrong*, 148 U. S. 50 [13 Sup. Ct. 533], belong—in which it is held that although the relations of the parties there involved, were in the beginning fiduciary, they ceased to be so when the agent commingled the money with its own. These, however, were cases where commercial paper was delivered for collection and credit, and where the collection and credit consequently terminated the agency. The commingling and use of the money were in pursuance of the understanding; and upon this construction of the transaction these decisions rest. The distinction is noticed in *Knatchbull v. Hallett*, 13 Ch. Div. 702.

The bill is therefore sustained and a decree may be drawn accordingly.

AMERICAN & GENERAL MORTG. & INV. CORP., Limited, v. MARQUAM et al.

(Circuit Court, D. Oregon. August 13, 1894.)

No. 2,110.

1. ACCOMMODATION INDORSER—EXTENSION—RELEASE.

Where a note secured by a mortgage is signed by one of the makers as an accommodation maker, and the payee, with the knowledge of the fact, extends the time for the principal obligor, the extension of time works his discharge from liability.

2. PAROL EVIDENCE.

The liability of the accommodation signer as a surety may be shown by parol in an action by the payee to foreclose the mortgage.

3. CROSS BILL—DISMISSAL.

A cross bill seeking no discovery, and setting up no defense which might not as well have been taken by answer, will be dismissed.

Bill by the American & General Mortgage & Investment Corporation, Limited, against U. S. G. Marquam and others, to foreclose a mortgage.

Zera Snow, for plaintiff.

Milton W. Smith and U. S. G. Marquam, for defendants.

BELLINGER, District Judge. This is a suit to foreclose a mortgage to secure promissory notes made by Marquam and wife and Campbell. On April 5, 1890, Campbell owned the entire mortgaged premises, and on that date he conveyed an undivided one-half thereof to Marquam. On April 10th following, Marquam conveyed an undivided one-half of his undivided one-half to Livingstone; and, on June 25th, Livingstone reconveyed the same to Marquam. About June 28, 1890, Marquam and wife and Campbell executed the mortgage in suit, to the tract, to the complainant, to secure their promissory notes for \$5,500, to become due July 1, 1893. On Sep-

tember 11, 1890, Marquam reconveyed to Livingstone an undivided one-half of the undivided half held by him in the premises. Livingstone assumed one-half of the mortgage in suit. On December 29, 1892, Campbell conveyed his remaining one-half interest to Stratton, trustee. On November 17, 1893, Marquam, Livingstone, and Stratton partitioned the land by deed; Marquam and Livingstone taking the west half of the tract, and Stratton the east half. Campbell and Stratton filed their answers, alleging that Campbell signed the note and mortgage sued on for the accommodation of Marquam, and without consideration, of which fact the complainant had notice when it took its mortgage, and that, having this notice, the complainant, after the maturity of the note, for a valuable consideration, gave extensions of time for payment of the note and of installments of interest; and this alleged conduct on complainant's part is relied upon to discharge Campbell's liability, and the lien of the mortgage executed by him. The defendant Lardner answers the bill, alleging the execution by Campbell of a mortgage upon Campbell's interest in the land to him for \$1,000, subsequent to complainant's mortgage, and praying that the west half be first sold, and applied on such mortgage, before resorting to lands mortgaged to said defendant. Campbell filed his cross bill, alleging that Livingstone assumed payment of one-half of the complainant's mortgage, and praying that personal liability for any deficiency there may be, be adjudged solely against Marquam and Livingstone. Lardner files a cross bill against Campbell, Livingstone, Stratton, and Drugan, in which he alleges the execution of the mortgage subsequent to that of complainant; the agreement of Livingstone to pay one-half of the complainant's mortgage. Lardner's cross bill also alleges that Stratton assumed and agreed to pay his (Lardner's) note and mortgage. Lardner prays the court to decree that Livingstone pay one-half of the mortgage, according to his agreement, and that in the event of his failure to do so, and of the defendant Lardner being compelled thereby to pay anything to protect his interest, he have a decree against Livingstone for the amount so paid by him. Exceptions to these answers, and demurrers to the cross bills, are filed, and upon these the questions to be decided are raised.

It is claimed in support of the demurrers that the defendants cannot show that Campbell is merely an accommodation maker of the note in question, and hence stands in the relation of a surety, because this is to establish by parol a relationship and obligation different from that expressed in the writing. The rule is otherwise. It is competent for one of two makers of a promissory note, in an action on the note, to prove by parol that he signed the note as surety, to enable him to interpose as a defense that he was discharged by an extension of time given to the principal, with knowledge of the suretyship. Such evidence does not vary the written contract. It merely operates when the creditor has knowledge of it, to prevent him from changing the contract with the principal debtor without consent of the surety, and thus prevents him from impairing the rights of the latter. *Hubbard v. Gurney*, 64 N. Y. 459; *Irvine v. Adams*, 48 Wis. 468, 4 N. W. 573; *Stillwell v. Aaron*, v.62f.no.11—61

69 Mo. 539; Bank v. Kent, 4 N. H. 221; Perry v. Hodnett, 38 Ga. 104; Brown v. Rathburn, 10 Or. 158.

The allegations that Campbell's relation was that of a mere surety; that complainant had knowledge of such fact, and with such knowledge, for a valuable consideration, extended the principal creditor's time for payment,—is a good defense as to Campbell's liability, both on the note and mortgage, and this defense is available to Campbell's grantee, or a subsequent mortgagee of the mortgaged premises.

The cross bills present mere matters of defense. Such is not their office. Such a bill seeking no discovery, and setting up no defense which might not as well have been taken by answer, will be dismissed, with costs. 2 Daniell, Ch. Pr. 1552, note.

The alleged agreements of Livingstone to pay half of complainant's mortgage, and of Stratton to pay Lardner's mortgage, are not matters of defense to the complainant's complaint. These agreements were made with the principal debtor. They cannot affect the rights of the complainant. The exceptions to the answers are overruled, and the demurrers to the cross bills are sustained.

ESBERG-BACHMAN LEAF-TOBACCO CO. v. HEID.

(District Court, D. Alaska. July 21, 1894.)

AGREEMENT TO PAY ANOTHER'S DEBT—SUFFICIENCY OF COMPLAINT.

In an action on a contract whereby defendant agreed to pay to plaintiff an indebtedness of a third person for goods sold such third person "when and as soon as the same should thereafter become due," executed at the time of the sale, and as a part of the same transaction, plaintiff need not allege either that he has exhausted his legal remedies against such third person, or that he is insolvent.

Action at law by the Esberg-Bachman Leaf-Tobacco Company against John G. Heid on a written contract. Defendant demurred to the complaint. Demurrer overruled.

Bugbee & Blackett and Lytton Taylor, for plaintiff.
Johnson & Heid, for defendant.

TRUITT, District Judge. This is an action brought on a written guaranty by defendant to pay an indebtedness of one T. Cohen for certain goods, wares, and merchandise, of the price and value of \$427.79, sold and delivered by plaintiff to said Cohen, for which he agreed to pay at the expiration of four months from the 19th day of January, 1892,—the date of the sale of said goods, wares, and merchandise. After alleging the sale and delivery of the goods, the promise to pay, and that the whole of the purchase price still remains due and wholly unpaid, the complaint sets out the following to show defendant's liability herein:

"That said defendant, for and in consideration of said sale and delivery of said goods, wares, and merchandise to said T. Cohen at the times aforesaid, and as a part of the same transaction, promised and agreed, by his certain instrument in writing bearing date December 15, 1891, that he would

pay to plaintiff the said indebtedness of said T. Cohen when and as soon as the same should thereafter become due, viz. on or about May 19, 1892; that said defendant, although knowing full well that said T. Cohen had failed and neglected to pay said indebtedness, or any part thereof, when the same thereafter became due, and although often requested by plaintiff to pay such indebtedness of said T. Cohen, has failed and neglected and refused, and still fails, neglects, and refuses, to pay the same, or any part thereof."

The defendant has interposed a general demurrer as a defense. To sustain the demurrer, it is urged that plaintiff must allege in the complaint that he has used due diligence to collect his demand from the principal debtor, and that he has exhausted all his legal remedies against him without avail, or that he is insolvent and unable to pay the said indebtedness, or any part thereof. But, to charge the defendant under such a contract as is alleged in the complaint, the plaintiff is not required to allege or prove either that he has exhausted his legal remedies against the principal debtor, or his insolvency. The terms of the guaranty must always determine and fix the nature and extent of the guarantor's liability. In this case there is an absolute obligation for the payment of said indebtedness if Cohen failed to pay it as soon as due, not a guaranty that the money can be made out of him by due diligence. It is not a conditional obligation to be affected by contingencies, but a plain contract to pay the plaintiff for said goods, wares, and merchandise when payment therefor should become due. *Rand. Com. Paper*, § 850, makes this distinction very clear. "A guaranty," says this author, "may be absolute (that is, for the payment of the bill or note), or conditional (that is, a guaranty that it is collectible by due diligence). One who guaranties payment becomes absolutely liable on any default of payment by his principal." In the case of *City of Memphis v. Brown*, 20 Wall. 294, it is held that "upon guaranty of payment, and not collection merely, a suit may be commenced against the guarantor without any previous suit against the principal." Also, see *Whiting v. Clark*, 17 Cal. 407, and *Hanna v. Savage* (Wash.) 35 Pac. 127. But in this case, under the contract alleged in the complaint, I am not certain that the defendant stands in the relation of a guarantor to the plaintiff. It is alleged that, as a part of the transaction of purchasing the said goods, wares, and merchandise, the defendant promised he would pay to plaintiff the said indebtedness "when and as soon as the same should thereafter become due." Now, it seems to me that the effect of this contract is such as to make defendant the absolute debtor of plaintiff, or at least a joint and several debtor with said Cohen, if considered in connection with the other allegation of the complaint,—that, at the time of the purchase of the goods, Cohen promised to pay for them when payment therefor should become due,—in which case plaintiff might properly sue either one or both of them. But, whether defendant herein be considered as a guarantor or original debtor, the complaint shows a good cause of action, and the demurrer must be overruled.

**In re EZETA. In re BOLANOS. In re COLOCHO. In re CIENFUEGOS.
In re BUSTAMANTE.**

(District Court, N. D. California. Before MORROW, District Judge, sitting
as a Committing Magistrate. September 4, 1894.)

Nos. 11,095-11,099.

INTERNATIONAL EXTRADITION—JURISDICTION OF MAGISTRATE.

By the treaty between the United States and Salvador, they agree to deliver up persons who, having been convicted or charged with certain specified crimes committed within the jurisdiction of one of them, shall seek an asylum or be found within the territories of the other. Rev. St. U. S. § 5270 (Act Aug. 12, 1848), provides that, whenever there is a treaty for extradition between the United States and any foreign government, any justice of the supreme court, circuit or district judge, etc., may, on complaint under oath charging any person found in any state, district, or territory with having committed, within the jurisdiction of such foreign government, any crime provided for by such treaty, issue his warrant for the apprehension of the person so charged, that he may be brought before him, to the end that the evidence of criminality may be heard and considered, etc. *Held*, that the jurisdiction of such justice or judge, sitting as a committing magistrate in a case in which citizens of and fugitives from Salvador are charged with extraditable crimes, is in no way affected by, and he will not inquire into, the manner in which the persons so charged came or were brought into the United States.

Applications for the extradition of Antonio Ezeta, Leon Bolanos, Jacinto Colocho, Juan Cienfuegos, and Florencio Bustamante, under the treaty between the United States of America and the republic of Salvador. Plea to jurisdiction. Plea overruled.

The defendants in the above cases sought refuge on June 6, 1894, on board the United States steamer Bennington, at the port of La Libertad, Salvador. They requested an asylum until the arrival of the steamer San Blas, on its way to Panama. Antonio Ezeta, one of the defendants, was the commander in chief of the government forces, and the acting president of the republic, by reason of the flight of his brother, Don Carlos Ezeta, who was the regularly constituted president. The other defendants all occupied military positions under General Antonio Ezeta. They had been unsuccessful in suppressing a revolution against the then existing government, and had retreated from the interior to the port of La Libertad, where they arrived with but a few hundred men, and closely pursued by the forces of the insurgents. Their request for an asylum was granted, and also as to 12 others who accompanied them, but these latter persons are in no wise connected with these proceedings. Three days later the steamer San Blas arrived at La Libertad, when the commander of the Bennington proceeded to make arrangements for the transfer of the fugitives on board the vessel. The arrangements were interrupted by commissioners, representing the successful revolutionary party, requesting that they should have an opportunity to make a demand for the extradition of the fugitives on charges of murder, arson, robbery, and rape. The fugitives were accordingly detained on board the Bennington, and, in view of the disturbed condition of affairs in Salvador, this concession was deemed by Capt. Thomas a courtesy to the new government, of some consequence, in the favorable influence it would probably have upon the authorities, in securing the safety of American citizens residing in that country. Upon the arrival of the next vessel at La Libertad, bound for Panama, the fugitives again requested permission to leave the Bennington, that they might take passage on the departing steamer; but the request was refused by Capt. Thomas, under instructions from the secretary of the navy. The Bennington remained at La Libertad until July 25, 1894, during which time no extradition proceedings, other than a demand by the government of Salvador for the surrender of the fugitives, appears to have reached Capt. Thomas. The vessel then pro-

ceeded north with the five fugitives on board who are the subject of the extradition proceedings. The Bennington arrived at Acapulco, Mexico, July 30th or 31st, where a request on the part of the fugitives to be allowed to leave the vessel was again refused. Leaving Acapulco August 2d, the Bennington arrived off the harbor of San Francisco on the 14th of August. She, however, did not enter the harbor of the port of San Francisco, under instructions from the secretary of the navy, until the 23d of August, 1894, when warrants for the arrest of the fugitives were duly served by the United States marshal. The counsel for the defendants offered to show these facts in support of the plea to the jurisdiction of the committing magistrate, claiming that the defendants did not seek an asylum in this country, but were brought into the United States against their will, and that they were not found here according to law and the treaty, and that, therefore, the court had no jurisdiction.

Plerson & Mitchell, for the republic of Salvador.

Charles Page, Horatio S. Reubens, and Gonzalo De Quesada, for the defendants.

Charles A. Garter, U. S. Atty., for the United States.

MORROW, District Judge (orally). My jurisdiction in this case over the subject-matter and the persons accused is regulated and controlled by the treaty between the United States and the republic of Salvador, and the statute of the United States passed to execute such treaty and other treaties that may have been entered into by the United States. Therefore, in determining whether or not I have jurisdiction of the persons of the accused in this case, I must go to the law of the United States and the treaty, and determine from them what the jurisdiction is, and the limitations that have been placed upon it. The treaty has been referred to, and will again be cited upon this subject. Article 1 of the treaty between this country and Salvador is as follows:

"The government of the United States and the government of Salvador mutually agree to deliver up persons who, having been convicted of or charged with the crimes specified in the following article, committed within the jurisdiction of one of the contracting parties, shall seek an asylum or be found within the territories of the other."

Section 5270, Rev. St. (Act Aug. 12, 1848), under which treaties of extradition are carried into effect by the officers of the United States, provides that:

"Whenever there is a treaty or convention for extradition between the government of the United States and any foreign government, any justice of the supreme court, circuit judge, district judge, commissioner, or judge of a court of record of general jurisdiction of any state, may, upon complaint made under oath, charging any person found within the limits of any state, district, or territory, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered," etc.

Under the provision of this statute and the treaty, complaints were made before me, and warrants of arrest issued. The warrants were placed in the hands of the marshal. The marshal has made return to these warrants that he found these accused persons in this district, and brings them before the court. As is admitted by both sides, primarily this gives me jurisdiction to inquire whether or not

an offense has been committed, which, under the treaty, requires extradition proceedings. But it is said on behalf of the accused that they should now be permitted to introduce evidence tending to show that these persons were not in fact found within the territory of the United States, and did not seek an asylum within that territory. Is it incumbent upon me, as a judge or committing magistrate, to inquire whether or not these persons were found within the United States, or sought asylum, under the circumstances which the counsel offers to prove by testimony? In support of the contention that I may make such an inquiry, a number of cases have been cited. I have not had an opportunity to examine all of them, but I think I understand the principles of law which have been declared in those cases.

As has been properly observed by counsel for the government of Salvador, there is a difference in the application of the law to interstate rendition cases and international extradition cases. This is clearly stated by Judge Jenkins in the case of *In re Cook*, 49 Fed. 836. So far as the rendition of fugitives between the states is concerned, the proceedings are governed by section 5278, Rev. St., which regulates the procedure and fixes the limitation of the court with respect to such matters. With respect to international extradition, I must consult the treaty, as I said before, and the acts of congress governing the proceedings, and such principles of law as have been declared by the courts. The question is the proper application of such principles of law. We must be very careful in considering the principles that have been declared by the courts, and apply them properly to facts to which they relate. The Case of *Watts*, reported in 8 Sawy. 370, 14 Fed. 130, has been cited. The Case of *Rauscher*, reported in 119 U. S. 407, 7 Sup. Ct. 234, has also been cited. The Case of *Rauscher* follows after the Case of *Watts*, and refers to the decision in that case. The Case of *Watts* was briefly this: *Watts* was indicted in this court for crimes arising under the laws of the United States. *Watts* fled to England. He was extradited, and brought back to this district. It was claimed on his behalf that he could only be tried for the crimes for which he had been extradited. Judge Hoffman held that an extradited fugitive could not, under the treaty of 1842 between the United States and Great Britain, be held to answer for an offense for which his surrender could not have been asked, and would not have been granted. This question afterwards came up before the supreme court of the United States in the Case of *Rauscher*. In that case, *Rauscher* had been indicted upon a charge of murder committed upon the high seas within the admiralty and maritime jurisdiction of the United States. He fled to England. He was extradited, and brought back to New York. The question in that case arose whether or not he could be tried upon the charge of beating and wounding a sailor on board a ship, it being admitted that the same witnesses and substantially the same testimony delivered in the case of beating and wounding would have been delivered in the case of murder. There were other questions involved in that case. The supreme court of the United States, following the Cases of *Watts* and others, held that

the person extradited could only be tried for the crimes for which he was extradited, unless, after having been tried for such crimes, a sufficient time had elapsed after being released for him to go to another country. It had been said in that class of cases that the reason why a person could not be tried for any crime other than the one for which the extradition had been made was that the court would not go behind the fact that the person was brought into the district within the jurisdiction of the court, and, he being in the jurisdiction of the court,—having been brought there, if you please, without authority of law,—nevertheless the court would not inquire as to how he had been brought within the jurisdiction. Had that doctrine been denied in the Case of Rauscher, it would have established the principle for all such cases that such an inquiry would be made by the court, but the decision in that case was not placed upon that ground. This is made clear by the case of *Kerr v. People of Illinois*, 119 U. S. 436, 7 Sup. Ct. 225, immediately following. The accused in that case had been indicted in Cook county, Ill., for larceny, the indictment including also charges of embezzlement. He had escaped, and gone to Peru. Extradition papers had been secured from the United States government, and agents of the government were dispatched to Peru to bring back the accused. The agents did not make use of the extradition papers, but took the person on board of the United States steamer *Essex*, in the harbor of Callao. The steamer *Essex* carried him to Honolulu, where he was transferred on board the *City of Sydney*, in which he was carried a prisoner to San Francisco, in the state of California. After being brought to California, he was then arrested on extradition papers that had been issued under the laws of the state; that is to say, he was taken upon interstate rendition papers,—the extradition papers procured from the United States not being made use of,—and he was transferred to the state of Illinois, where he was tried. His case went to the supreme court of the state, and from there to the supreme court of the United States. It was claimed on behalf of the accused, among other things, that he had been kidnapped in Peru, and transferred by the United States steamer *Essex*, by force, to Honolulu, and from there on board of the *City of Sydney*, and brought to San Francisco; that he had been refused an opportunity, from the time of his arrest in Lima until he was delivered over to the authorities of Cook county, of communicating with any person, or seeking any advice or assistance, in regard to procuring his release by legal process or otherwise; and he alleged that the proceedings were in violation of the provision of the treaty between the United States and Peru, and his rights under the constitution of the United States. The case was very carefully considered, and, as I said before, it followed immediately after the Rauscher Case. In order to point the distinction between the two cases, it is proper that I should now refer to a portion of the decision in the Case of Rauscher. In that case the court say:

"Upon a review of these decisions"—in which the Cases of *Watts* and others are reviewed—"upon a review of these decisions of the federal and state

courts, to which may be added the opinions of the distinguished writers which we have cited in the earlier part of this opinion, we feel authorized to state that the weight of authority and of sound principle are in favor of the proposition that a person who has been brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty can only be tried for one of the offenses described in that treaty, and for the offense with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings."

Following this case comes the Case of Kerr, the facts being as I have stated. The supreme court says, in concluding the opinion in the Kerr Case:

"The question of how far his forcible seizure in another country, and transfer, by violence, force, or fraud, to this country, could be made available to resist trial in the state court for the offense now charged upon him, is one which we do not feel called upon to decide, for in that transaction we do not see that the constitution or laws or treaties of the United States guaranty him any protection. There are authorities of the highest respectability which hold that such forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offense, and presents no valid objection to his trial in such court. Among the authorities which support the proposition are the following: *Ex parte Scott* (1829) 9 Barn. & C. 446; *Lopez and Sattler's Cases*, 1 Dears. & B. Cr. Cas. 525; *State v. Smith* (1829) 1 Bailey, 283; *State v. Brewster* (1835) 7 Vt. 118; *Dow's Case*, (1851) 18 Pa. St. 37; *State v. Ross* (1866) 21 Iowa, 467; *The Richmond v. U. S.*, 9 Cranch, 102. However this may be, the decision of that question is as much within the province of the state court as a question of common law or of the law of nations, of which that court is bound to take notice as it is of the courts of the United States; and, though we might or might not differ with the Illinois court on that subject, it is one in which we have no right to review their decision. It must be remembered that this view of the subject does not leave the prisoner or the government of Peru without remedy for his unauthorized seizure within its territory. Even this treaty with that country provides for the extradition of persons charged with kidnapping, and, on demand from Peru, Julian, the party who is guilty of it, could be surrendered and tried in its courts for this violation of its laws. The party himself would probably not be without redress, for he could sue Julian in an action of trespass and false imprisonment, and the facts set out in the plea would, without doubt, sustain the action. Whether he could recover a sum sufficient to justify the action would probably depend upon the moral aspect of the case, which we cannot here consider."

The prisoner himself cannot set up the mode of his capture by way of defense. *Mahon v. Justice*, 127 U. S. 700-717, 8 Sup. Ct. 1204. It is contended that, while this may be the law with respect to a case where a person is brought from a foreign country to this country for trial, it is not applicable to a case where a person has been found in the United States, and is to be extradited or returned to the country from whence he came. Still, the principles of law may be the same with respect to the two classes of cases. The fact is, there is no case in the books which presents precisely the same state of facts as we have in this case. As I said in the beginning, it is therefore necessary for us to apply to this case such principles of law as we may find applicable. The question is as to whether or not the principle involved in the Case of Kerr, as distinguished from the Case of Rauscher, is applicable to this case. It seems to me that, if anything, there is more of a limitation upon the judge in

Inquiring into how the persons came into this jurisdiction in the present case than there would be in such a case as that of Kerr, and that the question, under this treaty and under the law, is simply for me to determine whether or not these defendants have been found here, and whether or not it is reasonable to believe they have committed the crimes charged against them. Let us see what position we would be in if we extended our investigation any further. The respondents propose to show, as I understand it, that they have been outraged by the executive department, by being brought to this country by force and against their will. The United States is not a party to the proceeding now before me. So far as these proceedings are concerned, it is between the republic of Salvador and these defendants. By the law of congress and by the treaty, the republic of Salvador is permitted to come before me, and say that these persons have been guilty of crimes in Salvador, and that, by an agreement which has been entered into between the United States and Salvador, they are entitled to come and have these persons returned to the country from whence they came. The United States simply furnishes the process, and furnishes the machinery for these proceedings. It is in accordance with the enlightened administration of law all over the world that criminals should be extradited for those crimes which are recognized as crimes by all nations. Therefore, the government of the United States simply furnishes the machinery for the extradition of persons charged with such crimes. It is not a party to these proceedings. If the United States is to be a party,—if it is to be charged here with having committed an outrage on these persons,—it should come before me, and should have an opportunity of saying whether or not it was proper for the commander of this vessel to take these parties. But that is not the position. That is not the fact. The United States is not before me, and these accused persons propose to show that they have been brought here by force by the United States in this case, and perhaps it might be, in some other case, by some German or British vessel, or some other power or party. It occurs to me that that plea is outside of the case. If the United States has done these parties an injustice, which I do not admit, undoubtedly the government of the United States will make reparation for it. If I should hold that these persons have committed a crime within the republic of Salvador, and should extradite them, the proceedings will be certified to the secretary of state for the action of the executive department. Whether, upon such certificate, the executive will extradite these persons, is a matter entirely in the judgment and discretion of the president of the United States and the secretary of state. I may hold that they have committed all the crimes charged against them, and that they should be extradited, and that they come within the treaty, but there is then no obligation resting on the president of the United States or the secretary of state to return them to Salvador. They may review the evidence in the case, and conclude that these crimes charged are peculiarly political offenses, and therefore within the cognizance of the executive department of this government to consider, no matter what I may determine; so that, this case being cer-

tified to the president of the United States and secretary of state, if they determine that these parties have been improperly brought within this jurisdiction, it is peculiarly within the province of the secretary of state and the president to so determine, and to act in accordance with their judgment in that respect. That this is the proper view to take of the situation in this case, and of the decisions that have been rendered in the various cases that have been cited, I think is fully sustained by a very able article in the American Law Review, for the month of August of this year, entitled "The Right to Try an Extradited Fugitive for an Offense Other than That Specified in the Extradition Proceedings." This article is by Ardemus Stewart, of Philadelphia. It is subject to the criticism that it refers to the question of trying a fugitive for a crime other than that for which he was extradited; but, as I said before, I think the principles of law are applicable here. Mr. Stewart reviews all of the cases that have been cited, and many others. He says:

"It is an elementary principle of criminal law that a court which has obtained jurisdiction of the person of the accused will not inquire into the means by which that jurisdiction was acquired. The mere fact of jurisdiction is all with which it is concerned. As was said above, a fugitive who has been kidnapped in a foreign country, and brought, forcibly and against his will, into the jurisdiction where he stands accused, will not be released on that ground, although the act of kidnapping is an offense against the government within whose territory he is found, as well as a plain violation of his personal right to freedom from arrest except by due process of law. So, too, the fact that an arrest is procured by fraud, or the employment of other illegal means to bring the criminal within the jurisdiction, will not entitle him to discharge. Whatever may be the illegality of the arrest in the place where made, as soon as the fugitive is brought, in pursuance of it, within the jurisdiction of the proper court, that jurisdiction attaches, and the subsequent proceedings are based upon that, without regard to the first arrest. When, therefore, the court has the fugitive within its jurisdiction, it has a perfect right to deal with him as far as its own laws permit, regardless of the fact that by so doing it may cause political complications with the surrendering government. The judiciary have nothing to do with the political relations of the government, these belonging wholly to the domain of the executive, as was acknowledged by Justice Gray in his concurring opinion in the Rauscher Case."

It seems to me the law here stated is applicable to the case before me; peculiarly so because whatever may be the evidence in this case, as interposed in support of this plea, it relates entirely to political matters, or to matters coming within the jurisdiction of the political department of the government.

I do not think, under any circumstances, it is proper for me to enter into an inquiry as to the conduct of a war vessel of the United States. In this case it appears, so far as the testimony has gone, that the Bennington was sent from this country to Salvador to protect American interests; that she proceeded to execute the commands of the executive department of the government. While there, these persons came on board the vessel, flying from the opposing forces in sight, and took refuge on board this vessel. It might be said with much force that when these persons took refuge on board of an American man-of-war, they were flying to the territory of the United States, and seeking asylum in the territory of the United States. It has been said that the deck of an American

public vessel is the territory of the United States. Then, when the fugitives came on board the Bennington, they came seeking asylum. "The right of asylum is frequently claimed by refugees, not only on the actual territory of a foreign state, but on board vessels belonging to that state, and even on board merchant vessels carrying its flag. A distinction must be drawn here. It is clear that, since a man-of-war is part of the public force of an independent state, and represents that state, in some respects, wherever it floats the national colors, it is, by a fiction of international law, considered a portion of the foreign territory to which it belongs. Hence, all nations admit, without difficulty and without any kind of restriction, the principle of extritoriality in favor of the military marine, and waive, with respect to it, the right of searching for, pursuing, or claiming the persons who, having violated the civil or political laws of the country, have succeeded in sheltering themselves under the flag of a foreign man-of-war." Calvo's *Dictionnaire de Droit International*, Public, et Privé.

But it is said that when these fugitives went on board the Bennington they did so with the understanding that they would be transferred to another vessel. When a fugitive seeks an asylum in another territory, it is not for him to make conditions. As well might a person come into this country, and, stepping upon one of our docks, say: "I have come here seeking an asylum, but I want it distinctly understood that I must be transferred immediately to British Columbia, or some other territory. I am not to remain here." The political department of the government would say: "If you come seeking an asylum in this country, you come seeking it on such conditions as you find. We make no agreement with persons under such circumstances." So it may be said with respect to persons coming on board an American man-of-war. When they come there they are subject to the rules governing the vessel,—to the directions that may be given to the officer in command,—and it is not for fugitives to say whether they shall be placed on shore, or on another vessel. So, there is even much in this view of the case opposed to the plea of jurisdiction.

At all events, on the whole case, as it appears to me, without entering into a critical review of these cases in detail, which I have not had the time to examine carefully, I think the principle of law is as I have stated. The plea to the jurisdiction is therefore overruled, and the objection to the evidence is sustained.

Mr. Page: We had hoped that we might be allowed to take this testimony, in order that when the case is certified, if it be necessary to certify it, these facts might be included in the case presented to the political department.

THE COURT: I have considered the possibility of a motion of that kind being made. In view of what I have said,—that this plea is peculiarly one that addresses itself to the executive department, and if I shall hold these persons as having come within the provisions of the treaty, and therefore to be extradited, that question may be reviewed by the executive department upon such evidence,—

I have determined, in case you make that motion, to allow the testimony to be taken, and certify it with the other evidence in the case.

In re EZETA. In re BOLANOS. In re COLOCHO. In re CIENFUEGOS.
In re BUSTAMANTE.

(District Court, N. D. California. September 22, 1894.)

Nos. 11,095-11,099.

1. INTERNATIONAL EXTRADITION—PRELIMINARY PROOF.

Rev. St. U. S. § 5270, relating to extradition, provides that if the committing magistrate deems the evidence sufficient to sustain the charge, under the proper treaty, he shall certify the same, etc. The treaty between the United States and Salvador provides that fugitives from justice shall be delivered up only on such evidence of criminality as, according to the laws of the place where the fugitive is found, would justify his commitment for trial if the crime had been there committed. Rev. St. U. S. § 1014, provides that persons charged with crimes against the United States may be arrested and imprisoned or bailed "agreeable to the usual mode of process against offenders in such state." Pen. Code Cal. § 872, provides that if it appears that a public offense has been committed, and there is sufficient cause to believe defendant guilty thereof, the magistrate shall make an order to that effect, and that defendant be held to answer. *Held*, that in the examination of persons found in California, charged with being fugitives from the justice of Salvador, the evidence of criminality must conform to, and be weighed and judged by, the laws of this country, and particularly the laws of California, and that the evidence of criminality which will justify holding the accused need be such only as ordinarily obtains at a preliminary examination, and amounts to probable cause, or such as would justify a cautious man in believing the accused guilty.

2. SAME—EXAMINATION OF ACCUSED—DEPOSITIONS—WHEN ADMISSIBLE.

Act Aug. 3, 1882 (22 Stat. 216) § 5, provides that any depositions or other papers, or copies thereof, shall be received in evidence on the hearing of any extradition case under Rev. St. U. S. tit. 26, if they are properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that they are authenticated in the manner required by this act. *Held*, that papers purporting to be depositions, so certified, are admissible on such hearing, though the recitals contained in the introductory part thereof show that they are mere statements, and not depositions.

3. SAME—ATTEMPT TO MURDER—EVIDENCE—SUFFICIENCY.

J. C., a military officer of Salvador, was accused of attempt to murder one A. in front of the latter's residence in Salvador, while Carlos Ezeta was president, and Antonio Ezeta was general of the army, and four months before the revolution of 1894. Q., a police officer, testified the day after the alleged attempt that he heard several shots while near A.'s residence, and saw three persons running; that he found J. C. and another person together; that he captured J. C., but the other person escaped; that J. C. had a revolver in his hand, from which three shots had been fired by him at A.; and that he could not identify the person who was with J. C. The record contained a statement by J. C., designated as a deposition, made to the authorities upon his arrest, to the effect that while he, one C., and three others were passing opposite the porch of A.'s residence, A. shot at the group; that C. instantly fired a shot, and afterwards two more; that declarant fired two shots at A.; that his companions scattered, and he appeared before Q., handed him his revolver, and told him he had fired two shots at A.; that he was constantly escorting C., by order of Gen. Ezeta,

to guard him from harm, and especially in consequence of a misunderstanding between C. and A.; and that he fired the shots at A. to defend C. The accused testified to substantially the same facts contained in such statement. The record showed that the court ordered that he should remain in temporary custody. He testified also that, soon after his arrest, Gen. Ezeta procured his release; that an hour later he was rearrested by order of President Ezeta; that three days afterwards he was released by instructions of the president; and that he was never rearrested. *Held*, that the evidence showed probable cause of J. C.'s guilt.

4. SAME—JUSTIFICATION.

One accused of an attempt to murder in Salvador admitted that he twice shot at a person as charged, but claimed that he did so in defense of himself and another whom he was ordered by his superior military officers to protect. *Held*, that the accused should be held for extradition, his justification being matter of defense for the courts of Salvador.

5. SAME—RELEASE OF ACCUSED WITHOUT TRIAL—EFFECT.

The release of the accused by his superior officers, without being tried or pardoned, construed as a privilege conferred on him by executive authority equivalent to an order entered only by judicial authority in the United States, permitting him to go on his own recognizance, affords no legal objection to his arrest and trial on such charge; and the magistrate cannot consider the fact, if it exists, that the renewal of the prosecution is an effort by the present government of Salvador to secure the accused's person for the purpose of wreaking vengeance on him for the part he took against the revolutionists in the late war.

6. SAME—MURDER—SUFFICIENCY OF EVIDENCE.

L. and F., officers under Gen. Ezeta, were accused of hanging four unknown persons May 29, 1894, in Pulgas ravine. M., whose deposition was taken June 24, 1894, testified that "what he knows from ocular evidence only is" that F., by order of L., hung four persons in Pulgas ravine at the end of May, whose names he does not know; that some soldiers had found these persons hidden in little houses in P. canton, and L. ordered F. to hang them; that F. took them out of the house, and accomplished their death; that L. was present; and that one E. and others could testify to the matter. E., in his deposition, did not allude to such hanging, and the testimony of no other witness was produced. The accused denied their connection with such hanging. *Held*, that the evidence failed to show probable cause to believe the accused guilty.

7. SAME.

Gen. Antonio Ezeta, vice president and commander in chief of the army of Salvador, and J. C., L., and F., officers under him, were charged with the murder of C. H., at the village of Coatepeque, Salvador, June 3, 1894, during the revolutionary hostilities. The statement of C. H.'s father, not under oath, showed that Gen. A., an officer under Ezeta, took his son from his house on such day; that, on reaching the army, A. turned his son over to L., who ordered him delivered to Ezeta; that, on being told that his son was a spy, Ezeta struck him, and ordered him hung; that he was then taken to the plaza of Coatepeque, and hung; that F. cut the rope to see the corpse fall, and J. C. fired several shots into the body; and that his son took no part in the revolution, nor with Ezeta's forces. R. testified that Ezeta ordered C. H. to be hung, believing he was a spy and enemy, and that J. C., F., and one S. took part in carrying out the order. E. testified he saw C. H. carried away by A., J. C., and F. towards Ezeta's headquarters; that soon afterwards the same party went to the middle of the plaza, where they hung C. H. to a lamp-post; that J. C., F., and S. hung him. O. testified that Ezeta ordered C. H. hung, and delivered him to the populace to do as they wished with him. The accused all testified that they had nothing whatever to do with, and did not see, the hanging of C. H., but F. contradicted himself by afterwards stating that he saw the hanging. Ezeta testified that the forces that captured C. H. carried him through the streets; that on hearing the noise he learned of the capture; that he was afterwards informed that he was killed; and that he did not order him hung, or see him hung. *Held*, that the evidence showed prob-

able cause to believe the guilt of Ezeta, J. C., and F., considered without reference to any political aspect of the acts, but failed to show the guilt of L.

8. SAME—ROBBERY—SUFFICIENCY OF EVIDENCE.

Gen. Ezeta, then president of Salvador, was charged with robbery of the International Bank of Salvador & Nicaragua on June 5, 1894. R. testified that the agency of such bank in Santa Tecla was in charge of the house of A. & R., in which he was a partner; that on June 5, 1894, an officer and witness' clerk came to him, and told him he was wanted at such agency by a superior officer; that he went to the agency, and met a colonel and many more of Ezeta's officers; that such colonel said that, pursuant to orders of President Ezeta, the witness should hand over to him \$10,000, threatening him at once if he did not do so; that he told the officer there was not \$10,000 there; that the officer then told him, in an insolent way, and always threatening him, to hand over what there was without delay; that he was forced to give what there was in the vault; that he ordered the vault opened, and such officers took the money, \$2,584, and carried it to Ezeta, accompanied by witness; and that Ezeta gave the money to the paymaster of his forces, who gave witness a receipt for it by Ezeta's order. R. was corroborated in all important particulars by the testimony of his clerk and partner. *Held*, that there was probable cause to believe the accused guilty.

9. SAME—ROBBERY—WHAT CONSTITUTES.

The treaty between the United States and Salvador defines robbery as "the action of feloniously and forcibly taking from the person of another goods or money by violence, or putting him in fear." *Held*, that taking money or goods from the presence or view of the party robbed, by violence, or by putting him in fear, was robbery, within the meaning of such treaty.

10. SAME—MURDER—SUFFICIENCY OF EVIDENCE.

President Ezeta, of Salvador, and J. C., his officer, were charged with the murder of one C., June 6, 1894, on the road from Santa Tecla to La Libertad. The evidence of the prosecution was that Ezeta and staff met C. on such road; that C. approached Ezeta, and told him that the enemy wanted his head; that both Ezeta and C. drew revolvers, and Ezeta fired a shot at C; that J. C. immediately followed with three shots; and that C. was killed. Which (Ezeta or C.) made the first movement to draw his revolver did not appear, but C. did not shoot. The accused admitted that they shot and killed C., but claimed that they did it in self-defense; that C., as an officer under Ezeta, had been traitorous to his trust; that he surrendered the soldiers, etc., under his command to the enemy that morning; that when he met the accused he was intoxicated, and said to Ezeta, "General, Manuel Rivas wants your head;" that he then seized Ezeta by the throat, and made a movement as if to draw his revolver; that J. C. attempted to prevent him from drawing it; that Ezeta immediately fired a shot at C.; and that J. C. followed with three shots. *Held* that, considering the act charged merely as a common crime, and eliminating the question as to whether it may be regarded as a military act, and therefore a political offense, the evidence showed probable cause to believe the accused guilty.

11. SAME—MURDER—WHAT CONSTITUTES.

The treaty between the United States and Salvador (article 3) defines murder as "comprehending the crimes designated in the penal codes of the contracting parties by the terms homicide, parricide, assassination, poisoning, and infanticide." The Penal Code of Salvador provides: "Art. 360. Murder is homicide committed with premeditation, and under one of the following circumstances: (1) With perfidy or breach of trust; (2) for a price or promise of reward; (3) by means of flood, fire or poison. The crime of murder will be punished with the penalty of death. Homicide, Art. 361. He who kills another with premeditation, and without any of the circumstances enumerated in the preceding article, or under some one of said circumstances and without premeditation, will be punished with the penalty of imprisonment at hard labor. In any other case the penalty of imprison-

ment at hard labor shall be imposed on the offender." *Held*, that homicide, as defined in the Penal Code of Salvador (article 361), constitutes murder, as defined in such treaty.

12. SAME—COMMITTING MAGISTRATE—DETERMINATION THAT OFFENSE IS POLITICAL.

The treaty between the United States and Salvador provides that persons charged with or convicted of any of the extraditable offenses shall be delivered up only "upon such evidence of criminality as according to the laws of the place where the fugitive or person so charged shall be found would justify his or her apprehension and commitment for trial if the crime had been there committed;" that its provisions "shall not apply to any crime or offense of a political character; that a warrant for the apprehension of a fugitive may issue, in order that he may be brought before the proper judicial authority for examination; and that if it should then be decided that according to law and the evidence the extradition is due, pursuant to the treaty, he may be given up. Rev. St. U. S. § 5270, provides that any person charged with an extraditable crime under any treaty may be arrested and brought before the magistrate, "to the end that the evidence of criminality may be heard and considered," and that if it is sufficient the magistrate must certify the same, together with a copy of all the testimony taken before him, to the secretary of state, that warrant may issue on the requisition of the proper authorities for the surrender of such person, according to the stipulations of the treaty. *Held*, that the committing magistrate has jurisdiction, and it is his duty, to determine whether the offense charged is political, and not subject to extradition.

13. SAME—POLITICAL OFFENSES—WHAT ARE.

The testimony showed that the alleged hanging of four persons, May 29, 1894, by L. and F., officers of President Ezeta; the killing of C. H., June 3, 1894, at Coatepeque plaza, by President Ezeta and the other defendants, his officers; the robbery of a bank, June 5, 1894, by President Ezeta; and the killing of C., June 6, 1894, by President Ezeta and J. C., his officer,—were all committed during the existence of a state of siege in the republic of Salvador, proclaimed April 29, 1894, and the progress of actual hostilities between the contending forces, wherein Ezeta and his companions were seeking to maintain the authority of the then existing government against a revolutionary uprising; that such acts were associated with the actual conflict of such armed forces; that the four persons were hung because they did not assist in defending the government; that C. H. was killed because he was considered a spy; that the robbery of the bank was for the purpose of paying Ezeta's soldiers, and was what is known in the Central and South American states as a "forced loan," recognized by the treaty between the United States and Salvador; and that the killing of C. was the result of a report that he had gone over to the enemy. *Held*, that such offenses were of a political character, and not subject to extradition.

14. SAME—MILITARY OFFENSES AND JURISDICTION.

The killing of C. by President Ezeta and his officer, being within the jurisdiction of the military law of Salvador, is not subject to extradition.

15. SAME—CHANGE OF GOVERNMENT—EFFECT.

The overthrow of the Ezeta government by such revolution, and the dissolution of its army, did not change the status of the question as to whether such offenses were within such military jurisdiction.

Applications by the republic of Salvador for the extradition of five persons, upon the following charges: (1) In re No. 11,095, Leon Bolanos and Florencio Bustamante, for the crime of murder of four persons, names unknown; (2) In re No. 11,096, Juan Cienfuegos, for an attempt to murder one Andres Amaya; (3) In re No. 11,097, Antonio Ezeta, Leon Bolanos, Jacinto Colocho, Juan Cienfuegos, and Florencio Bustamante, for the murder of one Casimiro Henriquez; (4) In re No. 11,098, Antonio Ezeta, for the robbery of the International Bank of Salvador & Nicaragua; and

(5) Antonio Ezeta and Juan Cienfuegos, for the murder of one Tomas Canas. The applications, with the exception of that for the extradition of Juan Cienfuegos for the attempt to murder (In re No. 11,096), were refused, upon the following grounds, to wit: In re No. 11,095: That the evidence of criminality against Leon Bolanos and Florencio Bustamante, for the murder of four persons (names unknown), was insufficient in law to justify committing them. In re No. 11,097: That the evidence of criminality was sufficient in law to justify committing Antonio Ezeta, Juan Cienfuegos, and Florencio Bustamante for the murder of Casimiro Henriquez, but that said crime was of a political character, and hence not extraditable under article 3 of the treaty, and that the evidence of criminality against Leon Bolanos and Jacinto Colocho, for the alleged part they took in the murder of said Casimiro Henriquez, was not sufficient in law to justify committing them for extradition. In re No. 11,098: That the evidence of criminality against Antonio Ezeta, for the robbery of the International Bank of Salvador & Nicaragua, was sufficient in law to justify his commitment on said charge, but that said crime was of a political character, and therefore not extraditable under article 3 of the treaty. In re No. 11,099: That the evidence of criminality, upon the charge of murder of one Tomas Canas, against Antonio Ezeta and Juan Cienfuegos, was sufficient in law to justify their commitment for extradition, but that said crime was of a political character, and therefore not extraditable under article 3 of the treaty. The application to commit Juan Cienfuegos for extradition, on the charge of attempt to murder one Andres Amaya, was granted; the evidence of criminality amounting to probable cause of the fugitive's guilt, and the offense not being of a political character.

Pierson & Mitchell, for the republic of Salvador.

Charles Page, Horatio S. Reubens, and Gonzalo De Quesada, for defendants.

Charles A. Garter, U. S. Atty., for the United States.

MORROW, District Judge. These matters are before me, sitting as a committing magistrate, to determine upon the application of the republic of Salvador for the extradition, under its treaty with the United States, of Antonio Ezeta, Leon Bolanos, Jacinto Colocho, Juan Cienfuegos, and Florencio Bustamante, for trial in Salvador upon five charges; three being for murder, one for attempt to murder, and one for robbery. Upon the hearing it was claimed by the refugees—First, that there was not sufficient evidence amounting to probable cause to justify the holding of the accused; and, second, that all the offenses charged, with the exception of the charge of attempt to murder made against Juan Cienfuegos, assuming that probable cause existed, were political acts, and for that reason not extraditable, by the terms of the treaty.

The constitution of the republic of Salvador provides that the president and vice president shall be elected for a term of four years. Gen. Francisco Menendez was the president, and Dr. Rafael

Ayala vice president, for the term commencing March 1, 1887, and ending March 1, 1891. On the night of June 22, 1890, Gen. Carlos Ezeta appeared at the city of San Salvador, the capital of the republic, at the head of an armed force of 600 men, and proclaimed a revolt against the then existing government. President Menendez was giving a banquet at the time, celebrating the anniversary of his triumphant occupation of the capital five years before. In the tumult that followed, he was either slain by his political enemies, or he died suddenly from the effect of the excitement caused by the hostile demonstration. The government of Menendez was overthrown, and Gen. Carlos Ezeta proclaimed provisional president by the army. He immediately assumed the reins of government, and, with the assistance of his brother, Gen. Antonio Ezeta, proceeded to establish his executive authority,—not, however, without serious opposition. He was called upon to face an armed demonstration made against him on the part of Guatemala, and to encounter resistance at home, headed by Gen. Rivas, supporting the claims of vice president Ayala for the constitutional succession to the presidency. The Ezetas, however, were successful in their military operations. In a sanguinary struggle with Gen. Rivas for the capital, the latter was defeated, and afterwards shot as a traitor. Through the intervention of the members of the foreign diplomatic corps, Guatemala was induced to agree to peace on condition that the people of Salvador should be allowed a free expression in the choice of their president; and, in September, 1890, Gen. Carlos Ezeta was elected provisional president of the republic, and, on the first day of March, 1891, he was duly installed as president, with Gen. Antonio Ezeta as vice president, for the full term of four years. Gen. Antonio Ezeta afterwards became commander in chief of the army. Reference to other disturbances that followed will not be necessary. It is sufficient for the present purpose to say that the Ezeta government managed, by the use of vigorous measures in suppressing opposition, to continue in power down to the time of the occurrences which have been described in the testimony, and deemed relevant and material in the present examination.

A knowledge of what has just been stated, pertaining to the recent history of Salvador, drawn from public reports, appears to be necessary, however, to a clear understanding of the facts involved in the charges made against the defendants. On the 29th day of April, 1894, a revolution against the Ezeta government broke out in the military garrison at Santa Ana, a city in the western part of the republic, and distant about 60 miles from the capital. The revolution appears to have involved at first only a regular battalion of 500 men, stationed at that place, but it soon spread to other departments of the republic. Gen. Antonio Ezeta, the commander in chief, was stationed at this time at Santa Ana, as was also Gen. Jacinto Colucho, the commander of the garrison. After an unsuccessful attempt to recover the garrison, these officers, with a few men, retreated to Coatepeque, a place about 12 miles nearer the capital, where a force was gathered, and from which point operations were directed against the revolutionary forces. In an engage-

ment that took place on May 3d, Gen. Ezeta was wounded, and Gen. Bolanos became commander of the army. On May 23d, Gen. Antonio Ezeta, having recovered from his wounds, resumed command, and thereafter directed the operations of the government forces in that department. In the meantime the revolution had gained strength in other departments of the republic, under the leadership of Gen. Rafael Antonio Gutierrez, who has since become president; and on June 4, 1894, Gen. Carlos Ezeta fled from the capital, and, taking passage in a vessel at La Libertad for Panama, he proceeded (so it is reported) to New York, and thence to Europe. Gen. Antonio Ezeta thereupon became the acting president. On June 4th he and his army retreated in the direction of Santa Tecla, or New San Salvador, arriving there on June 5th, and on the 6th the retreat was continued to the port of La Libertad. Between April 29th and June 6th a number of battles and skirmishes took place between the contending forces, in which several hundred on both sides were killed and wounded. The force under Gen. Antonio Ezeta numbered at one time about 1,700 men, but it was reduced by desertions, and losses in killed and wounded, to a few hundred, when the remnant of the army, under the immediate command of Gen. Colocho, reached La Libertad. While these operations were in progress the government of the United States dispatched the United States steamer Bennington from California to Salvador, to look after the interests of citizens of the United States in that country during the revolution. This vessel was at the port of La Libertad when Gen. Antonio Ezeta and his officers and men reached that place. Among those officers, who had taken part in the military operations on the part of the government under Gen. Antonio Ezeta, were Gens. Bolanos and Colocho, previously mentioned; Lieut. Col. Juan Cienfuegos, on the staff of Gen. Ezeta; and Capt. Florencio Bustamante, field commissary. Upon the arrival of Gen. Antonio Ezeta at La Libertad, he proceeded to the American consulate, and requested asylum on board the Bennington until the arrival of the steamer San Blas, on its way to Panama. The message was signaled to Capt. Thomas, the commander of the Bennington, who granted the request, and Gen. Ezeta immediately proceeded on board the vessel. Later on in the same day, 16 others of Gen. Ezeta's company, including the officers I have named, went alongside of the Bennington, in a lighter, and applied for asylum. This request was at first refused, on account of a lack of accommodations on board the vessel; but, the pursuing revolutionary forces threatening to follow the fugitives under the beam of the Bennington, they were taken on board. Three days later the steamer San Blas arrived at La Libertad, when the commander of the Bennington proceeded to make arrangements for the transfer of the fugitives on board that vessel. The arrangements were interrupted, however, by commissioners representing the successful revolutionary party, requesting that they should have an opportunity to make a demand for the extradition of the fugitives on charges of murder, arson, robbery, and rape. The fugitives were accordingly detained on board the Bennington, and, in view of the disturbed condition of affairs in Salvador, this concession was

deemed by Capt. Thomas a courtesy to the new government, of some consequence, in the favorable influence it would probably have upon the authorities in securing the safety of American citizens residing in that country. Upon the arrival of the next vessel at La Libertad, bound for Panama, the fugitives again requested permission to leave the Bennington, that they might take passage on the departing steamer; but the request was refused by Capt. Thomas, under instructions from the secretary of the navy. The Bennington remained at La Libertad until July 25, 1894, during which time no extradition proceedings other than a demand by the government of Salvador for the surrender of the fugitives appear to have reached Capt. Thomas. The vessel then proceeded north with the five fugitives on-board, who have been the subject of these proceedings. What became of the other 12 is not disclosed by the testimony in the case. The Bennington arrived at Acapulco, Mexico, July 30th or 31st, where a request on the part of the fugitives to be allowed to leave the vessel was again refused. Leaving Acapulco August 2d, the Bennington arrived off the harbor of San Francisco on the 14th of August. The government of Gen. Gutierrez, as provisional president of Salvador, was formally recognized by the president of the United States on August 3, 1894, by the reception of Dr. Horacio Guzman as envoy extraordinary and minister plenipotentiary of the republic of Salvador. This last fact may be, in part, an explanation, and a sufficient reason, why the fugitives were detained on board the Bennington until the arrival of the vessel at this port; but, however that may be, that question is not before me for consideration. In passing upon the plea to the jurisdiction, I declined to enter upon any inquiry as to the conduct of the navy department in bringing the fugitives to San Francisco. The fact that they were found by the marshal in this district was, in my opinion, sufficient for the purpose of this examination; and I now only refer to this previous history, that the charges against the accused may be considered in the light of all the surrounding circumstances.

The authority for the present examination is derived from the statutes of the United States, the treaty between the United States of America and the republic of Salvador, and a mandate issued by the department of state under date of August 11, 1894, which recites that an application had been made in due form, to the proper authorities for the arrest of Antonio Ezeta, Leon Bolanos, Jacinto Colocho, Juan Cienfuegos, and Florencio Bustamante, charged with the crimes of murder, robbery, and arson. The certificate further recites that it was alleged that the parties named were fugitives from the justice of Salvador, and were believed to be within the jurisdiction of the United States; that it was proper they should be apprehended, and the case examined in the mode provided by the laws of the United States; that those facts were certified to the end that the evidence of the criminality of the accused might be heard and considered, and, if deemed sufficient to sustain the charges, the same might be certified, together with a copy of all the proceedings, to the secretary of state, that a warrant might

issue for their surrender, pursuant to said treaty stipulation. In conformity with this mandate, Eustorjio Calderon, the consul of Salvador at this port, on the 22d day of August, 1894, filed five separate complaints against the accused, charging Juan Cienfuegos with an attempt to murder one Andres Amaya on January 3, 1894, in front of the house occupied by said Amaya as his residence in the city of San Salvador; Leon Bolanos and Florencio Bustamante, with the murder of four persons, names unknown, on the 29th of May, 1894, in the gulch of Las Pulgas, in the canton of Primavera; Antonio Ezeta, Leon Bolanos, Jacinto Colucho, Juan Cienfuegos, and Florencio Bustamante, with the murder of one Casimiro Henriquez on the 3d of June, 1894, in the village of Coatepeque; Antonio Ezeta, with the robbery of José Ruiz and Evaristo Ambrosy, constituting the firm of Ambrosy & Ruiz, having in charge the agency of the International Bank of El Salvador & Nicaragua, of the sum of \$2,584, on the 3d (5th) of June, 1894, in the city of Santa Tecla, or New San Salvador; Antonio Ezeta and Juan Cienfuegos, with the murder of Tomas Canas on June 6, 1894, on the public road leading from the city or town of Santa Tecla, or New San Salvador, to the city or town of La Libertad. Upon these complaints, warrants were issued, and the accused brought before me for examination. After the testimony on the part of the government of Salvador had been introduced, it appeared insufficient to hold Jacinto Colucho on the charge preferred against him, and accordingly, on motion of counsel, he was discharged. Testimony was thereupon introduced on the part of the remaining defendants, and the question now is whether, upon the facts proven, and the rules of law applicable thereto, they, or any of them, should be held for extradition, under the terms of the treaty. For the purpose of ascertaining whether the evidence sufficiently establishes the charges of crime against the accused to justify me, as a committing magistrate, in holding them for extradition, it becomes necessary to determine at the outset the degree of proof required to support the accusations for the purpose of these proceedings.

Section 5270 of the Revised Statutes of the United States, relating to extradition, provides that:

"If, on such hearing, he [the committing magistrate] deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same," etc.

This section had its origin in section one of the act of August 12, 1848 (9 Stat. at Large, 302). The treaty under consideration was ratified in 1874, and provides that fugitives from justice shall be delivered up only "upon such evidence of criminality as according to the laws of the place where the fugitive or person so charged shall be found would justify his or her apprehension and commitment for trial if the crime had been there committed." Section 1014 of the Revised Statutes of the United States, relating to the arrest of offenders charged with any crime or offense against the United States, provides that they may be arrested and imprisoned, or bailed, "agreeable to the usual mode of process against offenders in such state."

The defendants having been found within the territory of the state of California, the law of this state must furnish the rule of procedure in this examination. The Penal Code of California, under the title relating to proceedings in criminal actions, provides as follows:

"If, after hearing the proofs, it appears either that no public offense has been committed, or that there is not sufficient cause to believe the defendant guilty of a public offense, the magistrate must order the defendant to be discharged, * * *."

Section 872 provides:

"If, however, it appears from the examination that a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof, the magistrate must make or endorse on the deposition an order, signed by him, to the following effect: It appearing to me that the offense in the within depositions mentioned (or any offense according to the facts, stating generally the nature thereof) has been committed, and that there is sufficient cause to believe the within-named A. B. guilty thereof, I order that he be held to answer to the same," etc.

The degree of proof that will enable the committing magistrate to determine that there is sufficient cause to believe the defendant guilty of a public offense has been discussed by eminent judicial authority. Chief Justice Marshall, sitting as a committing magistrate in the Aaron Burr Case (1 Burr's Trial, 11), stated a rule which has been followed in this country. He said:

"On an application of this kind, I certainly should not require that proof which would be necessary to convict the person to be committed, on a trial in chief, nor should I even require that which should absolutely convince my own mind of the guilt of the accused. But I ought to require, and I should require, that probable cause be shown; and I understand probable cause to be a case made out by proof, furnishing good reason to believe that the crime alleged has been committed by the person charged with having committed it."

Mr. Justice Washington, in defining the expression "probable cause," said it was "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense with which he is charged." *Munns v. Dupont*, 3 Wash. C. C. 31, Fed. Cas. No. 9,926.

Judge Blatchford, in the Case of Farez, 7 Blatchf. 345, Fed. Cas. No. 4,645, fully confirms this view of the law as to the evidence of criminality required in an extradition case, in the following language:

"To say that the evidence must be such as to require the conviction of the prisoner if he were on trial before a petit jury would, if applied to cases of extradition, be likely to work great injustice. The theory on which treaties for extradition are made is that the place where a crime was committed is the proper place in which to try the person charged with having committed it; and nothing is required, to warrant extradition, except that sufficient evidence of the fact of the commission of the crime shall be produced to justify a commitment for trial for the crime. In acting under the thirty-third section of the judiciary act of 1789 (section 1014, Rev. St.) in regard to offenses against the United States, a committing magistrate acts on the principle that, in substance, after an examination into the matter, and a proper opportunity for the giving of testimony on both sides, there is reasonable ground to hold

the accused for trial. The contrary view would lead to the conclusion that the accused should not be given up to be tried in the country in which the offense was committed,—the country where the witnesses on both sides are presumptively to be found,—but should be tried in the country in which he may happen to be found. Such a result would entirely destroy the object of such treaties."

To the same effect is the doctrine declared in *Re Wadge*, 15 Fed. 864, 16 Fed. 332; in *Re Macdonnell*, 11 Blatchf. 170, Fed. Cas. No. 8,772; in *Re Behrendt*, 22 Fed. 699.

In the case of *Benson v. McMahon*, 127 U. S. 462, 8 Sup. Ct. 1240, Mr. Justice Miller, delivering the opinion of the court in that case, said:

"The subject of what proof shall be required for the delivery upon requisition of parties charged with crime is considered in article 1 of the treaty [with Mexico], in regard to which it is provided 'that this shall be done only when the fact of the commission of the crime shall be so established as that the laws of the country in which the fugitive or the person so accused shall be found would justify his or her apprehension and commitment for trial if the crime had been there committed.' Taking this provision of the treaty, and that of the Revised Statutes above recited, we are of the opinion that the proceeding before the commissioner is not to be regarded as in the nature of a final trial by which the prisoner could be convicted or acquitted of the crime charged against him, but rather of the character of those preliminary examinations which take place every day in this country before an examining or committing magistrate for the purpose of determining whether a case is made out which will justify the holding of the accused, either by imprisonment or under bail, to ultimately answer to an indictment, or other proceeding, in which he shall be finally tried upon the charge made against him."

In the examination, therefore, of persons charged with being fugitives from justice under a treaty stipulation such as we find in the present case, the evidence of criminality must conform to, and be weighed and judged by, the laws of this country, and particularly the laws of the place where the accused is found. The evidence of criminality, to justify holding the accused for the action of the executive upon surrender, need not be such as would be required at the trial of the accused, but must be such evidence as ordinarily obtains at a preliminary examination, and amount to probable cause of his guilt; probable cause being such evidence of guilt as would furnish good reason to a cautious man, and warrant him in the belief, that the person accused is guilty of the offense with which he is charged.

The first charge, in point of time, is that against Juan Cienfuegos, alias La Chucha. He is accused with attempting to murder one Andres Amaya on the 3d of January, 1894, at the city of San Salvador, in front of the house used by the said Amaya as his residence. The depositions introduced on the part of the republic of Salvador contain the statement of Andres Amaya, the party aggrieved; the testimony of Thomas Quijano, a police officer who arrested Cienfuegos; and a statement by Cienfuegos himself. The deposition of Quijano and the depositions, so called, of Amaya and Cienfuegos, were all taken on the 4th day of January, 1894, the day following the alleged attempt to murder. The statement of Andres Amaya

is briefly, that, at 10:10 o'clock on the evening of the 3d of January one Manuel Casin offended him at his own house, where he resides; that Casin was accompanied by four or five other persons; among these was Juan Cienfuegos, whom he recognized perfectly well; that this group were disguised; that they discharged their revolvers at him just at the moment he happened to be on the porch of his house, conversing with one Don Mariano Moran; that Cienfuegos was the one who fired the first shot, pointing directly at the declarant; that immediately afterwards the other persons discharged their revolvers; that he threw himself quickly on the floor, the last shot passing near his ear; that they then left; that Manuel Casin, about six days previously, struck him from behind with a revolver, discharging a shot at him without injury; that Casin, for several days, has been waylaying the declarant, to kill him; that the enmity which Manuel Casin bears towards him originated in the declarant having, as departmental revenue collector, prohibited him from entering on horseback inside a building occupied for the management of the office and for the deposit of distilled spirits, and from trampling on the guard. Thomas Quijano deposed that while on duty as a police officer, near the residence of Amaya, he heard the report of several shots; that he proceeded quickly to that place, and saw three persons running, whom he did not know; he found Cienfuegos and another person together; that the person in company with Cienfuegos succeeded in making his escape; that he managed to capture Cienfuegos; that Cienfuegos was carrying a revolver in his hand, which he handed to him; that three shots had been discharged from it; that Cienfuegos confessed to him at that moment that those shots had been fired by him at Don Andres Amaya; that he cannot identify the person in company with Cienfuegos; that he delivered the revolver to the police, and gave an account of the matter. The record which constitutes the letters rogatory requesting the surrender of Cienfuegos also contains a statement to the authorities made by Cienfuegos upon his arrest. This statement is designated at the conclusion as a deposition. He stated that he was on his way to the theater in company with Don Manuel Casin, Dante del Papa, baritone of the present opera troupe, Antonio Guicho, a gentleman named Tierno, and also another person; that when they were passing opposite the porch where Andres Amaya resides the latter was in the company of another person, whom he was unable to recognize; that Amaya directed a shot from his revolver at the group; that Manuel Casin instantly fired a shot, and afterwards two more; that the declarant fired two shots at the said Amaya; that he noticed Amaya close the porch, instantly; that all his companions scattered; that he alone appeared before Thomas Quijano, the first officer of police, and handed him his revolver, and told him that he had fired two shots at Amaya; that he saw that Amaya saved himself from the shots by placing himself behind the end column of the porch; that all of his companions wore cloaks, except Casin, who wore a sort of an overcoat, and the declarant, who was dressed in citizen's clothes; that during the two days prior thereto he was constantly escorting Don Manuel Casin, by order of Gen.

Antonio Ezeta, with instructions to guard Manuel Casin so that no one should harm him, and especially in consequence of a misunderstanding which existed between Manuel Casin and Andres Amaya; that he fired the shots at Señor Don Andres Amaya with a view of defending Don Manuel Casin.

Upon this evidence of criminality, the record shows that an order was made by the court No. 1 of first instance, at San Salvador, on the 5th day of January, 1894, that the suspected party, Don Juan Cienfuegos, should remain in temporary custody, there being sufficient cause therefor, and that the record of the proceedings should be submitted to the alcalde. Nothing further appears, from the depositions and record, relative to what other proceedings, if any, were taken against the accused, except that on June 22, 1894, an order was made by the court No. 1 of first instance that letters rogatory should issue to the commander of the Bennington for the surrender of Juan Cienfuegos for the alleged attempt to murder Andres Amaya. The accused, in his testimony before me, testified to substantially the same facts as are contained in the statement made by him upon his arrest. He admits that he shot at Don Andres Amaya at the time and place stated, and while he was in company with Manuel Casin, but he justifies himself by swearing that he shot only after Amaya had opened fire on them; and that when he did shoot he did so to defend and protect the life of Manuel Casin, whose person he had been detailed to guard by the order of his chief officer, Gen. Antonio Ezeta; that his orders were to dress in citizen's clothes, and to place himself at the order of Manuel Casin, and that he should defend him at all hazards, and, before he should allow him to be killed, that he should first allow himself to be killed. He further testified that he was taken, upon his arrest, to the police station, and was there asked to make a statement, which he did; that soon afterwards Gen. Antonio Ezeta arrived at the station, and procured his release; that an hour after that he was rearrested by order of President Carlos Ezeta; that he was put in a place where the flags are kept at the police station; that he remained there for three days, and was then released by instructions conveyed by the chief of staff from President Carlos Ezeta; that since that release he has never been rearrested for the same charge. He also testified that he knew Amaya by sight, but had never talked with him.

A technical objection is made to the depositions of Amaya and Cienfuegos. It is urged that they are but mere statements, and not depositions, and that, not being depositions, whatever they contain is not evidence against the accused. This contention is based upon the recitals as to the imposition of an oath to tell the truth, contained in the introductory part of the depositions. It appears that in all of the depositions where a witness, not a party interested, is sworn, the following recital occurs as to the administration of the oath, varying somewhat in phraseology:

"There being present the witness ———, to whom I read the penalties incurred by those who testify falsely in criminal proceedings, and, upon being sworn in legal form, he promised to tell the truth, he stated," etc.

In the statement of Andres Amaya the introductory recital is in the following form:

"A man who felt aggrieved appeared, and I instructed him as to his obligation to tell the truth, upon being interrogated by competent authorities, and he promised to do so, declaring," etc.

That of Cienfuegos reads:

"There being present a man mentioned in this proceeding, to whom I impose the obligation of telling the truth, upon being interrogated by competent authority, and he promised to do so, saying," etc.

A perusal of all the depositions introduced discloses the fact that it does not distinctly appear that the complainant or party aggrieved takes an oath in the same form as that of a witness. But in other respects the depositions are similar, and the conclusion in all of them is substantially the same. In every one the declarant appears to have been interrogated, and it is significant that the proceeding is called a deposition at the conclusion. Section 5 of the act of August 3, 1882 (22 Stat. at Large, 216), provides:

"That in all cases where any depositions, warrants, or other papers or copies thereof shall be offered in evidence upon the hearing of any extradition case under title sixty-six of the Revised Statutes of the United States, such depositions, warrants, and other papers, or the copies thereof, shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any deposition, warrant or other paper or copies thereof, so offered, are authenticated in the manner required by this act."

It appears by the stipulation filed by counsel in these cases that all the depositions and other papers offered in evidence on the part of the republic of Salvador are so certified. This certificate covers the statement or deposition of Andres Amaya, and under the statute it must be received and admitted as evidence for all the purposes of the hearing. While the depositions were being read, objections were offered to certain portions of the testimony of some of the witnesses on the ground that the evidence was either incompetent, irrelevant, or immaterial, as, for instance, that the testimony was clearly hearsay. I sustained objections of this character, and on motion the testimony was struck out; but, doubting the propriety of this ruling, I afterwards suggested that a motion to strike out was unnecessary, as I would disregard testimony deemed inadmissible under the rules of evidence prevailing in this country. This ruling was not intended, however, to go any further than to indicate the rules of evidence applicable to the substance of the testimony. The form of the depositions or other papers is clearly covered by the certificate under the act of congress. But the statement of Andres Amaya, if deemed defective in failing to show that the deponent had been sworn to tell the truth, is not of itself essential to establish the charge against Cienfuegos. The deposition of the police officer, Thomas Quijano, which is admittedly free from the alleged defect, serves, in my opinion, to establish a

probable cause of guilt, sufficient to justify me in holding the defendant for extradition; certainly so, in view of his admissions.

As the act was committed some four months before the revolution began, it is free from any political aspect, so far as the act charged itself is concerned; and the only question to be determined is whether the evidence of criminality amounts to probable cause of the guilt of the accused. As stated above, the admission of the accused, both as it is contained in the record and as made at the hearing, that he shot at Amaya, removes any doubt upon this question. It appears to me that, even in the absence of the admissions of the accused, the evidence of criminality presented is sufficient to amount to probable cause. His justification—that he was merely acting in obedience to the orders of his superior officers in protecting the life of Casin—cannot here be considered. What that defense would amount to upon the trial of the case in Salvador cannot now be determined, nor is it necessary. The fact that he fired the shots in defense of himself and Casin is obviously a matter of defense, to be presented in the tribunals of the republic of Salvador upon a full hearing of the case, where all the witnesses of the affair may be secured. The testimony for the prosecution establishes the fact that the act charged was in fact committed. And as this evidence amounts to probable cause, the inquiry need go no further on this preliminary examination, unless there is some explanation to be made which does not contradict or impugn the testimony on the part of the prosecution, but serves to explain it so as to show that the consequence otherwise deducible does not follow. This I understand to be the law declared in *U. S. v. White*, 2 Wash. C. C. 29, Fed. Cas. No. 16,685; and in *Catlow's Case*, 16 Op. Attys. Gen. 642; 1 Moore, Extrad. p. 528.

Counsel for the defendant contends that as Cienfuegos was released by order of his superior officers, and has never been prosecuted, or any steps taken against him, for the part he took in the alleged attempt to murder Andres Amaya, until after he had taken refuge on board the Bennington, this revival of the prosecution is nothing more or less than an effort on the part of the present government of Salvador to secure the person of the accused for the purpose of wreaking their vengeance on him for the part he took against them in the late war. This argument is not, perhaps, destitute of force, but it is not a matter of which I can properly take cognizance, in view of the other features of this particular case. He was not tried for the offense, nor was he pardoned, but, being discharged from prison by order of President Don Carlos Ezeta, he appears to have enjoyed a privilege conferred by executive authority equivalent to an order entered only by judicial authority in this country, permitting the accused to be discharged from custody on his own recognizance. If this is a correct interpretation of the proceedings stated in the record, then Col. Cienfuegos has continued subject to arrest and trial upon this charge. If, as is claimed, he is being extradited for a political purpose, that is a matter which can very properly be called to the attention of the executive when he comes to review my action.

The next charge is that against Leon Bolanos and Florencio Bustamante, for the hanging on the 29th of May, 1894, of four unknown persons at Las Pulgas ravine. The accusation rests on the deposition of one witness, named Leopold Maza. This deposition was taken on June 24, 1894. The witness deposes "that what he knows from ocular evidence only is" that Florencio Bustamante, alias Monkey in the Hole, by order of Leon Bolanos, hung four persons, in Las Pulgas ravine, at the end of May, at 11 o'clock a. m.; that he does not know the names of these persons, but he knows that they were from the volcano of Santa Ana. The witness then proceeds to assign a motive for the hanging, which he says was that some soldiers had found these persons hidden in certain little houses located in Primavera canton; that Leon Bolanos carried away said persons to a house situated in Las Pulgas ravine, to take their depositions, and, said persons having declared that they had concealed themselves in consequence of not having taken part either for or against the revolution, Bolanos ordered Bustamante to hang them. The witness then goes on to state what took place at the hanging. He says that Bustamante took these persons out of the house, carrying one of them bound by the neck; that, having come to a post in the yard of the house, Bustamante tied the lasso, and dragged him by his feet, in order to hasten the execution; that he accomplished *their* death; that Bolanos was present. The witness then continues his testimony by making statements intended to implicate Antonio Ezeta and the defendants connected with this particular charge with the commission of many other offenses, and with general lawlessness. These latter statements are manifestly based upon public rumors, and are therefore hearsay. Although the witness stated at the close of his deposition that one Rodrigo Escobar and others, whose names he did not recollect, could testify in the matter, yet the deposition of Rodrigo Escobar, contained in the record, makes not the slightest allusion to the hanging in question, and the testimony of no other witness bearing upon this accusation is produced. It may be said that, in the deposition of Carmen Quinteros, reference is made to this charge, but she bases her knowledge of the facts she relates upon the publicity of the affair in the canton. Her testimony is consequently without value. I must therefore rely upon the testimony of this solitary witness, Maza, to ascertain whether probable cause of the guilt of the accused is made out. The motive testified to by him, if indeed such evidence could be accepted as against these defendants, is at best but hearsay, for the witness is very careful to say at the outset of his testimony "that what he knows from ocular evidence only is" that Bustamante hung four persons by order of Bolanos. This reservation on the part of the witness would limit his knowledge of what took place to the hanging itself, and it is difficult to understand, without some explanation, how he could know, by ocular means only, that an order was given at all, or what the motive for the alleged hanging was. Assuming that he did have such knowledge, it must have been based upon information received from others, and, being hearsay, it is not admissible against Bolanos.

This is the only evidence in the testimony of this witness implicating Bolanos in any way with the alleged murder of these four persons. The fact that Bolanos may have been present at the alleged hanging, in the absence of any testimony, other than hearsay, that he took any part or contributed in any way to the execution, is clearly not sufficient. The evidence contained in the deposition does not, in my judgment, so connect Bolanos with the alleged hanging as to warrant me in saying that I have good reason to believe that he is probably guilty. While the testimony as to Bustamante is more specific and certain, yet, taken as a whole, it is also far from being satisfactory. I am not inclined, in view of the inconsistencies and palpable hearsay testimony contained in the deposition, to place much reliance on the uncorroborated testimony of this witness. The fact cannot be overlooked that although he stated that one Rodrigo Escobar and others, whose names he did not recall, could testify in this matter, the former person, despite the fact that in his deposition he takes a wide latitude in making charges against individuals, and as to the character of crimes committed, yet fails to say a single word to substantiate the witness Maza as to this charge. In view of the magnitude of the crime, it is singular that, if four persons were in fact hung upon such slight provocation, more satisfactory evidence was not produced. A committing magistrate would not be justified, in my opinion, in holding for extradition these accused persons, on so serious a charge, upon such unsatisfactory evidence. The accused deny that they had anything to do with the hanging of four men, or any men or man, at the time and place indicated, and under the circumstances detailed. They testify that a battle took place on that day, that there were some of their soldiers killed and wounded, but that they captured no prisoners. It may be observed that the testimony of the witness Maza was not taken until the 24th of June, 1894, nearly a month after the alleged hanging took place, and nearly three weeks after the accused had sought refuge on board the Bennington. The further fact that the identity of the four persons said to have been hung was not established tends to the conclusion that the whole affair is involved in too much uncertainty to warrant a commitment of the accused for the offense charged. But, whatever may be the actual facts concerning this affair, hostilities were in progress between the governmental and revolutionary forces in the vicinity of Las Pulgas ravine at that time; and the testimony shows that the acts of the accused, assuming that the testimony of this witness is true, were associated with the military operations at that place. It remains, therefore, to determine that feature of the case, which will be done at a later stage of this opinion.

The third charge is that against all of the fugitives, viz. Antonio Ezeta, Leon Bolanos, Jacinto Colocho, Juan Cienfuegos, and Florencio Bustamante, for the murder of one Casimiro Henriquez, on June 3, 1894, at the plaza of the village of Coatepeque. Jacinto Colocho having been discharged for want of sufficient evidence to connect him with this offense, his relation to the case will not be further considered.

It appears, from the deposition of Apolonio Henriquez that on June 3, 1894, one Gen. Emilio Avelar, an officer under Gen. Ezeta, came to the deponent's house, and took his son away a prisoner; that, on arriving at the vanguard of the army, he sought to shoot his son; that Gen. Avelar was dissuaded from his purpose by the opposition made by the physicians in charge of the ambulance; that Gen. Avelar thereupon turned his son over to Gen. Bolanos, and that the latter ordered that he be delivered to Gen. Ezeta; that while on the way to Gen. Ezeta's headquarters, the prisoner was maltreated by soldiers and women; that upon reaching Gen. Ezeta's headquarters the latter, on being told that the prisoner was a spy, struck him, and ordered him to be hung; that the women begged the general to deliver the prisoner over to them, to do as they pleased with him, which request he granted; that the prisoner was then taken to the plaza of the town of Coatepeque; that on the way he was severely maltreated; that he was hung at the plaza; that Cienfuegos, Bustamante, and another person gloated over what they had done; that Bustamante, enraged at the corpse, cut the rope, in order to see it fall, and Cienfuegos, supposing it still had life, directed several shots from his revolver into the body; that many persons can testify to all this; that there was no cause for the execution of his son, since he was neither a participant in the revolution nor in the forces of Ezeta. As it does not appear that the deponent testified as a witness under oath to the matters he undertakes to narrate, and manifestly could not have had the knowledge to so testify as to all the particulars related, his deposition cannot properly be considered as anything more than a statement of the complaint of an aggrieved party. The witness Anas-tacio Ruano testifies that Ezeta, believing it true that he (Casimiro Henriquez) was a spy, as well as enemy, ordered him to be hanged in the public plaza, in carrying out which order, Juan Cienfuegos, Florencio Bustamante, and one Fernando Salguero took part. Mauricio Escobar deposes that he saw Casimiro Henriquez being carried a prisoner by Gen. Emilio Avelar and the colonels, Juan Cienfuegos and Florencio Bustamante, accompanied by soldiers and women, who were stoning and clubbing the prisoner; that they directed their steps towards Ezeta's headquarters; that about a quarter of an hour later the same party retraced their steps, going towards the plaza, and then to the middle of it, where they hung Henriquez on a public lamp-post; that the authors of the deed were Florencio Bustamante, Juan Cienfuegos, and one Fernando Salguero; that declarant saw Juan Cienfuegos discharge shots into the body of Casimiro Henriquez. Horacio Olmedo testified that Ezeta gave the order to the soldiers who were conducting Casimiro Henriquez as a criminal that they should do what they pleased with him; that shortly after that he was hung in the plaza of Coatepeque; that when nearly dying he was lowered from the post, and Cien-fuegos fired two shots at him. Rodrigo Escobar deposed that he heard and saw, also, that Antonio Ezeta gave the order the evening of the 3d of June, 1894, to hang Casimiro Henriquez, upon being told that the latter was of the advance guard, and he delivered him to

the populace to do as they wished with him, and in this manner he was taken away to be hung; that the declarant did not witness the hanging. Francisco Menéndez testified:

"That among the many crimes perpetrated in Coatepeque during the time about which he is asked, in consequence of his having been a resident of that town, he witnessed only the death imposed upon Casimiro Henriquez, by hanging, in the plaza of said town, on the 3d of the present month [June], at about six o'clock p. m.; the order for which execution was given, as publicly known, by Antonio Ezeta. But declarant did not give his attention to whom the perpetrators of the crime were."

The defendants all testify that they had nothing whatever to do with the hanging of Casimiro Henriquez, and that they did not even witness the occurrence. It is not claimed that Antonio Ezeta was present. His connection with the alleged murder was in giving the order to execute Henriquez, and turning him over to the soldiers and women, that they might accomplish that design. One of the witnesses for the government of Salvador testifies positively that he heard and saw the order given. Ezeta testified, in answer to the question that he detail the circumstances under which he saw Casimiro Henriquez on that day, that:

"The forces that captured him [Henriquez] took him, and carried him through the streets of Coatepeque. Upon hearing the noise of the people, I inquired about the matter, and learned that he had been captured, and was being carried through the streets. Subsequently, I was informed that he had been killed. Probably, he was hung. Q. Did you see him hung? A. No, sir, I did not. I saw him when he was dead. Q. Did you order him to be hung? A. No, sir, I did not; but, in conscience, I will state that I believe he was well killed, because he was a rebel."

Cienfuegos claims that when the hanging took place he was with Gen. Ezeta at the latter's headquarters. He admits that he heard the tumult of the soldiers and women; that they were shouting, "Death to the traitor!" and that they were carrying some one, whom he could not see; and that the crowd finally turned towards the plaza, which, he testifies, was about four blocks distant from Ezeta's headquarters. He states that while all this excitement was going on he remained about the corridor of the house; that he did not follow the crowd, and took no part in the hanging. Bustamante claimed on the stand that he did not even see the execution, but subsequently in his testimony he contradicted himself by admitting that he did witness it. He claimed that he did not see the hanging because at the time he was busy with his carts stationed at the plaza; but, as the execution took place on the plaza itself, he must have witnessed it, as he subsequently admitted. But this testimony on behalf of Cienfuegos and Bustamante does not offset the positive evidence produced by the government of Salvador to the effect that Cienfuegos and Bustamante were both seen with the populace on that occasion; that they, with others, had the prisoner in custody; that they actually took part in the hanging, the particular part which each of them took in the execution being described by the witnesses in unmistakable language. From the testimony I find that there is sufficient evidence of criminality to warrant me in holding that there is in this case probable cause to

believe that Antonio Ezeta, Juan Cienfuegos, and Florencio Bustamante are guilty of this crime as charged. Whether the act charged was a political offense, within the meaning of the treaty, will be considered hereafter.

The only testimony I have been able to find in the record tending to connect Gen. Bolanos with this affair is that of Anastacio Ruano, that Henriquez was delivered, by order of Gen. Bolanos, to Gen. Ezeta, and the testimony of Horacio Olmedo, "that Gen. Leon Bolanos, having taken part in the affair, exciting the populace, in order that the execution should be more bloody." This last statement, at most, is but a mere recital, without any direct averment as to any specific act tending to connect Bolanos with the deed. The accused testifies that on June 3d, the day Henriquez was hung, he was in command of the artillery on a hill outside of the city of Coatepeque; that he did not reach the city until 7 o'clock in the evening, and knew nothing of the hanging until he was informed about it at 6 o'clock of that day. He denies having had any connection whatever with the execution. The evidence against this defendant is not, in my judgment, sufficient to justify his commitment, and he will therefore be discharged.

The fourth charge is against Antonio Ezeta, for the robbery of the International Bank of Salvador & Nicaragua, in the city of Santa Tecla, or New San Salvador, on June 5, 1894. The depositions of three witnesses were introduced in evidence on the part of the government of Salvador. The principal witness is one José Ruiz, who testifies to all of the matters connected with the alleged robbery. His deposition is as follows:

"The agency in this city of the International Bank of Salvador is in charge of the house of Ambrosy & Ruiz, located in the same, of which the deponent is a partner; that in effect, on the 5th day of this month [June], about one o'clock in the afternoon, there arrived, where the deponent was, an officer accompanying his clerk, Señor Enrique Orellana, and the clerk and that officer stated to the deponent that he was wanted at the agency by a chief or superior officer, to make a transaction; that then the deponent went to the agency, and met in the same a colonel, and many other officers besides, of Gen. Antonio Ezeta, who had on that day reached here at about ten o'clock a. m.; that said superior officer or colonel, on seeing the deponent, said to him that, pursuant to order of the senior president of the republic, Don Antonio Ezeta, that he (the deponent) should hand over to him ten thousand dollars of the funds of the said agency, threatening him at once if he did not do so; that the deponent replied that in the agency there were not ten thousand dollars, and that then the said colonel said to him (the deponent), in an insolent tone, and always threatening him, that he should turn over what there might be, but without delay, because the president, Antonio Ezeta, was becoming impatient; that in consequence of that the deponent saw himself forced to give what there was in the vault of the agency, and ordered the vault opened, and, the vault being opened, the latter, the said colonel, and the officers indicated, extracted the money which it contained, which they counted themselves, in presence of the deponent, and it reached the sum of two thousand five hundred and eighty-four dollars, which they carried away to the said Ezeta, who was in one of the habitations or apartments of the Gran Hotel, the deponent having accompanied them, by order of the same colonel; that Ezeta, after receiving the said sum, ordered called the paymaster of his forces, Col. Don Rudolf Quell, to whom the same was delivered, and the latter gave him (the deponent) a receipt for the money, which receipt was given and placed by order of the said Ezeta, and the deponent remitted then the said receipt to the

board of directors of the bank (Gerencia), furnishing it an account of what had occurred; that he (the deponent) does not know the name of the colonel, nor that of any of the other officers to whom reference has been made, and that the following persons can depose in the matter, to wit, Don Evaristo Ambrosy, his partner, who arrived at the time the money was counted, the said clerk, and the paymaster, Senor Quell; deponent declaring that the sum alluded to is exactly that which the International Bank had in cash in the safe or coffers of the said agency, and that what he has testified he both heard and saw."

The other witnesses, viz. Don Evaristo Ambrosy, the partner, and Enrique Orellana, the clerk in the bank, both corroborate the witness Ruiz in all the important particulars of fact. But it is objected by counsel for defendant that the facts as proven do not establish the crime of robbery, defined in the treaty. Article 2, subd. 4, of the treaty, defines robbery to be "the action of feloniously and forcibly taking from the person of another goods or money by violence, or putting him in fear." It is contended that as the money was not taken from the person the crime of robbery, called for by the treaty, has not been proven. The point is also made that there was no "absolute intimidation," only an "implied intimidation." It is sufficient to say that the witness Ruiz, one of the proprietors of the bank, stated unequivocally that he was threatened. As to the other point, I have no doubt that "taking from the person" includes "taking from the immediate presence of the person" as well. The definition in the treaty is in effect the common-law definition of robbery, and, as Mr. Justice Washington says:

"If a statute of the United States uses a technical term, which is known, and its meaning fully ascertained by the common or civil law, from one or the other of which it is obviously borrowed, no doubt can exist that it is necessary to refer to the source whence it is taken, for its precise meaning." *U. S. v. Jones*, 3 Wash. C. C. 215, Fed. Cas. No. 15,494.

According to the common-law definition, it is well settled that robbery of the person includes robbery "in the immediate presence of the person." Mr. Justice Washington, in charging a jury in the above case, gave the common-law definition, and the interpretation thereof, in the following language:

"[Robbery] is the felonious taking of goods from the person of another, or in his presence, by violence, or by putting him in fear, and against his will. It is objected that the taking must be from the person. The law is otherwise, for if it be in the presence of the owner,—as if by intimidation he is compelled to open his desk, from which his money is taken, or to throw down his purse, which the robber picks up,—it is robbery, as much as if he has put his hand into the pocket of the owner, and taken money from thence. But the taking must be in the presence of the owner."

The similarity between the common-law definition of robbery, as given by Mr. Justice Washington, and that contained in the treaty, needs no comment. The definition in the *American & English Encyclopedia of Law* (volume 21, pp. 414, 424), further confirms the correctness of the construction placed upon the definition of robbery contained in the treaty:

"To constitute robbery, the taking must be from the person of the party robbed. But anything taken from the presence or view of the party, or from

his protection, is constructively taken from his person." 1 Hale, P. C. 533; 2 East, P. C. 707; Reg. v. Selway, Cox, Cr. Cas. 235; State v. Calhoun, 72 Iowa, 432, 34 N. W. 194; Clements v. State, 84 Ga. 660, 11 S. E. 505.

In my opinion, it is enough, therefore, to bring the offense within the crime of robbery, as defined in the treaty of extradition, that the money or goods be taken from the presence or view of the party robbed, by violence, or by putting him in fear.

The defendant does not deny that the money was taken from the bank by his officer, Col. Juan Cienfuegos. He admits that the latter went to the bank at his orders. He claims that it was absolutely necessary to have the money for the purpose of paying the troops, who had not been paid for two days, and that it was the custom to pay the troops daily. Whether the exigencies of the military operations required that this so-called "forced loan" should be made, and was justifiable under the circumstances, remains to be considered when I come to treat of the political phase of the offenses charged. Suffice it to say that so far as the offense itself is concerned, considered without reference to any political aspect of the act, the evidence of criminality preponderates sufficiently over the testimony of the accused to justify me in saying that there is probable cause to believe the defendant guilty.

The last charge is that against Antonio Ezeta and Juan Cienfuegos, for the murder of Tomas Canas, on June 6, 1894, on the road leading from Santa Tecla to La Libertad. The facts of this alleged murder, as severally testified to by the witnesses on the part of the government of Salvador, are, briefly, that while Gen. Antonio Ezeta, with his staff, were proceeding along the road leading from Santa Tecla to La Libertad, they met one Col. Tomas Canas, who was coming from an opposite direction. Canas approached Gen. Ezeta, and told him that the enemy wanted his head. One of the witnesses states that Canas drew near to Gen. Ezeta, speaking to him at his ear; that afterwards Gen. Ezeta told them that Canas had said to him that Manuel Rivas wanted his head. Both drew their revolvers, and Gen. Ezeta fired a shot at Canas. Cienfuegos immediately followed with three shots. Canas was afterwards found dead by the roadside, with several bullet wounds in his body. Which one of the two made the first movement to draw his revolver does not appear from the evidence of the government of Salvador, but it is certain that Canas did not shoot. And in this connection the testimony of one Fernando Carranza, a boy aged 13 years, bugler to Gen. Ezeta, may be referred to. He testifies as follows:

"That on the road, and before the reaching the point called El Amatillo, Col. Tomas Canas approached near to Ezeta, and told him that the enemy wanted his head; that Juan Cienfuegos reached to where Canas stood, and wanted to take his revolver from his pocket, which he obtained; that, after the words which passed between Canas and Ezeta, the latter fired a shot at the former, and Cienfuegos fired three other shots at him."

The statement that Cienfuegos procured the revolver of Canas is not corroborated by any of the other witnesses, and is inconsistent with the testimony of Gen. Calixto Guzman, who stated that both

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drew their revolvers. It is in evidence on the part of the defendants that Cienfuegos did make an effort to prevent Canas from touching Gen. Ezeta, and it is probably to this circumstance the witness means to refer. The defendants admit that they shot at and killed Tomas Canas, but they justify their action on the ground of self-defense. It is claimed by them that Tomas Canas had been traitorous to his trust as an officer under Gen. Antonio Ezeta, and that he had surrendered, that very morning, the soldiers, ammunition, and military accouterments under his command; that when he came up to Ezeta he appeared to be somewhat intoxicated; that he exclaimed to Gen. Ezeta, "General, Manuel Rivas wants your head!" that thereupon he seized Gen. Ezeta by the throat, and also made a movement as if to draw his revolver; that Cienfuegos made an attempt to prevent Canas from drawing his revolver; that Gen. Ezeta immediately drew his revolver, and fired one shot at Canas, and Cienfuegos followed with three other shots; that Canas half turned his horse, and fell on the roadside, where he was left by Gen. Ezeta and his staff. It is objected that the facts proven do not, in any view, tend to establish the crime of murder, as defined by the treaty and the law of Salvador. In article 3 of the treaty the crime of murder is defined as follows: "Murder, comprehending the crimes designated in the penal codes of the contracting parties by the terms homicide, parricide, assassination, poisoning, and infanticide." It is contended that "homicide, parricide," etc., must amount to the crime of murder, to come within the treaty,—in other words, that the extraditable offense is limited to the crime known in our law as "the killing of a human being, with malice aforethought,"—or, if we look to the law of Salvador, we must still find the facts sufficient to bring the case within the offense amounting to murder under the law of that republic. The Penal Code of Salvador provides as follows:

"Article 360. Murder is homicide committed with premeditation, and under any one of the following circumstances: First, with perfidy or breach of trust; second, for a price, or promise of reward; third, by means of flood, fire, or poison. The crime of murder will be punishable with the penalty of death.

"Article 361. Homicide. He who kills another with premeditation, and without any of the circumstances enumerated in the preceding article, or under some one of said circumstances, and without premeditation, will be punished with the penalty of imprisonment at hard labor. In any other case, the penalty of imprisonment at hard labor shall be imposed on the offender."

It is contended that the facts here proven do not show the circumstances constituting murder, within the meaning of the law of Salvador, and therefore the accused cannot be extradited for that offense, and that, if the facts be held to bring the case within section 361 of the Penal Code of Salvador, still the accused cannot be extradited, for that is not the crime known as murder. It seems to me that this is a refinement not justified by the terms of the treaty. I cannot understand why, if the treaty was only intended to comprehend murder as known to our law, or what corresponds to that crime elsewhere, there should have been a further enumeration of offenses amounting to the same degree. In my opinion the article of the treaty in question should be read according to its plain and

obvious meaning in the designation under the general title of "Murder," as the crime of homicide is defined in article 361 of the Penal Code of Salvador. As the act involves principles of military law, and in that connection is claimed to constitute a political offense, this aspect of the accusation will be considered in conjunction with the other political offenses. But, eliminating the question as to whether the act may be regarded as a military act, and therefore coming within the saving clause of political offenses, and considering the act charged merely as a common crime, it is evident that the testimony of the witnesses on the part of the government of Salvador, with the admissions of the defendants, makes out the requisite case of probable cause of their guilt.

I have now reached the most important question to be considered in this examination. It is claimed by counsel for the defendants that, with the exception of the charge against Juan Cienfuegos for the attempt to murder Amaya, all the acts charged against the defendants in these several complaints were committed during the progress of actual hostilities, in which the accused were engaged as military officers under the government, acting against revolutionary forces in the field; that the crimes or offenses were therefore of a political character, and, under the treaty, not subject to extradition. Counsel for the present government of Salvador contend, on the other hand, that it is no part of my duty to determine this question; that my jurisdiction is limited to the examination of the criminality of the accused, as charged in the complaints, and, if it appears upon this examination that the evidence is sufficient to warrant me in the belief that the persons accused are guilty of the offenses charged, then I must so certify that fact to the executive department of the United States, where it may properly be determined whether the offenses are of a political character or not. The argument in support of this proposition is derived from the language of the treaty, describing the offenses made subject to extradition, and particularly the provision that persons convicted or charged with any of the crimes specified shall be delivered up only "upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his or her apprehension and commitment for trial if the crime had been there committed." It is contended that this provision necessarily excludes the jurisdiction of the committing magistrate to inquire into the political character of the offense, for the reason that under our laws there can be no crime of a political character, unless it partakes of the nature of treason. Further argument in support of this position is found in the language of section 5270 of the Revised Statutes, providing that any person charged with an extraditable crime under any treaty may be arrested and brought before the magistrate "to the end that the evidence of criminality may be heard and considered." It is claimed that this provision is a limitation upon the jurisdiction of the committing magistrate; that when he has received and considered the evidence of criminality of the accused as to the crime charged in the complaint the examination is at an end. If the evidence is not

sufficient the defendant is discharged. If it is sufficient he is required by this same section "to certify the same, together with a copy of all the testimony taken before him, to the secretary of state, that a warrant may issue, upon the requisition of the proper authorities of such foreign government for the surrender of such person, according to the stipulations of the treaty or convention;" the requirement that the testimony shall be certified to the secretary of state being for the purpose of enabling the executive department to determine whether the fugitive should be surrendered according to the stipulations of the treaty, and this inquiry would include in the present case the question whether, upon the evidence contained in the record, or found on the files of the department, the crimes charged are of a political character. The case of *In re Stupp*, 12 Blatchf. 515, Fed. Cas. No. 13,563, is cited to the effect that after a commitment of the accused for surrender, and even after his discharge on habeas corpus has been refused, the president may lawfully decline to surrender him, either on the ground that the case is not within the treaty, or that the evidence is not sufficient to establish the charge of criminality. There is no doubt but that the president has this authority under the statute. There is no other review of the decision of the committing magistrate provided, and there are many reasons, arising out of public policy and the relations of one nation with another, why this review should be vested in the chief executive. But does this authority deprive the committing magistrate of the jurisdiction to determine preliminarily whether the offense proven is of a political character or not? He is to take all the testimony, and determine its sufficiency with respect to the offense charged. Does not that jurisdiction properly and necessarily include all the elements of law as well as fact? The constitution of the United States declares that treaties are part of the supreme law of the land. Then let us see what the terms of this treaty are with respect to the question under consideration. Article 3 of the treaty provides as follows: "The provisions of this treaty shall not apply to any crime or offense of a political character." Article 6 provides a method of procedure for making a requisition for the surrender of a fugitive from justice, and the issuance of a warrant for his apprehension, "in order that he may be brought before the proper judicial authority for examination. If it should then be decided that, according to law and the evidence, the extradition is due, pursuant to the treaty, the fugitive may be given up according to the forms prescribed in such cases." Plainly, the duty of the judicial authority is to decide whether extradition is due, according to law and the evidence, and pursuant to the treaty. The whole case must be considered by the magistrate, whether the questions involved arise out of the law, the evidence, or the treaty. There is no limitation in this respect as to his jurisdiction, and his duty is fully and accurately stated. The executive has a discretion in the provision that "the fugitive may be given up according to the forms prescribed in such cases," but he has no judicial authority to take testimony or make an examination; and it is difficult to understand how he could satisfactorily exercise such authority, if he

had it. But it is said that all the testimony is to be taken by the committing magistrate, and upon such testimony and the records of the state department the president is to determine whatever political questions there may be involved in the case. This is a suggestion as to the mode of procedure, rather than an argument based upon the provisions of the treaty. The case of Castioni [1891] 1 Q. B. 149, is cited in support of such a procedure; but that case was based upon the provisions of a statute clearly authorizing the proceedings, and providing: that "a fugitive criminal shall not be surrendered if the offense in respect to which his surrender is demanded is one of a political character." 33 & 34 Vict. c. 52, § 3. In this case the prohibition is not that there shall be no surrender, but that "the provisions of this treaty shall not apply to any crime or offense of a political character." The prohibition extends to the action of the committing magistrate, and terminates his jurisdiction when the political character of the crime or offense is established. In other words, he has no authority to certify such a case to the executive department for any action whatever. This view of the law does not in any way conflict with my decision upon the plea to the jurisdiction, where the political questions there suggested were outside the merits of the case, and had no relation to the criminality of the accused.

Having jurisdiction to determine whether the charges against the accused are of a political character or not, I proceed to the consideration of that question. As before stated, the charge against Juan Cienfuegos for the attempt to murder Andres Amaya does not involve any such question. The other charges do. The testimony shows that they were all committed during the progress of actual hostilities between the contending forces, wherein Gen. Ezeta and his companions were seeking to maintain the authority of the then existing government against the active operations of a revolutionary uprising. With the merits of this strife I have nothing to do. My duty will have been performed when I shall have determined the character of the crimes or offenses charged against these defendants, with respect to that conflict. During its progress, crimes may have been committed by the contending forces of the most atrocious and inhuman character, and still the perpetrators of such crimes escape punishment as fugitives beyond the reach of extradition. I have no authority, in this examination, to determine what acts are within the rules of civilized warfare, and what are not. War, at best, is barbarous, and hence it is said that "the law is silent during war."

What constitutes an offense of a political character has not yet been determined by judicial authority. Sir James Stephens, in his work, *History of the Criminal Law of England* (volume 2, p. 71), thinks that it should be "interpreted to mean that fugitive criminals are not to be surrendered for extradition crimes if those crimes were incidental to and formed a part of political disturbances." Mr. John Stuart Mill, in the house of commons, in 1866, while discussing an amendment to the act of extradition, on which the treaty between England and France was founded, gave this defini-

tion: "Any offense committed in the course of or furthering of civil war, insurrection, or political commotion." *Hansard's Debates*, vol. 184, p. 2115. In the *Castioni Case*, *supra*, decided in 1891, the question was discussed by the most eminent counsel at the English bar, and considered by distinguished judges, without a definition being framed that would draw a fixed and certain line between a municipal or common crime and one of a political character. "I do not think," said Denman, J., "it is necessary or desirable that we should attempt to put into language, in the shape of an exhaustive definition, exactly the whole state of things, or every state of things, which might bring a particular case within the description of an offense of a political character." In that case, Castioni was charged with the murder of one Rossi, by shooting him with a revolver, in the town of Bellinzona, in the canton of Ticino, in Switzerland. The deceased, Rossi, was a member of the state council of the canton of Ticino. Castioni was a citizen of the same canton. For some time previous to the murder, much dissatisfaction had been felt and expressed by a large number of inhabitants of Ticino at the mode in which the political party then in power were conducting the government of the canton. A request was presented to the government for a revision of the constitution of the canton, and, the government having declined to take a popular vote on that question, a number of the citizens of Bellinzona, among whom was Castioni, seized the arsenal of the town, from which they took rifles and ammunition, disarmed the gendarmes, arrested and bound or handcuffed several persons connected with the government, and forced them to march in front of the armed crowd to the municipal palace. Admission to the palace was demanded in the name of the people, and was refused by Rossi and another member of the government, who were in the palace. The crowd then broke open the outer gate of the palace, and rushed in, pushing before them the government officials whom they had arrested and bound. Castioni, who was armed with a revolver, was among the first to enter. A second door, which was locked, was broken open, and at this time, or immediately after, Rossi, who was in the passage, was shot through the body with a revolver, and died very soon afterwards. Some other shots were fired, but no one else was injured. Castioni fled to England. His extradition was requested by the federal council of Switzerland. He was arrested and taken before a police magistrate, as provided by the statute, who held him for extradition. Application was made by the accused to the high court of justice of England for a writ of habeas corpus. He was represented by Sir Charles Russell, now lord chief justice. The attorney general, Sir Richard Webster, appeared for the crown, and the solicitor general, Sir Edward Clarke, and Robert Woodfall, for the federal council of Switzerland. This array of distinguished counsel, and the high character of the court, commends the case as one of the highest authority. It appeared from an admission by one of the parties engaged in the disturbances "that the death of Rossi was a misfortune, and not necessary for the rising." The opinions of the judges as to the political character of the

crime charged against Castioni, upon the facts stated, is exceedingly interesting, but I need only refer to the following passages. Judge Denman says:

"The question really is whether, upon the facts, it is clear that the man was acting as one of a number of persons engaged in acts of violence of a political character with a political object, and as part of the political movement and rising in which he was taking part."

Judge Hawkins, in commenting upon the character of political offenses, said:

"I cannot help thinking that everybody knows there are many acts of a political character done without reason, done against all reason; but at the same time one cannot look too hardly, and weigh in golden scales the acts of men hot in their political excitement. We know that in heat, and in heated blood, men often do things which are against and contrary to reason; but none the less an act of this description may be done for the purpose of furthering and in furtherance of a political rising, even though it is an act which may be deplored and lamented, as even cruel and against all reason, by those who can calmly reflect upon it after the battle is over."

Sir James Stephens, whose definition as an author has already been cited, was one of the judges, and joined in the views taken as to the political character of the crime charged against Castioni. The prisoner was discharged. Applying, by analogy, the action of the English court in that case to the four cases now before me, under consideration, the conclusion follows that the crimes charged here, associated as they are with the actual conflict of armed forces, are of a political character.

The draft of a treaty on International Penal Law, adopted by the congress of Montevideo in 1888, and recommended by the International American Conference to the governments of the Latin-American nations in 1890, contains the following provision (article 23):

"Political offenses, offenses subversive of the internal and external safety of a state, or common offenses connected with these, shall not warrant extradition. The determination of the character of the offense is incumbent upon the nations upon which the demand for extradition is made; and its decision shall be made under and according to the provisions of the law which shall prove to be most favorable to the accused."

I am not aware that any part of this Code has been made the basis of treaty stipulations between any of the American nations, but the article cited may be at least accepted as expressing the wisdom of leading jurists and diplomats. The article is important with respect to two of its features: (1) It provides that a fugitive shall not be extradited for an offense connected with a political offense, or with an offense subversive of the internal or external safety of the state; and (2) the decision as to the character of the offense shall be made under and according to the provisions of the law which shall prove most favorable to the accused. The first provision is sanctioned by Calvo, who, speaking of the exemption from extradition of persons charged with political offenses, says:

"The exemption even extends to acts connected with political crimes or offenses, and it is enough, as says Mr. Faustin Hélio, that a common crime be connected with a political act, that it be the outcome of or be in the execution of such, to be covered by the privilege which protects the latter." 2 Calvo, *Droit Int.* (3me Ed.) p. 413, § 1262.

The second provision of the article is founded on the broad principles of humanity found everywhere in the criminal law, distinguishing its administration with respect to even the worst features of our civilization from the cruelties of barbarism. When this article was under discussion in the international American conference in Washington, Mr. Silva, of Colombia, submitted some observations upon the difficulty of drawing a line between an offense of a political character and a common crime, and incidentally referred to the crime of robbery, in terms worthy of some consideration here. He said:

"In the revolutions, as we conduct them in our countries, the common offenses are necessarily mixed up with the political in many cases. A revolutionist has no resources. My distinguished colleague General Caamaño [of Ecuador] knows how we carry on wars. A revolutionist needs horses for moving, beef to feed his troops, etc.; and since he does not go into the public markets to purchase those horses and that beef, nor the arms and saddles to mount and equip his forces, he takes them from the first pasture or shop he finds at hand. This is called robbery everywhere, and is a common offense in time of peace, but in time of war it is a circumstance closely allied to the manner of waging it." International American Conference, vol. 2, p. 615.

Looking now to the cases which have arisen in the United States, or with our immediate neighbors, where the political character of the offense has been in question, we find that the extradition proceedings have been against persons charged with acts committed against the government, and not, as in these cases, where the acts are charged against persons who for the time being represented the existing government. Nevertheless, these cases are of some value as authority upon the general question as to what constitutes an offense of a political character. I will therefore refer to these cases as I find them stated in 1 Moore on Extradition. The first case mentioned is that of William L. McKenzie. It—

"Arose under the New York statute of 1822, which authorized the governor of that state to deliver up, upon the requisition of the duly-authorized ministers or officers of foreign governments, persons charged with the commission, within the jurisdiction of such governments, of any crime, except treason, which by the laws of New York would, if there committed, be punishable with death or imprisonment in the state prison. Under this statute, Gov. Head, of Upper Canada, in 1837, made a requisition upon Gov. Marcy for the extradition of William Lyon McKenzie, a printer, on charges of murder, arson, and robbery. By the documents which accompanied the requisition, it appeared that McKenzie acted as the leader of a band of men, from six to fifteen hundred in number, who began an insurrection in Canada for the redress of alleged grievances. On the 4th of December, 1837, they assembled under arms near the city of Toronto. Gov. Head sent them a message, calling upon them to disperse, to which they replied that they would not treat with him unless they were allowed a free pardon, and unless he called a convention of the people to remodel the government. These conditions Gov. Head refused. On the night of the 4th of December a man named Moodie, in company with other persons, attempted to pass the lines of the insurgents in order to reach Toronto. While attempting to pass they were called upon to surrender themselves as prisoners. They refused, and a volley was fired by the insurgents, in which Moodie was killed. On the following day, in the prosecution of their enterprise, the insurgents burned the dwelling house of a Mr. Horne, and seized some mail bags which were in the custody of the driver of a stagecoach, and rifled them of their contents, obtaining a number of letters and some money. On the 6th of December the insurgents were dispersed by a military force under the command of Gov. Head, in a conflict in which fifty of the insurgents were killed and wound-

ed, and three of the government party wounded. When Gov. Marcy received the requisition for McKenzie's extradition, he referred the matter to the attorney general of the state, Samuel Beardsley, for an opinion. The attorney general, on December 23, 1837, gave an opinion in which, after reviewing the facts above narrated, he held that the acts with which the fugitive was charged were of a political character, and that consequently the governor was without authority to surrender him. Upon the receipt of this opinion, Gov. Marcy, on December 25, 1837, informed Gov. Head of the proceedings that had been taken upon his requisition. In this communication, Gov. Marcy stated that the documents clearly showed that McKenzie committed the crimes imputed to him, and also that previously thereto 'he had revolted and was in arms against her majesty's government of Upper Canada. His crime,' Gov. Marcy continued, 'is therefore treason, and, if a fugitive within this state, he must be regarded as a fugitive to avoid the punishment for this offense, rather than for those imputed to him in the documents accompanying your excellency's application. These latter offenses must be considered as the incidents of the alleged treason.' 1 Moore, Extrad. p. 313 et seq.

The next case is that of certain Mexican revolutionists. Mr. Moore gives the following statement of the facts of that case:

"Several cases are found in which the government of the United States has held that the offenses with which fugitives were charged were of a political character, and hence did not afford a ground for extradition. In 1880 a band of eight Mexicans, who were suspected of being revolutionists, came over from Sonora into the territory of Arizona, where they were captured, and placed in the custody of an officer of the United States army. A demand for their surrender, addressed to the territorial authorities, was refused. Application was then made to the federal government for their extradition on the charge of larceny of cattle and of other chattels of the value of twenty-five dollars and upwards. It appeared that they had entered the town of Magdalena, and, in the professed prosecution of a political enterprise, exacted large sums of money from the inhabitants, under threats of hanging them. The Mexican minister, in preferring the request of his government for the prisoners' surrender, adverted to the circumstances, and suggested the question whether the professed political motive was not a pretense to cover criminal acts."

The United States refused to deliver up the prisoners, stating as a reason, among others, that the fact—

"That they were charged with being revolutionists shows that, whatever may have been their other crimes, they may also have been guilty of a political offense for which the treaty stipulates that no extradition shall be granted." 1 Moore, Extrad. p. 323, § 216.

The next case mentioned by Mr. Moore is that of Cazo:

"On February 3, 1887, the Mexican minister presented a request for the extradition of one 'Francisco J. Cazo and his accomplices,' charged with murder, assault with intent to commit murder, and robbery, committed in the town of Agualeguas, in the state of Nuevo Leone, Mexico, on the 11th, 12th, and 13th of July, 1886, who had taken refuge in Texas. The evidence disclosed that, three or four days previously to the 11th of July, it was reported that Cazo was coming to attack the town. Just before midnight of the 10th of July a number of persons were observed to leave the place armed, and about two o'clock on the morning of the 11th an attack was made by a party of thirty or more persons, who could not be identified, but who kept shouting, 'Hurrah for Don Francisco J. Cazo, and death to the Garra party!' The raiders kept possession of the town for nearly three days, during which time they had armed encounters with the inhabitants, seized horses and other property, and committed other acts of violence. When they departed, Cazo left a proclamation with a citizen of the town, with directions to publish it. In reply to the application for extradition, Mr. Bayard, then secretary of state, on February 7, 1887, wrote as follows: 'After a careful examination of the papers inclosed in your note, I am unable to avoid the conclusion that the

acts of Oazo and his associates, who were about thirty or forty in number, were clearly of a political character, and consequently, under the express terms of article 6 of the treaty above mentioned, are not a proper basis for extradition. The character of the outbreak, the kind and quantity of the property taken, and the mode of attack, all lead to that conclusion. Although the first assault of Oazo's party was made in the night, there was no effort to conceal the personal identity of the leader; and such property as was seized was taken, manifestly, for the purpose of military equipment, for which it was adapted. The evidence offered of the fact that Oazo led the attack is the testimony of several witnesses that the assailants cried, "Hurrah for Don Francisco J. Oazo!" and at least one witness testifies to the additional and accompanying exclamation of "Death to the Garra party!" Another witness states that Oazo left a proclamation in the hands of a resident of Agualeguas, with a view to its publication. Indeed, all the circumstances point to the conclusion that the affair was an avowed partisan political conflict."

The acts and motives of the accused in the cases now before me are certainly as closely identified with the acts of a political uprising, in an unsuccessful effort to suppress it, as are the acts and motives of any of the persons whose cases have been reported. The alleged hanging of four persons in Las Pulgas ravine by Bolanos and Bustamante was because the persons executed were hiding in houses located in Primavera canton; and, having declared that they had concealed themselves in consequence of not desiring to take part either for or against the revolution, Bolanos ordered Bustamante to hang them. If this statement be true, it shows that the offense was directly connected with the conflict then raging between the army under Ezeta and the revolutionary forces. It must be remembered that a state of siege was prevailing in the republic, proclaimed on April 29, 1894, and that a state of siege is the equivalent of what is known in this country as "martial law." On the question of martial law, Wheaton, in his work on International Law (3d Eng. Ed. p. 470) says:

"Martial law has been defined to be the will of the commanding officer of an armed force, or of a geographical military department, expressed in time of war within the limit of his military jurisdiction, as necessity demands and prudence dictates, restrained or enlarged by the orders of its military chief or supreme executive ruler. * * * Martial law is founded on paramount necessity. It is the will of the commander of the forces. In the proper sense, it is not law at all. It is merely a cessation, from necessity, of all municipal law, and what necessity requires it justifies. Under it a man in actual armed resistance may be put to death on the spot by any one acting under the orders of competent authority, or, if arrested, may be tried in any manner which such authority shall direct; but if there be an abuse of the power so given him, and acts are done under it, not bona fide to suppress rebellion, and in self-defense, but to gratify malice, or in the caprice of tyranny, then, for such acts, the party doing them is responsible."

The hanging of Henriquez is also a case arising out of a conflict between military forces. He was charged with being a spy. His father says he did not participate on either side. It is not for me to determine which of these statements is true. He may have been a noncombatant, and his murder, like that of Rossi in the Case of Castioni, a misfortune (as it doubtless was in any view), and unnecessary in the enforcement of the governmental authority. But, conceding all this, the execution took place at the close of an important battle, and was undoubtedly connected with the turbulent condition of affairs prevailing at Coatepeque at that time, and was therefore of a political character.

The robbery of the International Bank of Salvador & Nicaragua, at Santa Tecla, was an act known in the Central and South American states as a "forced loan," recognized by the treaty of amity between the United States of America and the republic of Salvador, ratified in 1874, wherein it is provided, in article 29, subd. 3, that:

"The citizens of the United States residents in the republic of Salvador, and the citizens of Salvador residents in the United States, shall be exempted * * * from all contributions of war, military exactions, forced loans in time of war," etc.

The reciprocal character of this provision does not deprive it of its plain purpose to protect American citizens residing in Salvador from a system of government exactions prevailing in Central and South American states, under some of their political administrations. In this case the money taken from the bank was receipted for, and, by order of Gen. Ezeta, delivered to a paymaster, with orders to pay the forces. Gen. Ezeta was at this time not only the commander in chief of the army, but he was also the acting president of the republic. As to the political character of this offense, there cannot be, it seems to me, a shadow of doubt.

The murder of Col. Tomas Canas presents a different state of facts from either of the other cases. Col. Canas was an officer in the army, commanding a brigade under Gen. Ezeta. On the morning of the 6th of June, 1894, Gen. Bolanos reported to Gen. Ezeta, at Santa Tecla, that Col. Canas had gone over to the enemy. As Gen. Ezeta and his staff were proceeding rapidly on the road to La Libertad, they met Col. Canas. The testimony is to the effect that Col. Canas rode up to Gen. Ezeta, and, taking him by the throat, said, "General, Manuel Rivas wants your head!" that Canas placed his hand on his revolver, and at the same time Gen. Ezeta drew his revolver and fired at him, and Col. Cienfuegos also fired three shots at Canas. It will be seen from this statement that the affair involves, not only the question of the political character of this offense, but its relation to the military law. Indeed, it is contended by counsel for the defendants that these four cases are all subject to the military, and not to the civil, law, and for that reason not subject to extradition. I will not enter into an extended discussion of this feature of these cases, but, as the murder of Col. Canas makes it necessary that I should consider that phase of the charge against Gen. Ezeta and Col. Cienfuegos, I will do so briefly. A general principle of military law is that no acts of military officers or tribunals, within the scope of their jurisdiction, can be revised, set aside, or punished, civilly or criminally, by a court of common law. Another principle of law is that offenses committed by persons in the military service during the time of war, insurrection, or rebellion, are punishable only by military tribunals. This is found in the law of Salvador, relating to the state of siege, in the following terms (article 5):

"The state of siege being declared, the crimes of treason, rebellion and sedition will be subject to the military authorities; also crimes against the public peace, independence and sovereignty of the state and infringement of the law of nations."

This provision is found substantially in article 58 of the articles of war provided for the government of the army of the United States.

In *Coleman v. Tennessee*, 97 U. S. 509, the supreme court of the United States had under consideration the question of jurisdiction under this law. The facts of that case were that a soldier in the military service of the United States, on the 7th of March, 1865, and during the war of the Rebellion, committed the crime of murder in the state of Tennessee. He was tried by a military court-martial, convicted, and sentenced to suffer death. After the constitutional relations of the state of Tennessee to the Union were restored, he was indicted in one of her courts for the same murder. To the indictment he pleaded his conviction before a court-martial. The plea being overruled, he was tried, convicted, and sentenced to death. The question in the supreme court of the United States was the jurisdiction of the state court over the person of the defendant, and it was held that the state court had no jurisdiction to try him for the offense, as he, at the time of committing it, was not amenable to the laws of Tennessee. Mr. Justice Field, speaking for the court in this case, said:

"The laws of Tennessee with regard to offenses and their punishment, which were allowed to remain in force during its military occupation, did not apply to the defendant, as he was at the time a soldier in the army of the United States, and subject to the articles of war. He was responsible for his conduct to the laws of his own government only, as enforced by the commander of its army in that state, without whose consent he could not even go beyond its lines. Had he been caught by the forces of the enemy, after committing the offense, he might have been subject to a summary trial and punishment by order of their commander; and there would have been no just ground of complaint, for the marauder and the assassin are not protected by any usages of civilized warfare. But the courts of the state, whose regular government was superseded, and whose laws were tolerated from motives of convenience, were without jurisdiction to deal with him."

I am unable to understand how the overthrow of the Ezeta government and the dissolution of its army change the status of this question. In the case just cited the disbandment of the Union forces and the restoration of peace, in April, 1866, did not affect the question of jurisdiction. Mr. Justice Clifford, in a dissenting opinion, suggests that the proceedings against Coleman by court-martial were abandoned by the return of peace. The sentence of the court-martial was never executed, and the learned justice says, "It is, perhaps, equally clear that it has become a nullity by the intervention of peace." The facts upon which the prevailing opinion is based do not conflict with this explanation why the sentence against Coleman was not executed.

It follows, as a conclusion from the principles declared by these authorities, that the military law of Salvador had jurisdiction to punish the accused, as military officers, for the offenses committed by them during the progress of the revolution, and, this being so, these four cases now under consideration, and particularly the charge against Antonio Ezeta and Juan Cienfuegos, for the murder of Tomas Canas, were properly within that jurisdiction, and not within the jurisdiction of the municipal law. If this fact does not, of itself, place these offenses outside the law of extradition, it at

least, makes it more certain that the offenses charged are of a political character, and therefore not within the provisions of the treaty. The defendants Antonio Ezeta, Leon Bolanos, and Florencio Bustamante will therefore be discharged, and Juan Cienfuegos held for extradition, to answer the charge of an attempt to murder Andres Amaya on the 3d of January, 1894.

UNITED STATES v. WONG AH HUNG.

(District Court, N. D. California. August 29, 1894.)

No. 3,052.

CHINESE—REGISTRATION—PERSON IN PRISON—MERCHANT OR LABORER.

A Chinaman serving a term of imprisonment at hard labor is a "laborer," within Act May 5, 1892, § 6, requiring Chinese to register, and not "a merchant," within the exemption of Act Nov. 3, 1893, § 2, defining "merchant" as a person engaged in buying and selling merchandise at a fixed place of business, which business is conducted in his name, and who does not engage in manual labor, except such as is necessary in the conduct of his business as such merchant, though prior to his imprisonment he owned an interest, in the name of another, in a mercantile firm, and retains it during his imprisonment.

Proceedings by the United States against Wong Ah Hung to deport the defendant under the provisions of the act of November 3, 1893, entitled "An act to amend an act entitled 'An act to prohibit the coming of Chinese persons into the United States,' approved May 5th, 1892." Defendant ordered to be deported.

Charles A. Garter, U. S. Atty.

Lyman I. Mowry, for defendant.

MORROW, District Judge. The defendant was tried and convicted in this court, in December, 1887, upon two charges,—one for bringing into the United States kidnapped persons to hold to involuntary servitude (Act June 23, 1874, 18 Stat. 251); and the other for importing women for the purposes of prostitution (section 3, Act March 3, 1875; 18 Stat. 477). He was sentenced to five years' imprisonment at hard labor in the state prison, with a fine of \$1,000, upon each charge, imprisonment for the second charge to date from the expiration of the imprisonment on the first charge. These terms of imprisonment, allowing for deduction of time by reason of good conduct, expired August 13, 1894, when defendant was immediately rearrested, upon the warrant issued on the complaint and affidavit for deportation, filed herein. The present proceeding is prosecuted by the district attorney, under the provisions of section 6 of the act of May 5, 1892, entitled "An act to prohibit the coming of Chinese persons into the United States," as amended by the act approved November 3, 1893. The complaint and affidavit states that the defendant was and is a Chinese laborer; that he was convicted of a felony in the district court of the United States for the northern district of California, as above recited; that he has not procured a certificate of residence, as required by said act; and that he is therefore subject to deportation, as provided by said act. The

defendant claims that, at the time of his conviction, he was a merchant and a member of the firm of Quong On, doing business in San Francisco, and that he had been such for several years prior thereto, and that during his imprisonment he retained his interest in the firm of which he was a member up to January, 1894, when the copartnership went out of business; that, being a merchant, the provisions of the act of May 5, 1892, as amended by the act of November 3, 1893, do not apply to him; and that, for that reason, he was not required to procure a certificate of residence, and hence is not subject to deportation for failing to provide himself with such certificate.

It may be conceded as an established fact that prior to his incarceration in the state prison, in 1887, the defendant owned an interest in a mercantile firm, doing business in this city; that the capital of the firm was \$10,000; that defendant had an interest of \$800, in the name of Wong Yick Chew; and that he invested \$200 for one Wong Wing, making defendant's total interest \$1,000. Did the defendant maintain his status as a merchant while he was serving his term in prison? I think not. In my judgment, he was during his term of imprisonment a "laborer," within the meaning of section 6 of the act of May 5, 1892. He was certainly not a "merchant," within the meaning of section 2 of the amendatory act of November 3, 1893. It is there provided that:

"The term 'merchant,' as employed herein and in the acts of which this is amendatory, shall have the following meaning and none other: A merchant is a person engaged in buying and selling merchandise, at a fixed place of business, which business is conducted in his name, and who during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant."

Having failed to register under the provisions of the first-named act, and not being entitled to a certificate of residence under the amended act, because of his conviction of a felony, I am clearly of the opinion that he must be deported; and it is so ordered.

THE CITY OF FRANKFORT.

HOGUE et al. v. THE CITY OF FRANKFORT.

(District Court, D. Oregon. August 13, 1894.)

No. 3,813.

1. ADMIRALTY JURISDICTION—VESSEL IN POSSESSION OF ASSIGNEE IN INSOLVENCY—OREGON STATUTE.

A vessel in the possession of an assignee for the benefit of creditors, under the Oregon insolvent law, is not in the custody of the court, so as to prevent a proceeding against her in admiralty to enforce a maritime lien.

2. INSOLVENCY LAWS—PROPERTY IN CUSTODIA LEGIS.

A provision in an insolvent law (Oregon statute) that assignments thereunder shall operate to discharge prior attachments on which judgments have not been obtained does not invest the assignee with such a relation to the court that property in his possession is to be considered as in custodia legis.

This was a libel by H. A. Hogue and Henry Young against the City of Frankfort to enforce a maritime lien. The claimant, C. H. Chase, moved to dismiss the libel.

H. W. Hogue, for libelants.

J. F. Boothe, for claimant.

BELLINGER, District Judge. This is a motion to dismiss the libel filed to enforce a maritime lien, based upon the petition of C. H. Chase, claimant, who alleges that he is the assignee of the vessel proceeded against under an assignment made prior to the libel, by the owner for the benefit of creditors. It is contended in support of the motion that property in the possession of an assignee, under the insolvent act of this state, providing for such assignments, is in legal custody, and is not liable to be proceeded against in admiralty.

In the late case of *The James Roy*, 59 Fed. 784, it is held, following repeated adjudications to the same effect, that the possession of an assignee is not that of the court having the right to supervise the conduct of such assignee and to enforce the provisions of the assignment. It is claimed, however, that the Oregon law makes the possession of the assignee that of the court in the state, for the reason that such law provides that an assignment shall have the effect to discharge any and all attachments on which judgments shall not have been taken at the date of the assignment. The idea of the claimant seems to be that, because the assignment dissolves a pre-existing attachment, this operates somehow to invest the assignee with a relation to the court similar to that held by the officer levying the attachment, or, at least, that it establishes a different relation in that respect from that ordinarily existing. There is no reason for such contention. The possession of the assignee, and the power of the state court over him, are not in the least different under this law from what they are in those states having no such provision. The voluntary act of the debtor cannot establish a legal custody over his property. The dissolution of an attachment by assignment does not establish a custody, but discharges one. This law has nothing to do with the power of the court over the assigned property, but relates wholly to the matters of preference between creditors.

The motion to dismiss is denied.